

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CG-0941
Phone: (202) 372-3796
Fax: (202) 372-3972

16780
January 21, 2010

[REDACTED]
Attorneys at Law
1065 Peck Street
P.O. Box 687
Muskegon, MI 49443-0687
[REDACTED]

RE: Case No. 2718387
[REDACTED]
[REDACTED]
\$500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2718387, which includes your appeal on behalf of [REDACTED], as operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$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. | \$1,000.00 |

The violation is alleged to have occurred on June 30, 2006, after Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was being operated on Muskegon Lake, near Muskegon, Michigan.

On appeal, although you do not address the violation, itself, you mention the "dismissal of the case in state court." In addition, you refer to the Hearing Officer's July 30, 2008, letter to [REDACTED] and state that he would "like the opportunity to submit the requested evidence." Your appeal is denied for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the violation. The record shows that Coast Guard personnel first observed the [REDACTED] in the early morning hours of June 30, 2006. When the boarding officers first approached the vessel, Coast Guard personnel

observed a shirtless male who had been at the vessel's helm go below deck and return wearing a yellow shirt. When the boarding first commenced, boarding officers observed numerous beer cans strewn about the vessel and detected a strong odor of alcohol coming off all of the vessel's passengers. The vessel's owner was quickly identified to be [REDACTED]. When asked as to the vessel's operation, [REDACTED] insisted that no one was operating the vessel because it was just "drifting." After the boarding officers explained that a drifting vessel could still be considered under operation under the applicable regulations and noted that, under such circumstances, the person at the vessel's helm would be considered the vessel's operator, [REDACTED] became upset and began acting abusively towards the boarding officers. Irrespective of this fact, the boarding officers began conducting the administrative portion of the boarding and soon identified [REDACTED] as the person they had observed operating the vessel prior to the boarding. When [REDACTED] was asked how much he had to drink that evening, he acknowledged that he "was drunk." Based on their observations of the situation and [REDACTED] statement, the boarding officers commenced sobriety testing of [REDACTED]. The record shows that [REDACTED] performed poorly on 5 out of the 6 Field Sobriety Tests (hereinafter "FSTs") administered and that a subsequently administered chemical test revealed that he had a Blood Alcohol Concentration of .130%. As a consequence, the vessel's operation was terminated, the vessel was towed to its original mooring at Hartshorn Marina, and [REDACTED] was transported to the Muskegon County Police Department for further processing.

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).

As I have already stated, on appeal in addition to addressing the violation, you request the opportunity to submit evidence regarding the violation on [REDACTED] behalf. Based on this request, I believe that it would be beneficial to address the procedural progression of the case. The record shows that the Hearing Officer issued his Preliminary Letter of Assessment on February 28, 2008. In addition to describing the alleged violation, stating the maximum penalty available for that violation and informing [REDACTED] that the Hearing Officer had found *prima facie* evidence of the violation in the record, the Hearing Officer informed [REDACTED] that, in accordance with the procedures set forth in 33 CFR Part 1.07, he would have thirty days from receipt of that letter to either admit the penalties and pay the penalty amount initially assessed, submit written evidence in lieu of a hearing, or request a hearing in the matter. Because the initial letter was returned to the Coast Guard, the same letter was re-issued to [REDACTED] on March 18, 2008. Although the Hearing Officer allowed the case to remain open for considerably longer than 30 days, the record shows that [REDACTED] did not respond

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to the Hearing Officer's initial letter. As a result, on May 28, 2008, the Hearing Officer issued his Final Decision, wherein he found the alleged violation proved and assessed a penalty of \$500.00 in the matter. Sometime thereafter, the Hearing Officer received a letter from [REDACTED] post marked April 5, 2008. The record indicates that the letter was not received in a timely fashion because [REDACTED] mailed it to the Coast Guard's civil penalty payment center, in Charlotte, North Carolina, rather than the Hearing Office in Arlington, Virginia. [REDACTED] correspondence indicated that the "case was dismissed in 10/06" in Muskegon County and identified you as his attorney.

The record shows that the Hearing Officer reopened the case via a General Notification letter dated July 18, 2008. In that letter, the Hearing Officer informed [REDACTED] of the informal nature of the Coast Guard's civil penalty process and, in so doing, indicated that the process is "not that of a court" and that the "usual [court] requirements such as a formal notice of appearance need not be satisfied." At the same time, the Hearing Officer informed [REDACTED] that the Coast Guard's civil penalty case was not "bound by the decisions and rulings of a state proceeding," indicated that the hearing officer was "unaware of the evidence presented in the state court, admissibility rules, or other court protocols that may have caused the dismissal" and reiterated his conclusion that the evidence contained within the Coast Guard's case file "was sufficient for...[the Hearing Officer]...to determine that a violation did occur under the Federal statute." Regardless of these conclusions, based on [REDACTED] letter, the Hearing Officer's letter informed [REDACTED] that the matter would be reopened and that he would have "an additional 30 days to respond to the charge and provide...any additional information to consider or matters of extenuation or mitigation. The Hearing Officer concluded by stating that if he did not hear from [REDACTED] within the appropriate time period, he would make a final determination in the matter. Even though the Hearing Officer allowed the matter to remain open considerably longer than the 30 days noted in the general letter, [REDACTED] did not provide any additional evidence in response to the alleged violation. As a result, the Hearing Officer issued a second Final Letter of Decision in the matter, finding the violation proved and assessing a penalty of \$500.00, on September 23, 2008.

