



16780  
Oct 30, 2009

Mr. [REDACTED]  
109 Milford Avenue  
Wilmington, DE 19809

RE: Case No. 2731339  
Mr. [REDACTED]  
[REDACTED]  
\$1,000.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2731339, 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 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$1,000.00

The violation is alleged to have occurred on July 9, 2006, when Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was underway on Rehoboth Bay, near Rehoboth Beach, Delaware.

On appeal, although you do not "dispute...that a violation occurred," you seek mitigation of the \$1,000.00 penalty assessed by the Hearing Officer. To that end, you note that you "appeared in person in Sussex County Court House and paid a fine of \$252.00" and add that you "have not operated a boat since this unfortunate incident" occurred. At the same time, you insist that you have "learned... [your]...lesson" as a result of this incident. To further support your request for mitigation, you state that you are in your second year in the mortgage business "of which the market is in terrible shape" and add that you "have two children in Catholic elementary school." Based on these economic circumstances, you appeal only to seek "a lesser penalty" in the case. Your appeal is denied for the reasons discussed below.

First, I believe a brief recitation of the facts surrounding this incident is in order. The record shows that on July 9, 2006, at approximately 6:15 p.m., Coast Guard personnel observed your vessel transiting west bound on Rehoboth Bay. Because six children were observed onboard the vessel, the boarding officers decided that it would be appropriate to conduct a recreational boating safety examination of the vessel. As a consequence, the boarding officers engaged their blue lights and brought the vessel to a stop so that the boarding could commence. As the

boarding began, you were identified as the vessel's operator and were initially observed to be pleasant and cooperative. During the initial stages of the boarding, the boarding officers noticed a "moderate odor" of alcoholic beverage coming from your person and observed that your speech was slow, slurred and "somewhat confusing." At the same time, the record shows that when the boarding officers asked you for your identification, you fumbled through your wallet and exhibited motor skills that were "slightly restricted." Although you and your brother-in-law, who subsequently came to hinder the boarding, were able to produce all requested safety equipment, the boarding officers further noticed a 12 pack of beer in the center of the vessel and what appeared to be a bottle of Vodka directly under your operator's seat. Moreover, when the boarding officers inquired as to whether you had consumed any alcoholic beverages, the record shows that you admitted that you had consumed 2 to 3 alcoholic beverages prior to the boarding. Due to the boarding officers' observations of your manner, disposition, musculature control and demeanor, and because there were so many children present aboard the vessel, the boarding officers determined that it would be prudent to determine whether you were capable of safely operating the vessel. As a consequence, at approximately 6:15 p.m., the boarding officers requested that you come aboard the Coast Guard vessel so that afloat field sobriety testing could be conducted. The record shows that you agreed to do so.

Unfortunately, the record shows that when you were taken aboard the Coast Guard vessel for sobriety testing, your brother-in-law, who claimed to be a lawyer, began to interfere with the boarding by questioning the boarding officer's authority to conduct the testing, whether probable cause existed to allow for the testing, and continually interrupting the boarding officer as he asked you mandatory pre-test questions. The record further shows that because you performed poorly on all six afloat field sobriety tests administered, the boarding officers elected to escort the vessel, while under the operation of your brother-in-law, to Massey's Landing, a local marina, so that ashore field sobriety testing could be conducted. At this time, your brother-in-law became very aggressive and, in so doing, caused you to become similarly agitated and aggressive towards the boarding officers. Irrespective of this fact, when your brother-in-law informed the boarding officers that his child was diabetic and needed to get back home to take medication, the boarding officers obliged his request and escorted the vessel back to Bay City Marina instead of the initially proposed location. The record shows that you remained aboard the Coast Guard vessel during this transit.

The record shows that the vessels arrived at Bay City Marina at approximately 6:40 p.m. After you were removed from the vessel and allowed to wait on land for approximately 15 minutes, the boarding officers began administering ashore field sobriety tests. The record shows that you performed poorly on both ashore tests administered. As a result of your performance on the Field Sobriety Tests, the boarding officers asked if you would be willing to submit to a Preliminary Breath Test. Although you initially began to comply with the boarding officer's request to this end, the record shows that when your brother-in-law interrupted, he again escalated the situation.

