



16780
March 06, 2009

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2492906
[REDACTED]
[REDACTED]
\$750.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2492906, which includes your appeal as alleged operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$750.00 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. | \$750.00 |

The violation is alleged to have been observed on August 27, 2005, during a Coast Guard boarding of the [REDACTED] while it was underway on Lake Michigan approximately ¾ of a nautical mile west of Dunes State Park.

On appeal, although you do not deny being under the influence of alcohol at the time of the boarding, you contend that the violation could not possibly have occurred because you were not the vessel's operator at the relevant time. To that end, you contend that you only told the boarding officers that you were the operator of the vessel because you "wanted to protect" your friend who owned and operated the vessel "because he...[was]...a driver for a living and didn't want to get in trouble." You further contend that you were "willing to say that [you were operating the vessel] because...[you]...were aware at the time that no one was driving" and presumed, as a result, that no negative consequences could arise because there was no proof that anyone was operating the vessel at the relevant time. To support your assertions in this regard, you have provided statements from two individuals who were aboard the vessel during the boarding. You contend that these statements not only verify that you were not "driving the boat" but also show that the Coast Guard personnel could not possibly have known who was "driving because...[you]...were parked and NO ONE was the driver." You contend that this fact was "obvious" because the boarding officers had to ask who the vessel's operator was. You conclude

by noting that you responded to the Hearing Officer as soon as you received his letter but contend that because the letter was sent to your “previous address...it took quite awhile [sic] to get to” you. Your appeal is denied for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the violation. The record shows that a boarding of the [REDACTED] was commenced after Coast Guard personnel observed it operating by means of a searchlight, without navigational lights engaged, on Lake Michigan at approximately 2:30 a.m. on August 27th, 2005. After Coast Guard personnel acquired the vessel’s position on radar, they proceeded to the vessel’s position to investigate further. As soon as the Coast Guard vessel was along side the [REDACTED], a strong odor of alcohol was detected. Because the operator’s console of the vessel was vacant when the boarding officers first approached, the boarding officers asked who the operator was. According to the boarding officers, at that time you responded “I’ll be honest with you, I was driving the boat.” At the same time, although the vessel’s owner, [REDACTED], acknowledged owning the vessel, he stated that he was not driving at the relevant time. Thereafter, because you exhibited signs of being under the influence of alcohol and large amounts of open alcoholic beverages were strewn about the vessel, you were asked to submit to Field Sobriety Testing. The Field Sobriety Test (FST) Performance Report contained within the record shows that such testing began at 2:50a.m. and that although you performed satisfactorily on the “Alphabet Test” and the “Backwards Count” and “Finger to Nose” tests, you performed poorly on the “Finger Count,” “Palm Pat,” and “Horizontal Gaze Nystagmus” tests. Moreover, a chemical test administered during the boarding showed that you had a Blood Alcohol Concentration of .099% at the relevant time.

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).

Before I address the violation at issue, I feel it necessary to discuss the procedural progression of the case. The record shows that the Hearing Officer issued his Preliminary Letter of Assessment on October 18, 2006. In addition to describing the alleged violation, stating the maximum penalty available for that violation and informing you that the Hearing Officer had found *prima facie* evidence of the violation in the record, the Hearing Officer informed you that, in accordance with the procedures set forth in 33 CFR Part 1.07, you would have thirty days from receipt of that letter to either admit the penalties and pay the penalty amount initially assessed, submit written evidence in lieu of a hearing, or to request a hearing in the case. The record shows that on November 14, 2006, you wrote a letter to the Hearing Officer. In that letter, in addition to addressing the violations, you indicated that although you called the Hearing Office in an attempt to schedule a hearing in the matter, you were unable to do so. As a consequence,

you informed the Hearing Officer that he could either accept your version of the events and “completely drop [the] charges,” or “set up a hearing if...[he]...still wanted to push this.” The Hearing officer responded to you via a general notification letter dated December 20, 2006. In that letter, the Hearing Officer properly informed you that the applicable regulations, at 33 CFR 1.07-25(a), did not allow the course of action that you requested in your initial letter; you could either request a hearing or submit written evidence in lieu of a hearing. As a consequence, the Hearing Officer specifically stated that he would “simply treat your correspondence as a written defense unless you...[made]...a written request for a hearing” and afforded you an additional 30 days within which to do so. Although the Hearing Officer allowed the case to remain open for considerably longer than 30 days, you did not respond to the Hearing Officer’s general notification letter. As a result, on August 3, 2007, the Hearing Officer issued his Final Decision, finding the violation proved and assessing a penalty of \$750.00, in the matter. Via a letter postmarked August 29, 2007, you properly commenced an appeal of the Hearing Officer’s decision.

