



16780
November 01, 2008

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2573783
[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. 2573783, which includes your appeal on behalf of [REDACTED] as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,500.00 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.	\$1,500.00

The violation was first observed on July 24, 2005, when Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was underway on the Genesee River near Rochester, New York.

On appeal, although you do not deny that [REDACTED] operated the [REDACTED] while under the influence of alcohol on the relevant evening, you seek mitigation of the penalty assessed by the Hearing Officer. In that regard, you note that “[REDACTED] was tried and acquitted of the Rochester City Court BWI charge” and instead found guilty of “the lesser included non-criminal offense of boating while ability impaired.” In so stating, you imply that the imposition of a \$1,500.00 civil penalty in this case may be inappropriate. To further support mitigation of the assessed penalty, you note that [REDACTED] does not have “any prior adverse history regarding mariner enforcement,” that he “sold his vessel and no longer owns one” and that the unit responsible for initiating the instant civil penalty case recommended a penalty of only \$1,000.00 for the alleged violation. At the same time, you have provided an explanation to support your assertion that the mere fact that [REDACTED] was handcuffed during the relevant incident—a factor which the Hearing Officer considered in assessing a penalty of \$1,500.00 in the case—is not sufficient to justify aggravation of the assessed penalty. In that regard you assert that “[t]here is nothing remarkable about securing a subject when conducting a ‘turn-over arrest’” and note that “[REDACTED] was never charged with disorderly conduct, resisting arrest, obstruction of governmental administration nor anything of that nature” and insist, as a

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result, that “no relevant consideration can be given to uncharged conduct which does not relate to the gravamen of the true conduct at issue.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address your appeal arguments, I believe that it would be beneficial to briefly address both the intent of the Coast Guard’s civil penalty process and the applicable procedural regulations. 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 found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded administrative due process during informal adjudicative proceedings. The rules have been both sanctioned by Congress and upheld in 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 address your assertions with regard to [REDACTED] acquittal and conviction of a lesser included offense in New York for the conduct at issue in this proceeding. After a thorough review of the record, I note that your assertions in this regard fail to acknowledge that the standard of proof necessary to impose a civil penalty at an administrative proceeding like this one is less than what is necessary for a finding of guilt at a state or federal criminal proceeding. As I am sure you are well aware, 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. 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.

Moreover, I note that the Coast Guard's actions in this case are in no way barred by any proceedings in a related state action. That is because the waters of the Genesee 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 taken by the State of New York. Indeed, 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 in this case. In fact, as the Hearing Officer noted in his general notification letter to you, 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).

I will now address the violation, itself. In “operating under the influence” cases such as this one “[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.” See 33 CFR 95.030. 33 CFR 95.020(c) further provides that an individual is considered to be under the influence of alcohol 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.” Moreover, according to 33 CFR 95.040, when an individual refuses to take a timely chemical test when directed to by a law enforcement officer upon reasonable cause, it is presumed that the individual is under the influence of alcohol or dangerous drugs. A careful review of the Hearing Officer’s decision shows that he found the violation proved due to both recorded observations of [REDACTED] manner, disposition, speech, muscular movement, general appearance and behavior, and because of the presumption of intoxication created by his refusal to submit to a chemical test. After a thorough review of the record, I find that there is substantial evidence in the record to support the Hearing Officer’s conclusions in this regard.

First, the Field Sobriety Test Performance Report contained in the record shows that [REDACTED] had a “moderate” odor of alcohol on his breath, that his speech was “slurred,” that his face was “flushed,” and that his eyes were “watery” and “bloodshot” at the time of the boarding. More importantly, the Report shows that [REDACTED] performed poorly on all five Field Sobriety Tests administered during the boarding. Indeed, the Report shows that [REDACTED]hesitated and repeated letters during the “Alphabet Test,” that he hesitated during the “Backwards Count” test, that he miscounted, slid and improperly counted fingers and failed to speed up during the “Finger Count” test, that he slid his hand, improperly counted, hesitated and failed to speed up during the “Palm Pat” test, and that he lacked smooth pursuit, onset prior to 45 degrees, in both eyes and show distinct nystagmus at max deviation in his right eye on the “Horizontal Gaze Nystagmus” test¹. In light of this evidence, I do not find that the Hearing Officer was either arbitrary or capricious in determining that [REDACTED] was operating a vessel while under the influence of alcohol under the standard articulated at 33 CFR 95.020(c) 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.

