



REDACTED
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16780
15 April 2008

RE: Case No. 2234598
REDACTED
REDACTED
\$500.00

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2234598, which includes your appeal on behalf of REDACTED, as alleged 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 July 17, 2004, when Coast Guard boarding officers boarded the REDACTED while it was underway on the Grand River near Grand Haven, Michigan.

On appeal, although you do not deny that your client, REDACTED, was under the influence of alcohol on the evening of the boarding, you contend that she was not the operator of the vessel. To that end, you contend that REDACTED "made a poor decision on the night in question in an attempt to try to protect the true owner and operator of the boat" and add that "the drunk boating charge was dismissed by the Ottawa County (Michigan) Prosecutor based on the fact that REDACTED was not the true operator of the vessel." In that vein, you further indicate that "[h]ad there been clear evidence that REDACTED was the vessel's operator...[you]...do not believe the Prosecutor would have dismissed the charge." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

I will begin by addressing the procedural progression of the case. The record shows that the Hearing Officer issued his Preliminary Assessment Letter in this case on December 7, 2004. A review of that letter shows that, in accordance with the applicable procedural regulations, at 33 CFR Part 1.07, the Hearing Officer informed REDACTED of the alleged violation, the maximum penalty available for the violation, the amount of the preliminarily assessed penalty, and that she would have 30 days within which to either request a hearing, provide written evidence in lieu of a hearing or to pay the preliminarily assessed penalty. The record further

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shows that although the Hearing Officer allowed the case file to remain open for more than 60 days, REDACTED never responded to the Hearing Officer's Preliminary Assessment Letter. As a consequence, on February 11, 2005, the Hearing Officer issued his Final Letter of Decision in the case. In that decision, the Hearing Officer found the violation proved based on the evidence contained in the case file and assessed the penalty at issue in this proceeding. In addition, in accordance with the applicable procedural rules, the Hearing Officer informed REDACTED that she would have 30 days from the date of receipt of the Hearing Officer's letter to appeal the matter to the Commandant, United States Coast Guard. The record shows that you commenced the instant appeal via a letter to the Hearing Officer dated March 1, 2005.

Under 33 C.F.R. 1.07-70(a), only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. The record shows that neither you, nor your client, raised any issues before the Hearing Officer and that, indeed, your first correspondence with the Hearing Officer occurred after he issued his Final Letter of Decision in the case. As a result, because the issues you present on appeal were not raised before the Hearing Officer, your client's right to have those issues considered has been waived. Regardless of that fact, I note that even if I were to consider the issues that you raise on appeal, the record contains sufficient evidence to support the Hearing Officer's conclusion that the violation occurred and that REDACTED is an appropriate party to be charged with the violation.

Turning my attention to the case at hand, I will now address your contention that the Coast Guard's civil penalty action in this case is inappropriate because a related action brought by the State of Michigan was dismissed. Your contention, in this regard, is without merit. The Coast Guard's actions in this case are in no way barred by any of the proceedings in the related state action. The waters of the Grand River are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against REDACTED without regard to any action by the State of Michigan. Neither the applicable statute nor any known theory regarding the enforcement authority of the Federal and state governments precludes the Coast Guard from assessing a civil penalty. Indeed, the Federal government is not precluded from imposing both criminal and civil sanctions for the same conduct. See, One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S.Ct. 489 (1972). In addition, I note that 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. 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 its case against REDACTED by a preponderance of the evidence.

The record shows that you do not deny that your client was under the influence of alcohol at the time of the boarding. Rather, you contend, without any evidentiary support, that REDACTED was not "the true operator of the vessel." Contrary to your assertions, the Coast Guard Form 4100 Boarding Report for the incident identifies your client as the operator of the vessel. In addition, the record contains the statements of three Coast Guard boarding officers involved with the boarding of the REDACTED; two of those statements expressly indicate that they observed

your client operating the vessel. Given this evidence, I find that the Hearing Officer did not err in determining that your client operated the vessel on the evening of the boarding. Therefore, the sole issue remaining for my consideration is whether the record contains substantial evidence to support the Hearing Officer's conclusion that your client operated the REDACTED 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." 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, your client had a strong odor of alcohol on her breath, her speech was mumbled and slurred, her face was flushed and her eyes were bloodshot. In addition, the test report shows that your client performed poorly on all five Field Sobriety Tests administered by the boarding officers: 1) on the "Alphabet Test", your client sang, and missed and repeated letters; 2) on the "Finger Count" test, your client miscounted, slid her fingers and improperly touched and counted her fingers; 3) on the "Palm Pat" Test, your client slid her hands, improperly counted and was unable to successfully complete the test; 4) on the "Finger to Nose" Test, your client missed her nose, used a searching pattern and hesitated; and, 5) on the "Horizontal Gaze Nystagmus" Test, your client lacked smooth pursuit and showed distinct nystagmus onset prior to 45 degrees in both eyes. While each of these factors, alone, might not have been sufficient to support a conclusion that your client was operating a vessel under the influence of alcohol on the evening of the boarding, taken together, I am persuaded that the results of your client's Field Sobriety Tests and the personal observations of the Coast Guard boarding officer regarding her manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that REDACTED was "under the influence" under 33 CFR 95.030(a).

In addition, I note that the record shows that a breathalyzer test administered during the boarding revealed that your client had a blood alcohol concentration of .201%. Given this evidence, and the fact that you do not deny that your client was under the influence of alcohol at the time of the boarding, I find that the record contains sufficient evidence to support the Hearing Officer's conclusion that REDACTED was under the influence of alcohol under the standard articulated at 33 CFR 95.030(b), as well.

Having determined that there is substantial evidence in the record to support a conclusion that the violation occurred, I will now address the penalty amount. The record shows that, throughout the course of these proceedings, you have asserted that REDACTED was not the "true operator" of the vessel, but rather assumed operational control so that the vessel's owner, an individual with "a significant prior criminal record," could avoid responsibility in the case. I am inclined to accept your assertion in that regard and conclude, as a consequence, that REDACTED operated the vessel for a short period of time. Given my finding in this regard, I will reduced the assessed penalty to \$500.00.

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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 was the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find a penalty of \$500.00, rather than the \$1,000.00 penalty assessed by the Hearing Officer, or \$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 **\$500.00** 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