On appeal, in addition to reasserting your arguments regarding your alleged operation of the vessel, you provided a document containing statements from two persons who claim to have been passengers at the time of the boarding. Both of these statements indicate that you did not operate the vessel on the evening of the incident. Because 33 CFR 1.07-70(a) states that only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal, and you did not submit the statements at issue to the Hearing Officer prior to the issuance of his final decision in the matter, your right to have the statements considered has been waived. I note, however, that even if I were to consider the evidence that you submitted on appeal, I would not find that the Hearing Officer erred in finding the violation proved.

Because you do not deny being under the influence of alcohol at the time of the boarding, given the evidence contained in the case file, including your chemical test results (showing that you had a Blood Alcohol Concentration of .099%), I find that the record contains substantial evidence to support a conclusion that you were under the influence of alcohol at the time of the boarding. Therefore, the key issue presented here is whether there is sufficient evidence in the record to support a conclusion that you were operating a vessel while you were under the influence of alcohol in this case.

A careful review of your appeal reveals that you felt comfortable admitting to operating the vessel on the relevant evening because you believed that no one was actually operating the vessel at the time of the boarding. Indeed, in earlier correspondence in this regard, you indicated, among other things, that at the time of the boarding, the vessel was “parked in the channel.” After a thorough review of the applicable regulations, I do not find your arguments, in this regard to be persuasive. That is because the applicable regulations establish a clear definition as to what constitutes “operation of a vessel” in operating under the influence cases. In that regard, 33 CFR 95.015 states as follows:

...an individual is considered to be operating a vessel when...the individual has an essential role in the operation of a recreational vessel underway, including but

not limited to navigation of the vessel or control of the vessel's propulsion system.

The regulations further make clear that a vessel is "underway" when it is not "at anchor, or made fast to the shore, or aground." *See* 33 CFR 95.010. Accordingly, although the vessel was not under power at the time of the boarding, it was "underway" for the purposes of the applicable regulations.

The record shows, as you point out, that the boarding officers were unable to determine the vessel's operator when the boarding commenced. As a result, the boarding officers specifically asked who the operator was. The record further shows, and you do not deny, that you admitted operating the vessel stating: "I'll be honest, I was driving the boat." Through out the course of these proceedings, you have stated that you only admitted operating the vessel because you did not believe that the Coast Guard could prove that you were operating the vessel because you were "aware at the time that no one was driving...and there was no proof." As I have already stated, contrary to your assertions, the vessel was, in fact, underway at the time of the boarding. As such, the sole issue remaining is whether your admission constitutes substantial evidence to support the Hearing Officer's determination that you were, in fact, the vessel's operator.

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. 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. For the reasons set forth below, I am convinced that the Coast Guard proved that you were operating the vessel by a preponderance of the evidence.

Through out the course of these proceedings, you have asserted that you only admitted to driving the vessel because, in effect, you thought that no consequences could result from your admission. You contend that the vessel's owner was actually operating the vessel and that you only admitted operating the vessel to prevent your friend, whose job apparently depended on his license, from being charged with the violation. At the same time, you assert that there is no proof that you were operating the vessel because the boarding officers, themselves, had to inquire as to who the operator was. Regardless of your assertions after the fact, I find that the Hearing Officer did not err in according your admission on the relevant evening to be sufficient to provide substantial evidence that you were operating the vessel at the relevant time. Moreover, even if I were to consider the statements that you provided on appeal, I would not be compelled to alter the Hearing

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Officer's decision in this matter because there is simply no way to authenticate these self-serving statements.

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 \$750.00 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 **\$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 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