



[REDACTED]
[REDACTED]
[REDACTED]

16780
Nov 17, 2006

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED] ([REDACTED])
\$1,150.00

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 the alleged operator of the [REDACTED] recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,150.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 175.15(a)	No person may use a recreational vessel unless at least one Type I, II, or III PFD is on board for each person.	\$150.00
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 occurred on May 3, 2003, when Coast Guard boarding officers were conducting boating safety examinations at Phil Foster County Park, near Riviera Beach, Florida.

On appeal, although you do not specifically address the violations, you seem to believe that the Coast Guard lacks jurisdiction to assess a civil penalty against you due to the fact that a Florida Court acquitted you of all charges in the related state action. In addition, you point out that the boarding officers on whose statements the Hearing Officer relied in reaching her determination that you were, in fact, the operator of the vessel testified at the related state hearing and, presumably, were unable to provide sufficient evidence to support a similar conclusion in the state action. Your appeal is denied for the reasons discussed below.

I will begin by addressing your assertion that the instant civil penalty case should be dismissed because you were acquitted in the related state action. Although you have not identified it as such, you are raising a double jeopardy defense. 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.

In addition, you should be aware that acquittal of the state charges does not automatically result in 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. 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.

Having found that the case is properly before me, I will now address the violations, beginning with the alleged violation of 46 USC 2302(c). The record shows that although you did not deny being intoxicated on the evening of the boarding, you asserted that a violation did not occur because you were not the operator of the vessel. To support your assertion in this regard, you provided the Hearing Officer with several pieces of documentation, including an affidavit from the vessel owner Mr. Brian Ray and a document you filed in a related state manatee protective zone violation case. The Hearing Officer addressed your assertions, in this regard, in her Final Letter of Decision as follows:

You deny the charges and argue that you were not the operator of the vessel. To support your statement you provided a copy of a letter to U.S. District Court Central Violations Bureau (in a related State manatee speed zone violation) in which you state that you were neither the owner nor the operator of the vessel. You also provided the affidavit of the owner of the vessel, dated December 22, 2003, in which he states that he was the operator of the vessel.

The Coast Guard file, on the contrary, contains several pieces of evidence that indicate you, and not the owner, were the operator of the vessel. The 4100 Boarding Report indicates the operator's name was "[REDACTED]" and also that the "owner on board not operator." The 4100A Supplemental Boarding Report, signed by the boarding officer, BM3 Fitzgerald, states "[REDACTED] was seen to be operating vessel by two Coast Guard officers and made statements attesting to the fact that he was operating the vessel." Additionally, in the body of a separate signed narrative statement, the boarding officer states, "As we approached the vessel an unidentified man disembarked the boat...He was wearing a gray t-shirt. [REDACTED] was still behind the helm at this time." The boarding officer further states, "I then verified that he was operating the boat when they came around the corner to the ramps. He said that he was but he didn't do anything wrong."

The boarding officer states he asked you for identification and you replied that you had left it on the truck. But later the boarding officers discovered your identification on your person. The case file also shows that the boarding party interacted with the owner during the boarding, that the owner was aware you were undergoing field sobriety tests, but that he at no time indicated to the boarding party that he was the operator. Your written responses and the owner's affidavit notwithstanding, I find there is ample evidence to support the conclusion that you were the operator of the vessel.

It is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and resolve any conflicts in evidence. Therefore, although you and the boarding officers offer conflicting evidence as to whether you were the operator of the vessel, it is the Hearing Officer's role to evaluate the weight of the factual claims and make a determination as to what happened during the incident in question. In reviewing the record, I do not find that the Hearing Officer erred in finding that substantial evidence existed to support a conclusion that you were the operator of the vessel at the time of the boarding.

Having found sufficient evidence to support a conclusion that you were the operator of the vessel, I will now address whether sufficient evidence exists in the case file to support a conclusion that you were intoxicated. 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(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 were intoxicated. In her final letter of decision, the Hearing Officer stated as follows:

The boarding officer states, "As I talked with him I could smell the strong odor of an unknown alcoholic beverage. His eyes were watery and bloodshot, and his speech was mumbled and slightly slurred. In the boat I could see numerous beer cans and bottles strewn about the deck. They all looked like they were empty." You stated to the boarding officer that you had consumed "five or six" beers. The boarding officer then directed you to perform the Horizontal Gaze Nystagmus test, the Palm Pat, and the Alphabet test. Details of your performance on these tests are not included in the case file, however, after these tests you refused to conduct further tests or answer any other questions. The boarding officers then transported you to the Palm County Jail. At the jail, the boarding officer states that your "demeanor and attitude changed dramatically several times. From being cooperative to uncooperative, vulgar, and threatening."

Based on your observed behavior, the boarding officer directed you to take a chemical test. You refused the chemical test. Your refusal created a presumption that you were under the influence of alcohol and you have not refuted that presumption. I find the violation proved.

Not only does the record support the Hearing Officer's conclusions, in this regard, but it also shows that you have not, at any point, denied being intoxicated at the time of the boarding. Accordingly, I find substantial evidence in the record to support the Hearing Officer's conclusion that the violation occurred and, because I consider the violation to be a serious one, I will not mitigate the penalty assessed by the Hearing Officer.

I will now address the alleged violation of 33 CFR 175.15(a). 33 CFR 175.15(a) states that "[n]o person may use a recreational vessel unless at least one PFD...is on board for each person." The case file shows although there were 6 persons aboard the [REDACTED] at the time of the boarding, there were only 3 serviceable PFDs aboard the vessel. This evidence clearly evidences that a violation of 33 CFR 175.15(a) occurred. The record further shows that you have not, at any time during these proceedings, denied the violation; rather, you asserted that you were not an appropriate party to be charged with the violation. I do not agree. 33 CFR 175.15(a) makes clear that "no person may use a recreational vessel unless at least one PFD...is on board for each person." Pursuant to 33 CFR 175.3, the term "use" "means operate, navigate, or employ." As I stated above, there is sufficient evidence in the case file to support a conclusion that you were the operator of the [REDACTED] at the time of the boarding. As such, you were clearly "using" the vessel and are, as a consequence, an appropriate party to be charged with the violation of 33 CFR 175.15(a). Therefore, I find the violation proved and will not dismiss the \$150.00 penalty assessed by the Hearing Officer for the violation.

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. For the reasons discussed above, I find the \$1,150.00 penalty assessed by the Hearing Officer, rather than the \$6,100.00 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 **\$1,150.00** 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