



IS IT BUI? — NEGLIGENT OPERATIONS? — OR BOTH?

Written by: CDR M. Hammond

Consider this hypothetical scenario: A small boat crew discovers a 16-foot recreational boat with one person on board, adrift, and without its navigation lights energized after sunset. Based on that and additional observations during a boarding of the vessel, the boarding officer has reasonable cause to suspect the operator is intoxicated. Following the administration of field sobriety tests and a breath test, the operator is determined to be intoxicated and is subsequently charged for operating under the influence of alcohol or a dangerous drug (BUI), under Title 46 United States Code 2302(c). The operator is also charged under 33 CFR 83.20 for failing to comply with the rules for lights after sunset. Further, the operator is cited for a third charge under 46 U.S.C. 2302(a) – negligent operations. However, the only evidence in the case file to support the third charge is the brief statement “subject operated vsl with no lights and BAC of .086.” When the case is reviewed by the Hearing Officer, the negligent operations charge is dismissed. Why? Cases involving BUI are unfortunately common amongst the cases received by the Hearing Office for adjudication. Generally speaking, charging units are doing an excellent job of thoroughly documenting the critical factual elements of each case and providing the necessary evidence to support a charge of BUI. Hearing Officers routinely receive cases in which a charge under 46 U.S.C. 2302(a) for “Negligent Operations” is also included in addition to the BUI charge. However, more times than not, these cases do not contain additional evidence beyond that pertaining to the BUI charge and therefore the charge under 2302(a) is typically dismissed. That’s not to say that negligence did not occur in a particular circumstance; only that the case file did not contain sufficient evidence to support a prima facie case in order to proceed with a charge under 46 U.S.C. 2302(a).

According 46 U.S.C. 2302(a), a person operating a vessel in a negligent manner or interfering with the safe operation of a vessel, so as to endanger the life, limb, or property of a person is liable to the U.S. Government for a civil penalty. Negligence is the omission to do something which a reasonable person, guided by those common sense considerations which ordinarily regulate human affairs, would do; or the doing of something which a reasonable and prudent person would not do. It is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.

Negligence can also be established by showing that a person violated an applicable safety law. But 46 U.S.C. 2302(a) also requires proof that the negligent act endangered the life, limb or property of a person. In the example given above, the party is already charged for operating under the influence and for failing to have navigation lights energized after sunset. However, the case file does not contain evidence to show that these alleged violations of safety law endangered the life, limb or property of a person. And, even if there was such proof, the Hearing Officer would have two violations based on the same failure to comply with a safety law. That may be considered a case of multiplicitous charging, which means that the Hearing Officer may consider the two violations as a single violation for purposes of assessing an appropriate penalty. That would not be the case if the alleged negligent operations violation was based on an act that was independent of the already-charged BUI and navigation lights violations.

Generally, in a case where BUI or another safety law violation is alleged, it may be appropriate to also charge a negligent operation violation if it is based on an independent act that would support pursuing a civil penalty case by itself. Some examples could include: colliding with properly moored or anchored vessels; operating erratically in dense traffic causing other boaters to take evasive action to avoid collision; operating at a high rate of speed in a no wake zone; and allowing children without PFDs to bow ride at a high speed, etc. As always, careful attention to ensuring that civil penalty cases forwarded to the Hearing Office contain good and sufficient evidence to support each element of each charge cited will assist in the timely and proper notice to parties.