



REDACTED
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16780
08 June 2007

RE: Case No. REDACTED
REDACTED
REDACTED
\$250.00

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 REDACTED. The appeal is from the action of the Hearing Officer in assessing a \$500.00 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.	\$500.00

The violation is alleged to have occurred on June 20, 2004, after Coast Guard boarding officers commenced a boarding (which was later continued at the Apostle Island Marina in Bayfield, Wisconsin) of the REDACTED after finding it underway on Lake Superior, approximately 1 nautical mile west of Madeline Island, Wisconsin.

On appeal, you claim that there is insufficient evidence in the record to support the Hearing Officer's determination that the violation occurred. To that end, you assert that in finding the violation proved, the Hearing Officer disregarded: 1) information that you provided as to the weather and sea conditions at the time of the boarding and the effect of those conditions on your ability to satisfactorily complete the Field Sobriety Tests (hereinafter "FSTs") administered by the Coast Guard boarding officers, 2) obvious inconsistencies contained within the statements and recorded testimony of the boarding officers, 3) witness testimony that proved that the amount of alcohol that you ingested could not "substantiate intoxication," 4) flaws in the location where FSTs were administered, and 5) the impact that your being cold and improperly dressed during the administration of the FSTs would have on any FST results obtained. Your conclusion, based on these assertions is that the record contains insufficient evidence to support the Hearing Officer's conclusion that the violation occurred. Your appeal is denied for the reasons discussed below.

Before I begin, I believe a brief recitation of the circumstances surrounding the boarding and administration of FSTs in this case is in order. The record shows that at approximately 0250 on

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June 20, 2004, personnel from Coast Guard Station Bayfield, Wisconsin, conducted a boarding of the REDACTED approximately 1 nautical mile west of Madeline Island, Wisconsin. Coast Guard personnel observed you operating the vessel immediately prior to the initiation of the boarding, which you do not dispute. The statements of the boarding officers assert that once the boarding was initiated, you stumbled in a manner that was, in the boarding officer's opinion, beyond what is expected of a person on a small vessel under the prevailing weather conditions and indicated that your speech was slurred and you had a strong odor of alcohol from you. As a result of these observations, the Coast Guard boarding team suspected that you were intoxicated and towed your vessel to Apostle Island Marina to conduct ashore FSTs. As a consequence, you were administered the "Walk and Turn" test, "One Leg Stand" test, and the "Horizontal Gaze Nystagmus" test. Upon concluding that you failed all of those tests, the boarding officers requested that you submit to a breathalyzer test. Because the Coast Guard testing apparatus available at the time appeared to be malfunctioning, the boarding officers requested that an officer from the Bayfield Police Department administer a breathalyzer test to you. After several unsuccessful attempts to provide a breath sample, your Blood Alcohol Concentration was revealed to be .05%. You were subsequently taken into custody by the Bayfield Police Department who, in addition to alleging that you operated a vessel while intoxicated, alleged that you were found to have drug paraphernalia and marijuana on your person during the incident.

A review of the record shows that throughout the course of these proceedings, you denied that you operated your vessel while under the influence of alcohol, even though you admitted that you had consumed four alcoholic beverages in the several hours preceding the boarding. To support your assertion, in this regard, you provided statements from witnesses who were onboard your vessel at the time of the boarding who all indicated that you were not, and could not have been, intoxicated at the time of the boarding. You also note that the results of your breathalyzer test proved that you were below the legal limit for intoxication in the State of Wisconsin. Moreover, you have provided evidence in the form of weather reports and witness testimony to show that the temperature, sea, and wind conditions at the time of the boarding and during the administration of the FSTs were the likely cause of your stumbling and inability to pass the FSTs administered.

Although you have provided evidence to show that you "passed" a breathalyzer test administered by the Bayfield Police Department, I do not find that the Hearing Officer erred in finding the violation proved. As the Hearing Officer indicated in his Final Letter of Decision, the Coast Guard's actions in this case are in no way barred by any of the proceedings in the related state action. That is because the waters of Lake Superior are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against you without regard to any action taken by the State of Wisconsin. Neither the applicable statute nor any known theory regarding the enforcement authority of the Federal and state governments precludes the Coast Guard from assessing a civil penalty in this case. Indeed, the Federal government is not precluded from imposing both criminal and civil sanctions for the same conduct. See, *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489 (1972).

Furthermore, I note, as did the Hearing Officer, that the standard of proof necessary to impose a civil penalty at an administrative proceeding like this one is less than what is necessary for a finding of guilt at a state or federal criminal proceeding. Because of the more serious

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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 its case against you by a preponderance of the evidence.

