



REDACTED  
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REDACTED

16780  
March 31, 2008

RE: Case No. REDACTED  
REDACTED  
REDACTED  
\$250.00

Dear Mr. 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 owner/operator of the recreational vessel REDACTEDREDACTED. The appeal is from the action of the Hearing Officer in assessing a \$300.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 173.21(a)(1)	Use of a vessel without a valid Certificate of Number or temporary certificate on board.	Warning
33 CFR 173.27(a)(1)	Failure to have a vessel's number, as required by 173.15, painted on or permanently attached to each side of the forward half of the vessel.	\$50.00
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$250.00

The violations were first observed on May 28, 2004, when Coast Guard personnel boarded the REDACTED while it was underway on Lake Superior, approximately one-half nautical mile northwest of Madeline Island.

On appeal, although you do not expressly deny that the violation occurred, you assert that you "feel very strongly about the validity of these charges," and "respectfully request" that I consider your appeal. Although you do not specifically address the alleged violation of 33 CFR 173.21(a)(1), other than simply stating that the Hearing Officer assessed a warning for the violation, you do make specific arguments with regard to the remaining violations. Indeed, with

March 31, 2008

regard to the alleged violation of 33 CFR 173.27(a)(1), you reassert the arguments that you made before the Hearing Officer and specifically request that I “change the \$50.00 fine to a warning” based upon your assertion that you “truly...[were]...not dis-regarding this regulation.” With regard to the alleged violation of 46 USC 2302(c), although you do not deny operating your vessel while under the influence of alcohol, you assert, in effect, that it is improper for the Coast Guard to assess a penalty against you for the violation because you have already been convicted of the offense by a Wisconsin court. Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

As is noted above, you do not contest the alleged violation of 33 CFR 173.21(a)(1). The record shows that when your vessel was boarded, you were unable to produce either a copy of the vessel’s Certificate of Registration or a temporary certificate. The record shows that, while the case was before the Hearing Officer, you acknowledged that you had, on the very day that the violations allegedly occurred, renewed your registration and stated that, because you were only provided a “flimsy piece of paper” to show that you renewed your registration, you did not feel that it was prudent to bring that piece of paper aboard your vessel. Instead, you left the paper in the vehicle that you used to tow the REDACTED. The record shows that, in consideration of your arguments and in light of the evidence that you presented, namely a copy of a cancelled check showing that you paid to have your vessel’s registration renewed on the day of the boarding, the Hearing Officer mitigated the initially assessed penalty of \$50 to a warning. Since the record contains substantial evidence to support the Hearing Officer’s conclusion that the violation occurred and because you do not now, on appeal, contest the violation, I find the violation proved and the warning assessed by the Hearing Officer for it to be appropriate in light of the circumstances of this case.

I will next address your contentions with regard to the alleged violation of 33 CFR 173.27(a)(1). 33 CFR 173.15 makes clear, in relevant part that “[n]o person may use a vessel...unless...it has...[its]...number displayed as described in § 173.27.” In that respect, 33 CFR 173.27 makes clear, in relevant part, that “[e]ach number required by § 173.15 must...be painted on or permanently attached to each side of the forward half of the vessel.” The record shows that, at the time that the boarding occurred, the last letter of your vessel’s state number was not affixed to your vessel’s hull. Both in correspondence to the Hearing Officer and now, on appeal, you do not deny that the violation occurred. Instead, you offer a credible explanation for the violation. In that regard you note that your vessel’s numbers are the “stick-on-type of lettering that the majority of boats use” and assert the letter was likely missing because it fell off during a lengthy transport of the vessel. In her final letter of decision, the Hearing Officer stated, as follows, with regard to the violation:

Concerning the number on the bow, you indicate that the J had come off but anyone can see there was previously a J there. You don’t mention whether or not you have placed a new J, much less provided a photo or other evidence. It’s hard to believe you would not have corrected this by now, but there’s no evidence of that. On the hope that you have or will soon do so, a reduced penalty of \$50 is assessed.

March 31, 2008

On appeal, you assert that you “replaced the letter the day after the incident.” A careful review of the documents that you filed with the Hearing Officer shows that rather than focusing on whether you made any attempts to correct the violation, you were attempting to provide an explanation as to how the violation ultimately occurred. Because I believe both that you have provided a plausible explanation as to how the violation occurred and, more importantly, because I believe that the Hearing Officer would have assessed a warning for the violation if you had noted your quick corrective action while the matter was pending before the Hearing Officer, I will grant your request and assess a warning for the violation.

I will now turn my attention to the alleged violation of 46 USC 2302(c). On appeal, although you do not deny that the violation occurred, you raise what can best be described as a claim of double jeopardy. In that regard, you state as follows in your appeal:

I was taken to the Sheriff’s office, where an officer from Wisc. DNR charged, tested, and booked me. I paid the assessed fine to Bayfield county clerk of courts. I already have plead guilty. The Seventh Article of the U.S. Constitution bears out that a citizen will not be charged with the same offence more than once. I’d like to believe that document’s words also apply to me. I appeal to you to waive the fine assessed by the Hearing Officer.

Your assertion in this regard is not persuasive. In that vein, I note—as do you—that 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 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, it is permissible for the federal government to prosecute a person after a state prosecution of the same conduct, or vice versa.

In addition, you should be aware that even if you had been acquitted of the state charges, that fact would not automatically have resulted in the dismissal of the charges brought in the instant civil penalty case. That is because 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 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. Indeed, 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. Therefore, even in a case where a state criminal court finds insufficient evidence to support a finding of guilt, under the lesser standard of proof required in an administrative proceeding, sufficient evidence may exist to support a conclusion that a violation occurred.

Pursuant to Coast Guard regulation, “[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.” See 33 CFR 95.030. 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 review of the record shows that at the time of the boarding, the Coast Guard boarding officers observed that you had a strong odor of alcohol on your breath, that your speech was slurred, and that you admitted to consuming alcoholic beverages prior to operating your vessel. In addition, the Field Sobriety Test Report contained in the record indicates that you performed poorly on three of the four Field Sobriety Tests (FSTs) administered. Although you completed the “Finger Count” test satisfactorily, you missed letters during the “Alphabet Test,” missed numbers during the “Backwards Count” test and improperly counted during the “Palm Pat” test. Based upon this evidence, I do not believe that the Hearing Officer was either arbitrary or capricious in determining that you were intoxicated under 33 CFR 95.030(a) based upon the totality of the circumstances of the boarding, including your FST results and the personal observations of the Coast Guard boarding officers and personnel from the Florida Fish and Wildlife Department regarding your manner, disposition, speech, muscular movement, and behavior.

Although I have concluded that there was substantial evidence in the record to support the Hearing Officer’s determination that you were intoxicated 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 although you refused to submit to a chemical test offered by the Coast Guard boarding Officers, you did submit to a breathalyzer test after you were transferred to the custody of the Bayfield City Police Department and achieved a BAC result of .09%. Given this test result, I find that the record contains substantial evidence to support a conclusion that you operated a vessel under the influence of alcohol under 33 CFR 95.030(b).

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violations occurred and that you are the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. For the

March 31, 2008

reasons discussed above, I find a penalty of \$250.00, rather than the \$300.00 penalty assessed by the Hearing Officer or \$7,700.00 maximum permitted by statute for the violations to be appropriate in light of the circumstances of the case.

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. 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 1.00% 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. In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 1.07, this decision constitutes final agency action.

Sincerely,

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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