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

16731
January 30, 2009

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2480849
[REDACTED]
[REDACTED]
$500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2480849, which includes your appeal as operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a $1,000.00 penalty for the following violation:

LAW/REGULATION	NATURE OF VIOLATION	ASSESSED PENALTY
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 August 19, 2005, when Coast Guard boarding officers commenced a boarding of the [REDACTED] after observing it underway on Nippersink Lake, near Fox Lake, Illinois.

On appeal, you deny the violation and express your dismay that this case has "turned into a 'he said, they said' situation." In that regard, you contend that you have "no way to prove" that things happened the way you said they did and insist that the statements that you provided, including your own and those of the vessel owner and other passengers supports your version of the events. With regard to the violation, itself, you contend that you "had no intention of operating" the vessel and insist that you only "took the wheel for a minute" to allow the vessel's owner the opportunity to use the bathroom. You further note that you were "not nor had been in control of…[the vessel]…at any other time during the evening." You contend, contrary to the Coast Guard's report of the incident, that you "did not at any time sing the alphabet" and insist that the vessel's owner actually did. While you acknowledge that you may have said the letter u between y and z while performing the alphabet test, you insist that you only did so because you were nervous and had someone standing over you "shouting obscenities." You conclude by noting that "[s]ince this incident…happened…[you]…have been found not guilty by a court of

law." As a result of that fact, you assert that you should no longer have to offer a "defense of your innocence" because that "is why we have a legal system" and why you have already "had a court date" in this case. In that vein, you note that "[a]ll of the evidence was there at the trial" and insist, as a result, that the instant civil penalty case is "basically a redundant recounting of what has already been stated and found to prove…[your]…innocence in a court of law." You conclude by stating that you "do not understand how this [process] can supersede the decision that was made by our judiciary system." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

I begin by noting that 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 rules, at 33 CFR 1.07, are designed to ensure that parties are afforded due process during informal adjudicative proceedings. 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).

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 the only issue that was raised in this case prior to the issuance of the Hearing Officer's final decision was that of jurisdiction. In that vein, you argued that this case should be dismissed because you were found "not guilty" of the violation via a corresponding State court action. As a result, because the other issues that you have subsequently raised, including your assertions regarding the factual circumstances surrounding the violation, were not raised before the Hearing Officer prior to the issuance of a decision in this case, those issues may have been waived. Regardless of that fact, however, in the interest of fairness, I have considered the entire record in the case, including your version of the factual circumstances surrounding the boarding, and after such consideration, do not find that the Hearing Officer erred in finding the violation proved.

I will next address you concerns regarding a finding of "not guilty" in the related state court action. In raising these concerns, you are asserting what amounts to be a double jeopardy defense. 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. As I have already noted, the Coast Guard's civil penalty actions are 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. Therefore, it is permissible for the federal government to prosecute a defendant after a state prosecution of the same conduct, or vice versa. Thus, for the reasons just set forth, any claim of double jeopardy is inapplicable to the facts of this case.

I will now discuss the standard of proof applicable to Coast Guard civil penalty cases. 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. In fact, 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.

A careful review of the record indicates that you and several other individuals who were aboard the vessel at the time of the boarding, believe that it might not have been appropriate for the vessel to have been boarded on the relevant evening because it was being operated in accordance with the applicable navigation rules. Any such assertion is wholly without merit. The Coast Guard does not need probable cause to stop and board any vessel on the navigable waters of the United States. 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).

Next, I will address the assertion that you should not have been charged with the violation at issue here because you only operated the vessel for a short period of time (less than four minutes) on the evening in question. A careful review of the record shows that you have provided statements from the vessel's owner and several of its passengers which support your assertion in this regard. Indeed, in his statement, the vessel's owner stated as follows with regard to this assertion:

> I was the operator of this boat the entire evening until just minutes before the boat was stopped. It was not my intention to pass that responsibility to anyone else on the boat that evening; I simply need to relieve myself. [REDACTED] was the

> closest person to me at that point; we had been having a conversation when the "urge" struck and I asked him to take over while I used the head. I was the designated driver for the evening and accepted the responsibilities that come with that designation; [REDACTED] in no way showed impairment of any kind when I asked him to take the wheel or I most certainly would not have asked him to take over for me.

