



Mr. [REDACTED]
[REDACTED]
[REDACTED]

16780
March 12, 2003

RE: MV00002856
Mr. [REDACTED]
M/V [REDACTED]
\$550.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00002856, which includes your appeal as owner of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$550.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 USC 2020(a) (Rule 20)	Failure to comply with rules concerning lights and shapes (in any weather).	\$50.00
46 USC 2302(c)	Operation of a vessel while intoxicated.	\$500.00

The violations were observed on July 3, 2000, when Coast Guard boarding officers boarded your vessel while it was underway on Lake Erie near Marblehead, Ohio.

On appeal, you do not deny the violation of 33 USC 2020 (Rule 20). However, you deny the alleged violation of 46 USC 2302(c). With specific regard to the intoxicated operation charge, you "wish to appeal on the grounds that...[your]...rights to due process have been denied." While you admit that your blood alcohol content (BAC) was "above the legal limit" at the time that the test was administered, you contend that that "in no way represents...[your]...BAC at the time of operation." To that end, you contend that you were "denied due process because the Coast Guard has admitted evidence obtained both outside the legal guidelines and by threat" and add that the Coast Guard "[r]efused to admit evidence given by witnesses on...[your]...behalf." At the same time, you offer further evidence concerning the weapons charge levied against you by the state of Ohio. Furthermore, you seek to clarify factual errors that you alleged exist in the boarding officer's report of the incident concerning the following matters: 1) your operation of the vessel; 2) whether you denied having a weapon during the boarding; 3) the length of time between the boarding and the administration of Field Sobriety Tests (FST's) and BAC tests; 4) whether you consumed alcoholic beverages while the vessel was under Coast Guard tow;

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5) whether the Coast Guard was able to observe your actions while the vessel was under tow; 6) whether there were empty alcoholic beverage containers on board the vessel; 7) whether you took the "Palm Pat" test; 8) whether you were threatened into taking the BAC test; and, 9) whether the times and dates contained in the boarding report are accurate. Your appeal is denied for the following reasons.

As I noted above, you do not deny the violation of 33 USC 2020(a) (Rule 20). Since you have provided a check to cover the monetary civil penalty assessed for that violation (\$50.00), I find the violation proved and will neither mitigate nor dismiss the penalty. Because the check is now over two years old, I have enclosed it with this decision for your further disposal. Therefore, when you pay the penalty assessed below, you should include the \$50.00 assessed for the violation of 33 USC 2020(a). Parenthetically, I note that you have consistently discussed the weapons charge levied against you by the state of Ohio. Since you were not charged with any weapons violations by the Coast Guard, I will not consider any of the evidence that you have submitted in that regard. It simply is not relevant to the charges brought by the Coast Guard. To the extent the inconsistencies noted in your appeal impact the credibility of the boarding officer, I would note that the inconsistencies are minor and were not the main focus of the boarding officer. I will now address your alleged violation of 46 USC 2302(c).

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental 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 maximum due process during informal adjudicative proceedings. By balancing procedural fairness and legislative intent, the civil penalty process plays an important and essential role in furthering national maritime safety and environmental goals.

Under 33 CFR 95.030, "[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." The record clearly indicates that there is substantial evidence to support the Hearing Officer's determination that you were intoxicated, even without consideration of the results obtained through your chemical test. The Boarding Report of the incident in question indicates that you had a "strong" odor of alcohol on your breath and that your speech was "confused." In addition, your face was "flushed" and your eyes were both "bloodshot" and "watery." Finally, you were "talkative" and "indifferent." Furthermore, the record indicates that you failed all of the Field Sobriety Tests (FST's) administered. You showed a "slight sing" on the ABC Test, hesitated on the Count from 25 to 1, "stopped prior to being told" and improperly touched finger on the Finger Count Test, and "focused on nose," "missed nose," hesitated and failed to use the proper finger on the Finger to Nose Test. 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 personal observations of the Coast Guard boarding officers regarding your manner, disposition,

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speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were intoxicated under 33 CFR 95.030.

Although I have concluded that there was substantial evidence in the record to support a conclusion of intoxication absent the administration of a chemical test, I believe a discussion of the chemical test in issue is relevant to the disposition of this case. In your letter dated January 6, 2001, you asserted that you initially refused to submit to a chemical test because you consumed two alcoholic beverages following the initial boarding of your vessel while it was under Coast Guard tow. You further asserted that you eventually submitted to the chemical test, under protest, because the Coast Guard boarding officer threatened to bring child endangerment charges against you because of your failure to submit to his request. In the same vein, you asserted the state of Ohio did not bring intoxicated operation charges against you because "Ohio law does not permit the test after a time span between the stop and administering testing." Therefore, you asserted that the Coast Guard "disregarded" the law in asking you to submit to the chemical test in issue.

I will begin by addressing your contention that, by asking you to submit to the chemical test in issue, the Coast Guard "disregarded" applicable law. I do not agree. Although the state of Ohio may require that a chemical test be administered within a specific period, there is no comparable federal requirement. Indeed, 33 CFR 95.035(b) makes clear that "[w]hen an individual is directed to undergo a chemical test, the individual to be tested must be informed of that fact and directed to undergo a test **as soon as practicable.**" [*emphasis added*] The record indicates that the chemical test in issue was administered after the vessel was towed to Coast Guard Station Marblehead. Under the circumstances of this boarding, including the fact that a young child was on board the vessel, I see no error in the Coast Guard towing the vessel before the administration of the chemical test in issue. That test was administered "as soon as practicable" and, consequently, was legally administered.

In any event, the Coast Guard's actions in this case are in no way barred by Ohio law. The waters of Lake Erie are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against you, without regard to any action by the State of Ohio. 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. Indeed, 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).

You next contend that the chemical test results in issue should be ignored because you consumed alcoholic beverages after the initial Coast Guard boarding. This statement seems to imply that you no longer considered yourself the operator of the vessel while under tow. I do not agree. An operator is anyone with an essential role in the operation of the vessel while underway. Your vessel is underway even when being towed. Thus your self-admitted consumption of two beers is further evidence of your intoxication. Finally, I note your statement in your appeal where you admit "to having consumed alcohol that evening at a rate of approximately one drink per hour." While you do not specifically indicate how many drinks you had, this statement certainly indicates you had more than one drink in the hours before the boarding. A pamphlet distributed by BOAT/U.S.A. Foundation indicates that for an average adult (180 pounds), it would take 6

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drinks to achieve a BAC of .10. It is worth noting that your BAC reading was in excess of .15. Since, as you contend on appeal, "those drinks would not have been in...[your]...BAC at the time of boarding," you were clearly intoxicated, even prior to consuming the drinks while the vessel was under tow. Therefore, I find the violation proved.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations 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 \$550.00 rather than the \$950.00 preliminarily assessed or the \$10,500.00 maximum permitted by statute to be appropriate in light of the seriousness of the violations.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$550.00** 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 4.25% 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