



16780  
November 13, 2008

[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

RE: Case No. 2043253  
[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. 2043253, which includes your appeal on behalf of [REDACTED], as operator of the [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 March 26, 2004, when Coast Guard boarding officers boarded the [REDACTED] while it was underway on Bud Inlet, near Olympia, Washington.

On appeal, in addition to stating that all issues previously raised should be considered, you contend that because the Hearing Officer considered rebuttal comments (which you call "additional information, not previously transmitted to [REDACTED]") in reaching a final decision in the case, the case should be "subject to review by an independent hearing officer at trial." In addition, you imply that [REDACTED] has been denied due process in the administration of his case because he "has never really had any meaningful trial or opportunity to cross-examine anyone." At the same time, you ask that I "consider the jurisdiction of a branch of the military...to essentially 'try' and 'convict' or even impose penalties within the Port of Olympia...on a civilian who is not licensed or otherwise regulated by the Coast Guard" in this case. In so stating, you imply that the Coast Guard's jurisdiction would be more appropriate in a case arising from "something happening on the high seas" and, assert that jurisdiction here would be more appropriate for the "Olympia Police" and "the Prosecuting Attorney." Your appeal is denied for the reasons discussed below.

I will begin by addressing the due process considerations raised within your correspondence. The Coast Guard's civil penalty program is a critical element in the enforcement of numerous

marine safety and environmental laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are proved. The applicable procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded due process during informal adjudicative proceedings. It is also worth noting that the procedures in 33 CFR 1.07 have been sanctioned by Congress and have been upheld in the Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

I will now turn my attention to the issues that you raise on appeal, beginning with your assertion that a new hearing must be scheduled in this case. The record shows that, upon receiving the Hearing Officer's initial notification letter, you requested that a hearing be held in the matter. The record further shows one day before the Hearing was scheduled to occur, you submitted a written request, asking, in effect, that the Hearing Officer secure the attendance of the boarding officer at the Hearing. The Hearing Officer was not able to attend to your last minute request and, as a result, the hearing went forward without the boarding officer in attendance. As a consequence, the scheduled hearing was truncated because your primary defense revolved around cross-examination of the boarding officer. I note that the Hearing Officer's notes clearly indicate that, during the scheduled hearing, she expressly informed you that she could not "promise" that another hearing would be scheduled with regard to the case. In any event, the record shows that as a result of issues that you raised before the Hearing Officer (both in written correspondence and at the hearing), the Hearing Officer sought and received rebuttal comments from the unit responsible for initiating the instant civil penalty case and that you were provided the opportunity to submit written argument—and did so—in response to such evidence, and all other evidence, contained within the case file. While 33 CFR 1.07-50 does allow parties to request the assistance of the Hearing Officer in obtaining the personal attendance of a witness (upon written request for the same) in these proceedings, the regulation makes clear that if meeting the request is not "practical, the Hearing Officer shall proceed on the basis of the evidence before him." *See* 33 CFR 1.07-50. Given the fact that you requested the Hearing Officer's assistance in securing the attendance of the boarding officer only one day before the hearing was scheduled to occur, I do not find that the Hearing Officer erred in either determining that the boarding officer's attendance at the hearing was not practical or in proceeding with the hearing—and in the decision making process—on the basis of the evidence already contained in the case file.

Moreover, I note that, contrary to your assertions, the record shows that your client was granted a "due process" hearing in this case. In that respect, you assert that the instant process is flawed because your client was not afforded the opportunity to cross-examine the Coast Guard boarding officer who was responsible for providing the bulk of the record evidence supporting the violation. I believe that your assertions, in this regard, shows that you may not fully understand the nature of the instant proceeding. A formal, trial-type hearing is not always required for an agency to accord due process. Formal adjudications, presided over by an Administrative Law Judge, mirror very closely a trial in federal court. However, with the growth of the federal regulatory function, the need to conduct full, trial-type administrative hearings for the possibly thousands of civil penalty cases that an agency may be investigating came into question. To

avoid the significant time and manpower requirements associated with formal, on-the-record hearings, informal hearing procedures were developed. In spite of their informality, these proceedings are required to provide the respondent with notice, an opportunity to be heard, a right to present evidence at an informal hearing, and a right of appeal. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court set forth guidelines that distinguish between formal and informal proceedings. Since *Mathews*, courts and Congress have generally concluded that the need for a formal administrative adjudication before an Administrative Law Judge is not legally required in cases where the monetary interests of the respondent were all that was at stake. In 1978, the Coast Guard published its civil penalty procedures at 33 CFR 1.07. The procedures in 33 CFR Part 1.07 are remedial in nature and reflect an appropriate balance between the needs of the Coast Guard in addressing a caseload numbering in the several thousands with the need to provide all respondents with due process rights that are consistent with the monetary sanction being considered. As I have already noted, the Coast Guard's civil penalty process complies with all legal requirements and has specifically been upheld in *U.S. v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (1979).