As the Hearing Officer stated in his Final Decision, 33 CFR 95.030 makes clear that “[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.” [emphasis added] 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 the Hearing Officer carefully considered the evidence contained in the case file in determining that you operated the REDACTED while under the influence of alcohol in the early morning hours of June 20, 2004.

The FST report contained in the record shows not only that you had a “strong” odor of alcohol on your breath, that your speech was slurred and confused, that you had a flushed face, but also that you performed poorly on all three FSTs administered by the Coast Guard: 1) you moved your head from side to side to follow the pen with your eyes during the “Horizontal Gaze Nystagmus” test, even though instructed not to do so; 2) during the “Walk and Turn” test, you started before being instructed to do so, stopped and started again after re-instruction, and stopped again after 9 steps, thereby not completing the test; and 3) you failed four attempts to complete the “One Leg Stand” test. In addition, the record shows that you admitted consuming alcoholic beverages on the day of the boarding. Given this evidence, pursuant to Coast Guard regulation, it was proper for the Hearing Officer to determine that you were operating your vessel while under the influence of alcohol at the time of the boarding, irrespective of your chemical test results.

In your defense, you assert that the temperature, sea, and wind conditions at the time of the boarding and during the administration of the FSTs were the cause of your stumbling and inability to pass the tests. A careful review of the record shows that you and the Coast Guard present decidedly different views of the prevailing wind and sea conditions present during the boarding and the impact of those conditions on your ability to properly perform the FSTs administered. While the statements and testimony of the Coast Guard personnel and the situation report completed for the incident all indicate that, at the time of the boarding, the seas were between zero and one foot and that the wind was between five and ten knots, you contend that the seas were rough, and the winds were very heavy, factors which you contend contributed to any stumbling observed on your part and your negative FST results, which you insist were

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administered on a floating, wobbly dock. To support your assertion, in this regard, you provided a transcript from a suppression hearing held on August 26, 2004, in the Circuit Court for the County of Bayfield, Wisconsin, which shows that you testified that the wind was blowing between 12-17 miles per hour, that the waves were rough, and that the dock on which the FSTs were administered was wobbly. You also provided affidavits from your passengers which indicated that the seas were rough and running between 2 and 3 feet. In Coast Guard civil penalty proceedings, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts in the evidence. The record shows that the Hearing Officer did just that in this case. Indeed, in his Final Letter of Decision, the Hearing Officer stated as follows:

You and your witnesses repeatedly indicate that you could have staggered due to rough seas. I realize that this is a distinct possibility but I am inclined to believe that the trained members of the boarding team can determine the difference. In addition to the staggering, according to the report, your speech was slurred despite your witnesses' contention to the contrary. I am not at liberty to disregard information simply because you say that it is a lie. I realize that there are some inconsistencies between the reports in the file and the testimony offered at the hearing as evidenced by the transcript that includes the testimony of only two of the members of the boarding team. I find those inconsequential in that they do not tend to prove or disprove that you were under the influence. The report indicates that you failed three of three sobriety tests but there is no explanation for the failure to conduct other tests that could have easily been conducted ashore. Apparently the alphabet test, backwards count test, finger count and palm pat were not conducted or the results were not recorded. In addition to the failure to conduct the aforementioned tests, several of the pre test questions are marked "not asked" and there is no explanation for the failure to ask those questions."

Despite these deficiencies, you admitted that you had consumed alcoholic beverages...[and]...I find sufficient evidence to support the allegation that you were under the influence of alcohol or dangerous drugs using the burden of proof applicable to these proceedings.

Therefore, the record shows that the Hearing Officer clearly considered the evidence that you presented and I find no abuse of discretion in the Hearing Officer's resolution of the conflicting evidence contained within the record. Based upon the totality of the circumstances of the boarding, including your FST results and the personal observations of the Coast Guard boarding officers regarding your manner, disposition, speech, muscular movement, and behavior, I find that the Hearing Officer did not err in finding that you operated your vessel while under the influence of alcohol under 33 CFR 95.030(a). While the record supports the Hearing Officer's conclusion that you operated your vessel while under the influence of alcohol, in further consideration of the evidence that you present in mitigation, I will mitigate the assessed penalty to \$250.00.

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. Although the Hearing Officer's decision was neither arbitrary nor capricious, for the reasons

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discussed above, I find a penalty of \$250.00, rather than the \$500.00 assessed by the Hearing Officer or \$5,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$250.00** 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.

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