After a thorough review of the record, I am persuaded that prior to the assessment of the civil penalty at issue in the instant case, the Hearing Officer followed all regulatory procedures and ensured that [REDACTED] was fully apprised of and had the opportunity to exercise his rights in this matter. Indeed, as I noted above, the record shows that the Hearing Officer reopened the case—and allowed the matter to remain open for considerably longer than is mandatory—to ensure that [REDACTED] was given an appropriate opportunity to respond to the alleged violation. When the Hearing Officer did so, [REDACTED] did not provide any additional evidence or argument in response to the matter and, as such, his sole argument was an unsupported assertion that the matter was dismissed in a related state court action. Moreover, the record shows that the Hearing Officer carefully considered the evidence contained in the case file when he issued his Final Letter of Decision. The record also shows that, in accordance with 33 CFR 1.07-65(b), [REDACTED] was advised of his right to appeal the Hearing Officer's decision, which the record shows you have done on his behalf.

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The applicable regulations, at 33 CFR 1.07-70(a), make clear that only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. Moreover, the applicable regulations specifically provide, at 33 CFR 1.07-80, that a hearing may only be reopened on the basis of newly discovered evidence. This newly discovered evidence must be described in the petition to reopen and be accompanied by a written statement detailing why the “evidence would probably produce a different result favorable” to you. Additionally, the petition must state whether this evidence was known to you “at the time of the hearing, and, if not, why the newly found evidence could not have been discovered in the exercise of due diligence.” Evidence that was known, or reasonably discoverable, at the time of the hearing will not support a petition to reopen. At the same time I note that under 33 CFR 1.07, absent a reopening of the proceeding, there are no provisions to allow for a hearing—or the submission of written evidence in lieu of a hearing—on appeal. After a thorough review of both your submission and the evidence contained in the record, I find insufficient justification to support a (second) reopening of the proceeding to allow for the submission of additional evidence. Accordingly, your request to submit additional evidence on your client’s behalf is denied.

Irrespective of that fact, I note that a careful review of the record shows that, throughout the course of these proceedings, both you and [REDACTED] have implied that because a related state court action was dismissed, the assessment of a civil penalty here is inappropriate. In so stating you may be raising a double jeopardy concern. After a thorough review of the record, I do not find such an assertion to be persuasive. As I am sure you are aware, the Fifth Amendment to the U.S. Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” The concept of double jeopardy is one of the most fundamental rights afforded persons being tried for a crime in the United States. However, there are certain prerequisites that must be satisfied before an individual may assert double jeopardy as a defense. First, it is a concept that only applies in criminal proceedings. The double jeopardy clause does not apply in civil proceedings, i.e., to trials in which “life or limb” are not in jeopardy. A Coast Guard civil penalty action is administrative in nature and does not place anyone’s “life or limb” in jeopardy. Rather, it is remedial in nature and can only result in the assessment of an administrative civil penalty. Another limitation on the ability to rely upon the double jeopardy clause as a defense stems from our “dual sovereignty” doctrine. Conduct may simultaneously constitute a violation of both federal and state law. For example, boating while intoxicated is prosecutable under both federal and state law. The dual sovereignty doctrine was enunciated in *United States v. Lanza*, 260 U.S. 377 (1922), where the Supreme Court stated that “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be [prosecuted and] punished by each.” In effect, prosecutions under laws of separate sovereigns are prosecutions of different offenses, not re-prosecutions of the same offense.

Moreover, 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. 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. Accordingly, even if insufficient evidence is found to support the prosecution of a matter in a state court, the assessment of a civil penalty in a related administrative matter may still be appropriate.

Because a violation of 46 USC 2302(c) may only be assessed against an individual who is operating a vessel, I will begin by addressing whether the Hearing Officer erred in finding that [REDACTED] was operating the vessel at the time of the boarding. The record shows—and [REDACTED] does not deny—that, at the time of the boarding, Coast Guard boarding officers observed [REDACTED] to be the “shirtless man” who was at the vessel’s helm prior to the initiation of the boarding. Although the record does not contain any evidence to suggest that [REDACTED] was incorrectly identified as the person at the vessel’s helm, the record does show that, during the boarding, the vessel’s owner asserted that the vessel was not being operated but, rather, was simply drifting in the water. After a thorough review of the record, I find that the Hearing Officer did not err in determining that [REDACTED] was the operator of the vessel at the relevant time. That is because the applicable regulations establish a clear definition as to what constitutes “operation of a vessel” in operating under the influence cases. In that regard, 33 CFR 95.015 states as follows:

...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.

The regulations further make clear that a vessel is “underway” when it is not “at anchor, or made fast to the shore, or aground.” *See* 33 CFR 95.010. Accordingly, although the vessel may not have been under power at the time of the boarding, it was “underway” for the purposes of the applicable regulations.

46 USC 2302(c) makes clear, in relevant part, that “[a]n individual who is under the influence of alcohol, or a dangerous drug in violation of a law of the United States when operating a vessel, as determined by standards prescribed by the Secretary by a regulation...is liable to the United States Government for a civil penalty.” In that regard, 33 CFR 95.030 states that “[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.” (emphasis added) 33 CFR 95.020(c) further provides that an individual is considered to be under the influence of alcohol or dangerous drugs 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 record shows—and [REDACTED] does not deny—that during the boarding, [REDACTED] admitted that he was “drunk,” that he failed 5 of the 6 FSTs administered, and that a chemical test revealed that [REDACTED] had a Blood Alcohol Concentration of .130% during the boarding. As a consequence, I find that the record contains substantial evidence to support the Hearing Officer’s determination that [REDACTED]

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operated a vessel while under the influence of alcohol under the standards set forth at 33 CFR 95.030(a) and 33 CFR 95.030(b).

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

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. 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//

F. J. KENNEY
Captain, U. S. Coast Guard
Chief, Office of Maritime and International Law
By direction of the Commandant

CIVIL PENALTY CASE NO. 2718387

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Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center