At about this time, personnel from the Delaware Department of Natural Resources and Environmental Control Division of Fish and Wildlife (DNREC) arrived at the request of the boarding officers. The DNREC operates under a Memorandum of Agreement with the Coast Guard which allows the State of Delaware to criminally prosecute operating under the influence

cases that are found by the Coast Guard to have occurred on Delaware waters. When DNREC personnel arrived at the marina, you and your brother-in-law became very irritated and began threatening the officers with physical harm and verbally assaulting them. Sometime thereafter, however, you agreed to submit to the Preliminary Breath Test requested by the Coast Guard boarding officers. The test result showed that you had a Blood Alcohol Concentration of 0.161%, well above the legal limit. As a result, you were taken into the custody of the DNREC for further processing.

I will now address the violation. The record shows that while your case was pending before the Hearing Officer, you asserted that you were “surprised” by the Hearing Officer’s Preliminary Assessment Letter in the case because you “thought all was settled in court when... [you]...appeared in court and paid the fine determined by the judge.” With regard to this assertion I note, as did the Hearing Officer, that the Coast Guard’s actions in this case are in no way barred by any of the proceedings in the related state court action. While you did not expressly claim that the Coast Guard’s commencement of civil penalty action was a violation of the double jeopardy provision of the Fifth Amendment, your correspondence to the Hearing Officer brings that issue into question. Therefore, for the sake of clarity, I will address the issue here.

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 the assessment of 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.

In addition, the standard of proof necessary to impose a civil penalty at an administrative proceeding 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. For the reasons set forth below, I am convinced that the Coast Guard proved that you operated a vessel while under the influence of alcohol and, as a result, I do not find that the Hearing Officer erred in finding the violation proved.

In this case, the record shows that there is substantial evidence to support the Hearing Officer's conclusion that you operated a vessel while under the influence of alcohol. 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." The record shows that at the time of the boarding, you had a "strong" odor of alcohol on your breath, your speech was "mumbled," "slurred" and "stuttered," that your face was "flushed" and that your eyes were "bloodshot" and "watery." In addition, the boarding officers observed that you exhibited signs of an overall lack of coordination and you admitted that you consumed several alcoholic beverages prior to the boarding. Moreover, the record shows that you failed all afloat and ashore Field Sobriety Tests that were administered to you and that a breathalyzer test revealed that you had a Blood Alcohol Concentration of 0.161%. Given this evidence and the fact that you do not deny that the violation occurred, I find that the Hearing Officer did not err in finding the violation proved. Therefore, the sole issue remaining here is whether mitigation of the assessed penalty is appropriate under the circumstances of this case.

The record shows that the Hearing Officer declined to mitigate the initially assessed penalty because you failed—even after being accorded an additional opportunity to do so—to provide documentary evidence to support your assertions regarding the fine that you allegedly paid to the State of Delaware for the violation. I do not find that the Hearing Officer was either arbitrary or capricious in so doing. Irrespective of that fact, however, I note that even if you had provided documentary evidence to support your assertion regarding your payment of the fine, I would, nonetheless, find insufficient evidence in the record to support mitigation of the penalty assessed by the Hearing Officer. The record shows—and you do not deny—that you operated the vessel while under the influence of alcohol with six children aboard it, an action which seriously endangered the lives of those children. Moreover, the record shows that you were combative and uncooperative on numerous occasions during the boarding. After carefully considering these factors, mitigation of the assessed penalty is not warranted.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's conclusion 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 \$1,000.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute to be appropriate under the circumstances of this case.

Oct 30, 2009

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

Payment of **\$750.00** 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

Should you still believe that you are financially unable to pay the assessed penalty, you may request the establishment of a payment plan. Requests for relief should be directed to the Chief, Claims Branch, Maintenance and Logistics Command Pacific, Coast Guard Island, Alameda, California 94501-5100.

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//

F. J. KENNEY,  
Captain, U.S. Coast Guard  
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