



16780

[REDACTED]
[REDACTED]
[REDACTED]

August 1, 2002

RE: MV00002085
UNNAMED
([REDACTED])
[REDACTED]
\$800.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00002085, including your appeal as owner of the UNNAMED recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing an \$800.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 95	Operating a vessel while intoxicated.	\$800.00

The violation was observed on May 3, 2000, when Coast Guard Boarding Officers boarded your recreational vessel while it was underway in the Industrial Canal, near New Orleans, Louisiana.

On appeal, you contend that "it seems no one is listing to...[you]...or your passengers" and note that the Hearing Officer was not present during the Boarding to see "how the boarding officers put...[your]...life and the lives of...[your]...passengers in danger." You further contend that you never told the Hearing Officer that you did not want a hearing, but rather, that you could not schedule a hearing at that time because you "travel out of town a lot and...did not receive...[your]...schedule for the month yet." You seem to contend that you did not refuse to take the Alco Sensor III test but that, instead, the boarding officers had "harassed long enough and [that as a result] there was not going...[to be]...any more tests." You further assert that the "boarding officers did not even know if [the] Alco Sensor III was working properly." You assert that you will not pay the assessed penalty because you "did nothing wrong" and insist that "the only people who should be fined are the boarding officer or at least some discipline action [should be taken against them] for putting...[your]...life and the lives of...[your]...passengers at risk." You conclude that "[t]his is still harassment [and] depletion (sic) of character" and add that the Coast Guard boarding officers "abused their authority" during the incident in issue. Your appeal is denied for the reasons described below.

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I will begin by addressing your contention that you “did not turn down a hearing” and that the only reason you did not set a hearing date with the Hearing Officer was because you “travel out of town a lot and...did not receive...[your] schedule for the month” at the time that you spoke with the Hearing Officer. 33 CFR 1.07-25(a) makes clear that “[w]ithin 30 days after receipt of notice of the initiation of the action...the party, or counsel for the party, may request a hearing, provide any written evidence and arguments in lieu of a hearing, or pay the amount specified in the notice as being appropriate.” The record indicates that the Hearing Officer mailed his Preliminary Assessment Letter (PAL) to you on October 23, 2000. That letter clearly indicated your rights with regard to the Coast Guard action and specifically indicated that you had “the right to request a hearing or to submit written evidence in lieu of a hearing” provided that you did so “within 30 days of receipt” of the Hearing Officer’s notification. The record further indicates that the Coast Guard received a written response to the Hearing Officer’s initial notification from you on November 17, 2000. That response included not only your responses to the charge in issue, but also the written statements of [REDACTED] and [REDACTED]. Based upon a thorough review of the written statements that you submitted, I believe that you were afforded the opportunity to respond to the charge against you. Furthermore, since you did not specifically request a hearing in your written response to the Hearing Officer’s initial notification, or at anytime thereafter, I do find that your procedural due process rights have been violated, regardless of whether the Hearing Officer misunderstood your subsequent conversations concerning the scheduling of a hearing.

I will now address the violation in issue. 33 CFR 95.030 makes clear that “[a]cceptable evidence of intoxication 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.” 33 CFR §95.020(c) further provides that an individual is considered intoxicated 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.” Contrary to your assertions, the record indicates that there is substantial evidence to support the Hearing Officer’s determination that you were intoxicated at the time of the boarding, even absent considerations of your refusal to submit to a chemical test. The Boarding report shows that you he had a “moderate” odor of alcoholic beverage on your breath and that your speech was both “slurred” and “stuttered.” The report further indicates that your face was “pale” and that your eyes were “watery” and “bloodshot.” In addition, the report indicates that, during the boarding, your were “talkative,” “combative,” and “indifferent” and that you used “profanity” in speaking with the boarding officers.

Although both you and your passengers contend that you “passed” all of the Coast Guard’s sobriety tests, the Boarding Report indicates that you performed poorly on five out of six of the Field Sobriety Tests (FST’s) administered: (1) In the “A-B-C Test,” you sang and missed and repeated letters; (2) In the “Finger Count,” you miscounted, slid your fingers, and improperly touched and counted your fingers; (3) In the “Palm Pat,” you did not speed up, slid your hands and hesitated; (4) In the “Finger to Nose,” you used a searching pattern and opened your eyes, and (5) In the “Horizontal Gaze Nystagmus,” you showed a lack of smooth pursuit in both eyes and distinct nystagmus at max deviation and nystagmus onset before 45 degrees in both eyes. While I agree that each of these factors, alone, might not have been sufficient cause for a conclusion of intoxication, taken together, I am persuaded that the results of the FST’s and the

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personal observations of the Coast Guard boarding officers concerning your manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were intoxicated.

Furthermore, under 33 CFR 95.040, if an individual refuses to submit or cooperate in the administration of a timely chemical test when directed 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 intoxicated. That presumption is, however, a rebuttable one. In the light of the facts contained in the record, I am not persuaded that the presumption was sufficiently rebutted.

It is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and resolve conflicts in evidence. I find no abuse of discretion in his conclusion that the presumption appropriately operated in this case. While the presumption created by your refusal to submit to the chemical test is a rebuttable one, the evidence that you have provided on your behalf simply has not overcome that presumption. By electing to not take the tests, you voluntarily placed yourself in the position of having the presumption operate against you. Once the presumption was created, the burden to provide substantial evidence to rebut the presumption rested with you. While your statements and those of your passengers support your version of the incident, the Coast Guard Boarding Report offers a view of the incident and of your behavior that is decidedly different. In light of the CG-4100 Boarding Report and because you admit that you were drinking on the day of the incident, I am not persuaded that the Hearing Officer erred when he found the presumption was not sufficiently rebutted by your own self-serving statements. Furthermore, for the purposes of 33 CFR 95.020(c), as discussed above, there is enough evidence in the record to find you intoxicated absent the Coast Guard's presumption. Therefore, I find the violation proved and will not mitigate the penalty assessed by the Hearing Officer.

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. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the penalty of \$800.00 rather than the \$1,100.00 maximum permitted by statute appropriate in light of the seriousness of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$800.00** 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 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % 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

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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,

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DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, U.S. Coast Guard Hearing Office
Commander, Finance Center