



16780  
May 16, 2006

[REDACTED]  
[REDACTED].  
[REDACTED]

RE: Case No. [REDACTED]  
[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. [REDACTED] which includes your appeal as operator of the unnamed recreational vessel [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 2302I	Operating a vessel under the influence of alcohol or a dangerous drug.	\$1,000.00

The violation was observed on June 21, 2003, during a Coast Guard boarding of the [REDACTED] on Lake Macatawa, near Holland, Michigan. Coast Guard boarding officers commenced the boarding after they observed the vessel being operated after nightfall without its navigational lights energized.

On appeal, you do not deny that the violation occurred; rather, you contend that because the State of Michigan dismissed the related state court action, the Coast Guard should do the same. To that end, you cite the expungement provision found at 21 USC 844a as the "Coast Guard's Civil Penalty laws" and conclude that that provision requires that the instant civil penalty case be dismissed. Your appeal is denied for the reasons discussed below.

As a preliminary matter, I will address the administration of the case. The record shows that after the Hearing Officer issued his Preliminary Assessment Letter in the case, you contacted the Hearing Officer and requested an extension of time within which to file your response. The Hearing Officer granted your request and although he allowed the matter to remain open for considerably longer than the 30 day period granted via the extension, you failed to submit any additional evidence in response to the violation. As a result, the Hearing Officer issued his final letter of decision in the matter based solely on the evidence submitted by the Coast Guard. You have appealed that decision.

The Coast Guard's civil penalty procedural rules make clear that "[t]he only issues which will be considered on appeal are those issues specified in the appeal which were properly raised before

the Hearing Officer and jurisdictional questions.” *See* 33 CFR 1.07-70(a). Although the record shows that you did not raise any issues before the Hearing Officer, the issue you raise on appeal—that the Coast Guard should dismiss the case because the related stated court action resulted in dismissal—is jurisdictional in nature and may properly be considered here.

On appeal, you cite the “Expungement procedures” set forth in 21 USC 844a to support your assertion that the Coast Guard should dismiss this case. Your reliance on 21 USC 844a is misplaced. A review of the statute shows that it allows for the assessment of civil penalties against persons who knowingly possess personal use quantities of controlled substances. While the record shows that you had a personal use quantity of marijuana on your person at the time of the boarding, the instant civil penalty case did not result from that fact. Rather, this case was brought pursuant to 46 USC 2302I and centered on your alleged operation of the vessel [REDACTED] while under the influence of alcohol. Accordingly, the expungement provision you cite has no applicability here.

In addition, a review of your appeal indicates that you may believe that because the “operation under the influence [of alcohol]” charge was dismissed by the State of Michigan, it should similarly be dismissed by the Coast Guard on double jeopardy grounds. A reliance on this notion would also be misplaced. 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 defendant after a state prosecution of the same conduct, or vice versa. Thus for the reasons just set forth, any claim of double jeopardy is inapplicable to the facts of this case.

I will now address the violation. Pursuant to 33 CFR 95.030 “[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.” 33 CFR 95.020(a) further provides that an individual is considered to be under the

influence of alcohol when “[t]he individual is operating a recreational vessel and has a Blood Alcohol Concentration (BAC) level of .08 percent or more...in their blood.” The case file shows that the Breathalyzer test administered during the boarding revealed that your BAC was .173%. In addition, the record shows that you admitted consuming three to five alcoholic beverages within the six-hour period preceding the Coast Guard boarding of the vessel. Given this evidence, I find that the record contains substantial evidence to support the Hearing Officer’s conclusion that you operated the [REDACTED] while under the influence of alcohol on June 21, 2003.

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. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. I find the \$1,000.00 penalty assessed by the Hearing Officer, rather than the \$5,000.00 maximum permitted by statute to be appropriate in light of the circumstances of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. 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. Send your payment to:

U.S. Coast Guard – Civil Penalties  
P.O. Box 100160  
Atlanta, GA 30384

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