As I have already stated, you contend that your client has “never really had any meaningful trial or opportunity to cross-examine anyone” in the instant case and assert that such cross-examination is “particularly appropriate in light of the very conflicting renditions of fact being given by each side, because it is not usually appropriate to find facts based on mere written submissions without the benefit of examination or cross-examination under oath. I do not find your assertion in this regard to be persuasive. First and foremost, the confrontation clause of the Sixth Amendment—from which springs the right of cross examination—applies to criminal cases where a person's life and limb are at stake, not civil administrative proceedings where lesser interests (like money) are the only interests at stake. See *Bennett v. National Transportation Safety Board*, 66 F.3d 1130, 1136 (10th Cir. 1995) (stating that confrontation of witnesses does not apply to revocation proceedings because “Congress never intended the revocation or suspension of an airman's certificate to be a criminal penalty”). Perhaps more importantly, agencies have broad discretion in determining when or whether to deny or limit cross-examination. The procedural rules applicable to the instant proceeding emphasize this point in that they do not specifically mention cross-examination.

Irrespective of whether the Coast Guard's regulations contemplate cross-examination, the record shows that your assertions with respect to the cross-examination of the boarding officer are unfounded. First, the record shows that the Coast Guard did not call any witnesses at the hearing. Rather, as is required by regulation, the Coast Guard presented its case to the Hearing Officer by presenting him with a copy of the written case file. See 33 CFR 1.07-55(b). In effect, presentation of the written case files—albeit prior to the hearing—represented the Coast Guard's presentation of its case-in-chief. This highlights the informal nature of the Coast Guard's civil penalty process in that it is not structured to allow an adversarial hearing where each party calls witnesses and is afforded the opportunity to conduct cross-examination. Instead, the Coast Guard's procedural regulations require the Coast Guard to present its case by submission of a written case file and allow parties to respond to or rebut the evidence contained in the case file through the presentation of evidence either solely in writing or through the calling of witnesses at an informal hearing. See 33 CFR 1.07-55. While the relevant hearing might not have progressed as you expected, the record shows that your client was accorded the opportunity to respond to all

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of the evidence that the Coast Guard presented via written correspondence. Accordingly, a careful review of the record shows that the Hearing Officer followed the applicable procedural rules in the administration of your client's case and, as a result, I do not find your due process argument to be persuasive.

I will next address your assertions regarding the Coast Guard's jurisdiction in the instant case. On appeal, you imply that it is inappropriate for the Coast Guard to assess a penalty in this case because the factual occurrences surrounding the violation occurred "within the Port of Olympia" and concern "a civilian who is not licensed or otherwise regulated by the Coast Guard." First, I note under the dictates of 14 USC 89, the Coast Guard has broad authority to board any vessel at any time for the "prevention, detection, and suppression of violations of laws of the United States." This plenary authority to board U.S. vessels to conduct administrative inspections without probable cause has been approved by the U.S. Supreme Court. *See U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983). Moreover, 46 USC 2302(c) makes clear, in relevant part, that "[a]n individual who is under the influence of alcohol...in violation of the law of the United States when operating a vessel...is liable to the United States Government for a civil penalty." Therefore, irrespective of whether your client was operating a vessel under the authority of a Coast Guard issued mariner credential, if the record contains substantial evidence to support a conclusion that he was operating a vessel on the navigable waters of the United States while under the influence of alcohol, the assessment of a civil penalty is appropriate.

The record shows that while the matter was pending at the Hearing Officer level, you asserted that because the Olympia Police Department did not charge your client with a related state violation for operating a vessel while under the influence of alcohol, the Coast Guard's initiation of civil penalty action in this case is inappropriate. I do not agree. The issue presented in the instant case is not whether there was sufficient evidence to allow the Olympia Police Department to conclude that your client was operating a vessel while under the influence of alcohol, but rather whether there is sufficient evidence in the record to support the Hearing Officer's conclusion that your client operated a vessel while under the influence of alcohol under the definition set forth in the Coast Guard's regulations. The Coast Guard's actions in this case are not, in any way, contingent on the actions of the State of Washington. The waters of the Port of Olympia are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against your client for the instant violation without regard to any action taken by the State of Washington. Furthermore, as I am sure you are aware, 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

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forth below, I am convinced that the Coast Guard proved its case against your client by a preponderance of the evidence.