Indeed, the statements of the boarding officers support this version of the events from the standpoint that they all indicated that you were observed handing over control of the vessel to the vessel's owner immediately before the boarding commenced. After a thorough review of the applicable regulations, I do not find your arguments, in this regard to be persuasive. 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. Regardless of how long you were operating the vessel, the record shows—and you do not deny—that at least for a time you were at the vessel's helm and were responsible for its navigation. Under such circumstances, you were "operating a vessel" under the applicable regulations and, as such, may properly be charged with operating that vessel while under the influence of alcohol or a dangerous drug.

I will now address the operating under the influence violation, itself. 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."

According to the Coast Guard's version of the events, at the time of the boarding, you had a strong odor of alcohol on your breath, your speech was slurred, your face was pale, your eyes were bloodshot and watery, and you appeared sleepy. Moreover, you performed poorly on all Field Sobriety Tests administered. To that end, the record shows as follows: 1) on the "Alphabet Test," you sang and hesitated; 2) on the "Backwards Count" test, you hesitated; 3) on the "Finger Count" test, you slid and improperly counted your fingers and failed to speed up; 4) on the "Palm

Pat" test, you failed to speed up and slid your hand; 5) on the "Finger to Nose" test, you missed your nose, opened your eyes, and hesitated; and, 6) on the "Horizontal Gaze Nystagmus" test[1], you lacked smooth pursuit and showed distinct nystagmus onset prior to 45 degrees in both eyes.

A careful review of the record shows that although you do not deny consuming alcoholic beverages on the evening of the boarding, you question the veracity of the Coast Guard's report concerning your performance on the Field Sobriety Tests. In that regard, you assert that you did not sing the alphabet test, although you admit that you may have made errors during your performance of the test because you were "nervous." You have provided statements from the vessel's other passengers to support your version of the events. At the same time, you assert that a local Sheriff's Department officer, who was present during the boarding, indicated that he did not agree with the Coast Guard's administration of the boarding or with the boarding officer's ultimate conclusion that you operated a vessel while under the influence of alcohol at the relevant time and insist that he informed you that, according to him, you had "passed" all of the FSTs administered during the boarding.

The record shows that the Coast Guard filed rebuttal comments in response to your assertions. Most notably, these comments contained evidence to show that, on the relevant evening, you were arrested by the Lake County, Illinois, Sheriff's Department. In addition, the rebuttal comments contain a signed statement from the local police officer who was on scene during the boarding. Contrary to your assertions, the officer's statement made clear that he did not inform you that he believed that you had passed all of the sobriety tests administered and noted that your assertions were "far different from…[his]…recollection" of the incident. More importantly his statement shows that he believed that "all of the passengers, with the possible exception of…[the vessel's owner]…had been drinking alcohol."

As I noted above, "[a]cceptable evidence of when a vessel operator is under the influence of alcohol…includes, but is not limited to…[p]ersonal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior." The record shows, as the Hearing Officer noted, that you had a strong odor of alcohol on your breath, that your speech was slurred, that your face was pale, and that your eyes were bloodshot and watery. In addition, the record shows that you performed poorly on all six FSTs administered during the boarding. Moreover, the record shows both that you do not deny consuming alcoholic beverages on the evening of the incident and the vessel's owner expressly stated that he was serving as the designated driver for the evening to allow the other persons aboard the vessel, including yourself, to safely consume alcoholic beverages. With these circumstances in mind, I find based on the totality of the circumstances surrounding the boarding, that there is substantial evidence in the

[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).

record to support a conclusion that you operated a vessel while under the influence of alcohol or a dangerous drug under the standard set forth at 33 CFR 95.020(c). In addition, I note that the record shows that a breathalyzer test administered during the boarding revealed that you had a blood alcohol concentration of .137%. Given this evidence, I further find that the record contains sufficient evidence to support a conclusion that you were under the influence of alcohol under the standard articulated at 33 CFR 95.030(b), as well.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that you are the responsible party. For the reasons discussed above, the Hearing Officer's determination that the violation occurred was neither arbitrary nor capricious and is hereby affirmed. However, I will mitigate the assessed penalty to $500.00 upon consideration of the circumstances surrounding your limited operation of the vessel.

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//

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