



16780
July 16, 2008

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2303417
[REDACTED]
[REDACTED]
\$400.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2303417, 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 \$400.00 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.	\$400.00

The violation is alleged to have occurred on August 21, 2004, when Coast Guard boarding officers boarded the unnamed recreational vessel [REDACTED] while it was underway on the Milwaukee River, near Milwaukee, Wisconsin.

On appeal, although you do not deny being under the influence of alcohol on the evening of the alleged violation, you assert that you “do not believe that the circumstances [surrounding the violation] were fully considered” and contend that you do not “think that the intent of the regulation itself was violated” by your actions on the evening that the violation allegedly occurred. While you acknowledge that your lack of understanding as to the meaning of the term “underway” for Coast Guard navigational purposes “should not absolve...[you]...of all wrongdoing,” you imply that in a case such as this, where you could have simply dropped anchor and avoided any violation of the law, a serious violation—that of operating a vessel while under the influence—is “a pretty harsh penalty for...ignorance.” You conclude, after noting that you take this charge seriously, that your “boating and driving records are both clean” and request, as a result, that you be allowed to “plead ‘No Contest’ to a lesser charge and pay the \$400.00 fine” assessed by the Hearing Officer. Your appeal is denied for the reasons discussed below.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection 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. Procedural

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rules, at 33 CFR 1.07, are designed to ensure that parties are afforded maximum due process during informal administrative proceedings. The procedures in 33 CFR 1.07 have been sanctioned by Congress and 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 begin by discussing the factual occurrences surrounding the violation. The record shows that Coast Guard personnel commenced a boarding of your vessel on August 21, 2004, after witnessing the vessel operating with only its anchor light on. When Coast Guard personnel approached the vessel, they noticed that it was not at anchor, but rather was simply stopped with its engine turned off. Thereafter, Coast Guard boarding officers began an administrative boarding of the vessel, to ensure that it was being operated with all appropriate laws and regulations. The statements of the boarding officers show that, at the time that the boarding was commenced, you were sitting at the vessel's helm and identified yourself as the vessel's owner. During that time, the boarding officers observed that you had a moderate odor of alcohol on your breath and asked you if you had consumed any alcoholic beverages that evening. You admitted that you had consumed 4 beers an hour earlier. As a result of these observations, boarding officers asked that you submit to Field Sobriety Tests (FST). The record shows that although you performed satisfactorily on the "ABC" and "Count from 25 to 1" tests, you performed poorly on the "Horizontal Gaze Nystagmus" test and refused to submit to a chemical test. Personal observations of the boarding officers, combined with your FST results and the fact that you refused to submit to a chemical test led the boarding officers to conclude that you were operating your vessel while under the influence of alcohol. As a consequence, the boarding officers terminated your operation of the vessel and instructed one of your sober passengers to pilot the vessel home.

Because you do not deny being under the influence of alcohol at the time of the boarding, and because the record shows that you were seen to be seated at the vessel's helm, the key issue presented here is whether the Hearing Officer was correct to conclude that your vessel was "underway" at the time of the boarding. As the Hearing Officer properly noted in her Final Letter of Decision, for the purposes of the Coast Guard's vessel operating regulations, "an individual is considered to be operating a vessel when...[t]he 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." In addition, the Hearing Officer further noted that under the applicable regulations, a vessel is "underway" when it is "not at anchor, or made fast to the shore, or aground." *See* 33 CFR 95.010. On appeal, although you acknowledge that "ignorance of the term 'underway' should not absolve...[you]...of all wrong doing," you nonetheless assert that a determination that your vessel was underway is not consistent with the intent of the regulations. I do not agree.

When the Coast Guard first issued its "operating under the influence" regulations—then called operating while intoxicated—careful consideration was given as to the meaning of the term "underway." Indeed, the Final Rule promulgating the regulations in 33 CFR Part 95 addressed the term "underway" as follows:

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Two comments suggested that the regulations should clarify that “operating” a recreational vessel means the vessel is “underway,” to stay within the authorization of the law.

The statute [46 USC 2302] does not define the term “operate.” For many purposes, a commercial vessel is considered to be “operating” while moored to a dock or at anchor. The Coast Guard recognizes that recreational vessels may be used as vacation homes, or even primary residences, and that the activities of persons on board while the vessel is at anchor or moored differ from the activities taking place on commercial vessels. Therefore, the Coast Guard has limited the applicability of the rules to recreational vessels that are underway and included a definition of “underway” in § 95.010.

Accordingly, the situation presented in this case—when a vessel is idle on the navigable waters of the United States but not at anchor, made fast to shore, or aground, clearly meets the regulatory definition of being “underway.” As is noted above, such a conclusion is consistent with the stated intent of the applicable regulations. Indeed, as the Hearing Officer noted:

When a vessel is underway, someone is ‘operating’ it; someone must fulfill the vessel’s obligation to react to situations as required by the navigation rules. Sitting at the wheel, you were the one in a position to steer and control the vessel’s propulsion, even if you did not expect to do so.

Therefore, I do not find that the Hearing Officer erred in determining that you were operating a vessel while under the influence of alcohol under the applicable regulations. Moreover, I note that the record shows that the Hearing Officer carefully considered the particular circumstances of the case when she, in consideration of the “reduced risk involved in a vessel whose engine is not running and your intention not to operate the vessel back to the yacht club,” when she assessed “a reduced penalty of \$400” for the violation. Given the evidence contained in the record, including your performance on the FSTs and your refusal to submit to a chemical test, and the fact that the maximum penalty available for the violation is \$5,500.00, I do not find that the Hearing Officer was either arbitrary or capricious in assessing a penalty of \$400.00 for the violation.

Having so determined, I will now discuss your request that I allow you to “plead ‘no contest’ to a lesser charge and pay the \$400.00 fine.” The instant case resulted from an informal administrative adjudication, not a criminal proceeding. As such, there is no conviction as would be the case in a criminal proceeding. As I have already stated, the procedural regulations governing Coast Guard civil penalty cases are found at 33 CFR Part 1.07. The applicable procedural rules do not allow the action you suggest. More importantly, as I have already stated, because the record contains substantial evidence to support the Hearing Officer’s conclusion that the violation occurred and that you are the responsible party, the assessment of a monetary civil penalty is appropriate in this case.

Accordingly, I find that the Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$400.00 penalty assessed by the

Hearing Officer, rather than the \$5,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$400.00** 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 4.00% 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