The record shows that in your initial correspondence with the Hearing Officer, without expressly denying that your client was operating the vessel at the relevant time, you questioned how the Coast Guard boarding officer was able to positively identify your client as the vessel operator. The record shows that the Hearing Officer addressed your assertion, in that regard, in her final letter of decision as follows:

33 CFR 95.015 states “for purposes of this part, an individual is considered to be operating a vessel when the individual has an essential role in the operation of a recreational vessel underway, including but not limited to navigation of the vessel or control of the vessel’s propulsion system.” You argue that you and your passenger (who is representing you in this case) are physically similar and that the boarding officer would have had difficulty in distinguishing which of you was operating [the vessel]. In rebuttal, the boarding officer expanded on how he determined who was behind the wheel, including the fact that your passenger was seated wearing a baseball cap. Additionally, I note in your response of August 18<sup>th</sup> that you “kept lookout” and “radioed a tanker coming at us” while the other person on board dealt with an engine problem. Finally, I considered that at no time during the course of the boarding, nor in his responses to me, does your witness state that he was the vessel operator. I credit the boarding officer’s rebuttal. I find that you were operating for the purposes of this charge.

It is the Hearing Officer’s responsibility to decide the reliability and credibility of evidence and to resolve any conflicts presented in the evidence. Although you have implied that the record does not contain substantial evidence to support a conclusion that your client was operating the ARGONAUT on the relevant evening, there was substantial evidence in the record to support the Hearing Officer’s conclusion that your client was, in fact, the operator of the vessel at the relevant time. Therefore, I do not find that the Hearing Officer abused her discretion in finding your assertions with regard to the operation of the vessel unpersuasive.

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...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.” (emphasis added). 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 there was ample evidence in the record to support the Hearing Officer’s conclusion that your client operated a vessel while under the influence of alcohol for the purposes of this proceeding. Indeed, the record shows both that at the time of the boarding, [REDACTED] “showed extreme light sensitivity” and exhibited “confused” speech patterns and that open alcohol containers were observed aboard the vessel. In addition, the Coast Guard Field Sobriety Test Performance Report for the incident shows that [REDACTED] performed poorly on five of six Field Sobriety Tests administered to him.

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Although [REDACTED] performed satisfactorily on the “Recite A-B-C” test, he hesitated during the “Count from 25 to 1” test, miscounted, slid and improperly touched and counted fingers and failed to speed up during the “Finger Count” test, he failed to speed up during the “Palm Pat” test, and missed his nose during the “Finger to Nose” test. Based upon this evidence, I do not believe that the Hearing Officer was either arbitrary or capricious in determining that [REDACTED] operated a vessel while under the influence of alcohol under 33 CFR 95.030(a) based upon the totality of the circumstances of the boarding, including his FST results and the personal observations of the Coast Guard boarding officer regarding his manner, disposition, speech, muscular movement, and behavior.

Although I have concluded that there was substantial evidence in the record to support the Hearing Officer’s determination that [REDACTED] operated a vessel while under the influence of alcohol based upon recorded observations of his manner, disposition, muscular movement, and behavior, I believe that a discussion of his refusal to submit to a chemical test is important to the administration of this case. The signed statement of the boarding officer, contained within the record, shows that [REDACTED] refused to submit to a Breathalyzer test requested during the boarding. As the Hearing Officer properly noted in her final letter of decision, under 33 CFR 95.040(a), “[i]f an individual refuses to submit to or cooperate in the administration of a timely chemical test when directed by a law enforcement officer based on reasonable cause, evidence of that refusal is admissible in any administrative proceeding and the individual will be presumed to be under the influence of alcohol.” Given the recorded observations of [REDACTED] manner, disposition, muscular movement, and behavior, I believe that the boarding officers had reasonable cause to direct him to submit to a Breathalyzer test. Throughout the course of these proceedings, you have asserted that the boarding officer never informed either yourself or your client of the negative consequences associated with a refusal to submit to a chemical test. In her Final Letter of Decision, the Hearing Officer addressed your assertions, in that regard, as follows:

I considered your argument that the boarding officer did not inform you of the consequences of refusing the chemical test. In rebuttal, the boarding officer states this is not true and I credit his statement. Even if it were true, however, this alone would not be adequate grounds for dismissing this charge.

As I have already stated, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts presented within the evidence. I find no abuse of discretion in the Hearing Officer’s conclusion that the presumption of operating a vessel while under the influence of alcohol operated in this case. While the presumption created by your client’s refusal to submit to the chemical test is a rebuttable one, the evidence that you have provided on his behalf simply has not overcome that presumption. By electing to not take the relevant tests, including the chemical test, your client voluntarily placed himself in the position of having the presumption operate against him. Once the presumption was created, the burden to provide substantial evidence to rebut the presumption rested with you. Moreover, I do not find that the Hearing Officer erred in finding that the boarding officers did, in fact, inform your client of the ramifications of his refusal to submit to the relevant chemical test. Regardless of that finding, however, I note, as did the Hearing Officer, that there is no regulation that requires that parties be made aware of the operation of the presumption. Furthermore, for the purposes of 33

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CFR 95.020(c), as discussed above, there is enough evidence in the record to support a conclusion that your client operated a vessel while under the influence of alcohol without regard to the operation of the presumption. Therefore, I find the violation proved and will not mitigate the penalty assessed by the Hearing Officer.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that [REDACTED] is 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 in light of the circumstances surrounding 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 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