The record further shows that [REDACTED] refused to submit to a chemical test requested by the boarding officers during the relevant boarding. 33 CFR 95.040(a) makes clear that “[i]f an individual refuses to submit to...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.” 33 CFR 95.035(a) makes further clear, in relevant part, that “reasonable cause exists when...[t]he individual is suspected of being in violation of the standards in §§ 95.020 or 95.025.” Accordingly, if an 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,” reasonable cause would exist to allow a law enforcement officer to direct the individual to submit to a chemical test.

¹ Because there is a causal connection between the ingestion of alcohol and the detectable presence of exaggerated horizontal gaze nystagmus in a person’s eyes, the HGN test is generally accepted as providing scientific evidence that can be indicative of intoxication. See e.g., *U.S. v. Horn*, 185 F. Supp. 2d 530 (D.Md. 2002); *U.S. v. Daras*, 1998 WL 726748 (4th Cir. 1998) (unreported); *Hulse v. State*, 961 P.2d 75 (Mont. 1998); *State v. Superior Ct.*, 718 P.2d 1358 (Ariz.App.1989); *Whitson v. State*, 863 S.W.2d 794 (Ark. 1993); *State v. Duffy*, 778 A.2d 415 (N.H. 2001); *State v. O’Key*, 899 P.2d 663 (Or. 1995); *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997); *Smith v. State*, 11 P.3d 931 (Wyo. 2000).

As I have already noted, the record shows that, at the time of the boarding, [REDACTED] had a moderate odor of alcohol on his breath, his speech was slurred, his eyes were bloodshot and watery, and his face was flushed. In addition, [REDACTED] failed all five FSTs administered to him during the boarding. Given this evidence, I find that the Hearing Officer was correct to conclude that reasonable cause existed to allow a law enforcement officer to require him to submit to a chemical test. Since I note, as did the Hearing Officer, that you have not submitted any evidence to rebut the presumption of intoxication created by [REDACTED] refusal to submit to the requested chemical test, I find that the Hearing Officer was also correct to conclude that [REDACTED] operated a vessel while under the influence under the standard articulated at 33 CFR 95.020(a).

Having found substantial evidence in the record to support the Hearing Officer's conclusion that [REDACTED] operated a vessel while under the influence of alcohol, I will now address the assertions that you raise in mitigation. On appeal, in support of your request for mitigation, you note that [REDACTED] does not have a history of prior violations and assert that he has sold his vessel. In addition, you contend that the Hearing Officer erred in viewing evidence that [REDACTED] had to be handcuffed during the boarding as an aggravating factor and insist that such action is customary "incident to a 'turn-over arrest'." At the same time, you note that the unit responsible for initiating the instant civil penalty case recommended a penalty of \$1,000 in the case and imply that the Hearing Officer erred in assessing a penalty more than that recommended by the initiating unit. First and foremost, I note that the decision by the Hearing Officer to assess a penalty of \$1,500.00, rather than the \$1,000.00 recommended by the initiating unit was entirely within his discretion. Under the regulations governing Coast Guard civil penalty procedures, 33 CFR Part 1.07, a Coast Guard Hearing Officer exercises completely independent judgment in determining the amount of a penalty, subject only to the limitations prescribed by statute. (In this case, the maximum penalty allowed by statute for the violations is \$5,500.00.) In addition, I note that you contend that the Hearing Officer misunderstood the circumstances surrounding the handcuffing of your client and imply that it was done merely as an administrative function of the fact that he was being turned over to state law enforcement officials. After a careful review of the record, I do not find your assertions in this regard to be persuasive. Indeed, I note that the Activity Summary Report contained within the record states that your client "became belligerent and was placed in handcuffs for officer safety." While you assert, absent any legal support, that "no relevant consideration can be given to uncharged conduct which does not relate to the gravamen of the true conduct at issue," I find that the Hearing Officer did not err in considering [REDACTED] conduct during the boarding as an aggravating factor. As such, I do not find that the Hearing Officer was either arbitrary or capricious in assessing a \$1,500.00 penalty under the circumstances of this case. Irrespective of that fact, however, I will mitigate the \$1,500.00 penalty assessed by the Hearing Officer to \$1,000.00 upon consideration of the arguments raised in mitigation, including the fact that [REDACTED] has already paid a \$300.00 fine for the violation in a state court action.

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. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. However, for the reasons discussed above, I find a

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penalty of \$1,000.00, rather than the \$1,500.00 penalty assessed by the Hearing Officer, or \$5,500.00 maximum permitted by statute to be appropriate under the circumstances of the case.

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. Payment should be directed 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 1.0% 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