



WAS THE OPERATOR ACTUALLY DIRECTED TO TAKE A CHEMICAL TEST?

Was the operator actually “directed” to take a chemical test by the Coast Guard Boarding Officer? Or did the Boarding Officer just ask whether the operator wanted to take the chemical test? There is a very important distinction between a civil penalty case in which the Boarding Officer documents that he used his law enforcement authority to direct the operator to submit to a chemical test and a case in which the Boarding Officer simply asks the operator if he or she would like to take the test.

A Hearing Officer can only find that the presumption of being under the influence of alcohol or a dangerous drug is applicable, if he finds that the regulation that allows the presumption has been followed in all material respects by the Boarding Officer. 33 CFR 95.040 states: “If an individual refuses to submit to or cooperate in the administration of a timely chemical test when *directed* [emphasis added] by a law enforcement officer based on reasonable cause, evidence of the refusal is admissible in evidence in any administrative proceeding and the individual will be presumed to be under the influence of alcohol or a dangerous drug.”

33 CFR 95.040 expressly conditions the use of the presumption on the chemical test being **directed** by the law enforcement officer. If the Boarding Officer does not specifically direct the operator to submit to chemical testing, after reasonable cause has been established, the refusal to submit to a chemical test may not by itself allow application of the presumption of being under the influence of alcohol in accordance with the plain language of 33 CFR 95.040. This is why it is important that the evidence clearly indicate the operator was directed or ordered to submit to a chemical test and that the operator was read the refusal statement on the Field Sobriety Test (FST) form if he refused to submit to the chemical test.

Recently, Hearing Officers have been seeing a fair number of cases that do not clearly establish that the Boarding Officer specifically “directed” the operator to submit to a chemical test after establishing reasonable cause that the operator may be under the influence of alcohol. We have seen statements from the Boarding Officer such as “Gave him the option to take a chemical test,” “Asked him if he would like to take a chemical test,” or “Requested he take a chemical test.”

Statements such as these make it difficult for the Hearing Officer to determine if the operator was in fact directed to take the chemical test in accordance with the requirements set forth in 33 CFR 95.040. There should be no doubt by the operator that he is being directed, i.e. given an authoritative instruction or order by a law enforcement officer to do so. As such, direction to take the chemical test should be clearly reflected in the statements introduced into evidence by the Boarding Officer.

An operator may not only refuse to take a chemical test, but refuse all sobriety testing. Even in that case, it is a best practice for the Boarding Officer to direct the operator to

submit to a chemical test and document that, along with the basis for reasonable cause to believe the operator was under the influence of alcohol or a dangerous drug. If the operator still refuses to take the chemical test, the Boarding Officer should then read the operator the refusal to submit to a chemical test statement from the FST form.

Ideally, a written statement from the Boarding Officer would read something like - “After establishing reasonable cause that the operator may be under the influence of alcohol based on I directed the operator to submit to a chemical test and he refused to submit to the chemical test. I then read the operator the refusal statement directly from the FST form which states I asked the operator if he understood the implication of refusing to submit to a chemical test which I just explained to him. He indicated he understood. I then asked the operator if he still refused to submit to the chemical test. He said yes.”

Previous BUI articles referencing this issue:

[Refusal To Perform Field Sobriety Test & Chemical Test](#)

[The Field Sobriety Tests and Documentation](#)