



[REDACTED]  
[REDACTED]  
[REDACTED]

16780  
Aug 16, 2006

RE: Case No. 2220675  
[REDACTED]  
Unnamed [REDACTED]  
\$250.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2220675, which includes your appeal as owner/operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$250.00 penalty for the following violation:

| <u>LAW/REGULATION</u>    | <u>NATURE OF VIOLATION</u>   | <u>ASSESSED PENALTY</u> |
|--------------------------|--|-------------------------|
| 33 USC 2033(b) (Rule 33) | Failure to have some means of making an efficient sound signal for vessel less than 12 meters in length. | WARNING                 |
| 46 USC 2302(c)           | Operating a vessel under the influence of alcohol or a dangerous drug.                                   | \$250.00                |

The violation was observed on July 4, 2004, when Coast Guard boarding officers boarded your vessel while it was underway on Montauk Harbor near East Hampton, New York.

On appeal, although you do not deny the violations, you contend that the "civil penalty process has already been duly conducted and dispositioned (sic) by the town of East Hampton, New York." As a result, you contend that you do not believe that "a separate civil penalty process by the Coast Guard is warranted in this case" and add that you do not "feel additional penalties are commensurate with the potential impacts on public safety." As to the events surrounding the boarding of your vessel, you imply that because you were operating a small vessel at a low speed in an area with "no other boats," irrespective of the fact that you were operating under the influence, you operated the vessel in a "safe manner." Finally, you imply that the Coast Guard boarding officers mistreated you, in some way, because you had to ask them to inform your wife of your location after the boarding officers turned you over to the East Hampton Police. You conclude by stating that you were "more than sufficiently punished" for your actions and "don't believe that further civil penalties are fair or warranted." Your appeal is denied for the reasons discussed below.

On appeal, in stating that you have been “sufficiently punished” for your actions by the State of New York, you impliedly raise the issue of double jeopardy. 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 when a vessel operator is under the influence of alcohol or a dangerous drug 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 under the influence of alcohol or a dangerous drug 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.” The Field Sobriety Test Report of the incident shows that during the boarding, you had a moderate odor of alcohol on your breath, your speech was mumbled and slurred, your face was flushed and your eyes were bloodshot. In addition, the test report shows that you performed poorly on all five Field Sobriety Tests administered by the boarding officers: 1) on the “Alphabet Test”, you missed and repeated numerous letters; 2) on the “Finger Count” test, you miscounted, slid your fingers and improperly counted; 3) you were unable to complete the “Palm Pat” test; 4) you missed your nose during the “Finger to Nose” test; and, 5) you lacked smooth pursuit and showed distinct nystagmus onset prior to 45 degrees in both eyes on the “Horizontal Gaze Nystagmus” test. While each of these factors, alone, might not have been sufficient to support a conclusion that you were operating your vessel under the influence of alcohol on the evening of the boarding, taken together, I am persuaded that the results of your Field Sobriety Tests and the personal observations of the Coast Guard boarding officer regarding his manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were “under the influence” under 33 CFR 95.030(a).

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 result is also important to the administration of this case. In correspondence to the Hearing Officer, your attorney questioned the reliability of the Breathalyzer test results obtained during the Coast Guard's boarding of your vessel. In her final letter of decision, the Hearing Officer addressed that issue as follows:

I considered your argument regarding the chemical test results. The case file indicates that the Coast Guard administered a chemical test that resulted in a BAC of .134 at 1941 hours. You provided a copy of the East Hampton chemical test report that resulted in a BAC of .086 at 2124 hours, almost two hours later. Given the fact that alcohol is metabolized over time, the later results seem entirely credible. Lacking any further evidence, I do not agree with your argument that there are grounds to question the results of the Coast Guard chemical test.

I agree with the Hearing Officer in this regard and, at the same time, I note that the Coast Guard considers its breathalyzer test to be a reliable indication of intoxication. Since the record shows that your BAC was .134% at the time of the boarding, I find that the record contains sufficient evidence to support the Hearing Officer's conclusion that you were under the influence of alcohol, under the standard articulated at 33 CFR 95.030(b), at the time of the boarding. Therefore, for the reasons set forth above, the case file supports the Hearing Officer's decision to assess a \$250.00 penalty against you for operating your vessel under the influence of alcohol.

That said, I will conclude by addressing your concerns regarding the boarding, itself. The courts have long held that the Coast Guard may exercise plenary authority under 14 USC 89(a) to stop and board vessels on the navigable waters of the United States to conduct safety and documentation inspections even in the complete absence of suspicion of criminal activity. *See e.g., United States v. Kubiak*, 704 F.2d 1545, 1547-48 (11th Cir.1983); *United States v. Clark*, 664 F.2d 1174, 1175 (11th Cir.1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5<sup>th</sup> Cir. 1980) (en banc); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir.1978) (en banc), *cert. denied*, 446 U.S. 956, 100 S. Ct. 2928, 64 L. Ed. 2d 815 (1980). Therefore, irrespective of the reason for the boarding, the Coast Guard undoubtedly had the authority to board your vessel on the evening that the violations were observed. Furthermore, I do not find your assertion that you were operating your vessel in a safe manner to be persuasive. As I discussed above, the case file contains sufficient evidence to support a conclusion that you operated your vessel while under the influence of alcohol on the evening of the boarding. To do so is, by its very nature, unsafe and the fact that no one suffered actual harm as a result of your operation of the vessel in that manner means only that you were lucky—not that you safely operated your vessel. Finally, I note that there is simply no evidence in the case file to indicate that your boarding was, in any way, improperly conducted. On appeal, you imply that you were mistreated because the boarding officers did not offer to call your wife to inform her that you were being taken into the custody of the East Hampton Police. While I note that the boarding officers had no obligation to do so, you, yourself, acknowledge that the boarding officers did contact your wife after you asked them to do so. Given that fact, there is simply no evidence in the record to support a conclusion that the boarding officers did not extend you the utmost courtesy during the boarding.

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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. With respect to the penalty amount, since the record shows that the Hearing Officer mitigated the assessed penalty by nearly \$1,000.00 after considering the extensive costs of the related criminal matter, I find the \$250.00 penalty assessed by the Hearing Officer to be appropriate in light of the circumstances of the violations.

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 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