



16780

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Attn: [REDACTED]

SEPT 21, 2006

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$1,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal on behalf of [REDACTED] as owner/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:

<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 September 11, 2004, when Coast Guard boarding officers boarded the unnamed recreational vessel [REDACTED] while it was underway on the Illinois River, near Seneca, Illinois.

On appeal, you deny that the violation occurred and request that I "reverse" the Hearing Officer's decision finding the violation proved. You assert that "[t]he basis for this [a]ppel is that the finding of the Hearing Officer is against the manifest weight of the evidence." To that end, you assert that although the applicable regulations require "observations of manner, disposition, speech, muscular movement, appearance or behavior" to prove intoxication, no such evidence was present in the case file. Indeed, to the contrary, you contend that the Field Sobriety Test Report shows that "these characteristics were normal," with respect to your client, at the time of the boarding. Your appeal is denied for the reasons discussed below.

I will begin by noting that your interpretation of the applicable "operating under the influence" regulations is flawed. Although you correctly acknowledge that "[a]cceptable evidence of intoxication includes, but is not limited to...[p]ersonal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior," you fail to note that, pursuant to 33 CFR 95.030(b) acceptable evidence of intoxication may also include "[a] chemical test."

The record shows that, in the instant case, Coast Guard boarding officers engaged in a routine safety patrol of the Illinois River observed [REDACTED] drinking an alcoholic beverage while he was operating his vessel. As a result of this observance, the boarding officers commenced a safety boarding of [REDACTED] vessel. During that boarding, boarding officers observed an alcoholic beverage container near the vessel's helm, the vessel's passengers consuming alcoholic beverages and a cooler full of both empty and unopened cans of Busch beer. During the boarding, the boarding officers also noticed a "moderate" odor of alcohol coming from [REDACTED] breath and that his eyes were bloodshot and watery. The record further shows that, when asked, [REDACTED] stated that he had consumed "a few drinks" during his operation of the vessel.

In accordance with the applicable regulations, at 33 CFR Part 95, "a law enforcement officer...may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists." *See* 33 CFR 95.035. Pursuant to 33 CFR 95.035(a)(2), "reasonable cause" exists "[w]hen an individual is suspected of being in violation of the standards in §§ 95.020 or 95.025." In that vein, 33 CFR 95.020(c) makes clear that an individual is under the influence of alcohol or a dangerous drug when "the 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." Given the observations of the boarding officers, including the fact that [REDACTED] was observed consuming alcoholic beverages, had a moderate odor of alcohol on his breath, and had bloodshot and watery eyes, not to mention his admission of drinking, I find sufficient evidence in the record to support a conclusion that the boarding officers had reason to suspect that [REDACTED] was in violation of the standards of under the influence set forth at 33 CFR 95.020. As a consequence, I find that the boarding officers had reasonable cause, under 33 CFR 95.035, to direct [REDACTED] to submit to a chemical test.

In this case, the record further shows that, after discussing the issue with his passengers, [REDACTED] refused to submit to the administration of the chemical test requested by the boarding officers. Under 33 CFR 95.040(a), "[i]f an individual refuses to submit to or cooperate in the administration of a timely chemical test when directed by a law enforcement officer based on reasonable cause...the individual will be presumed to be under the influence of alcohol." The record shows that in his signed statement dated January 18, 2005, [REDACTED] stated that he refused the test because he had "just finished 39 Radiation Treatments for Cancer and had lost so much weight [that it was] hard telling what the outcome [of the breathalyzer test] would be." In his Final Letter of Decision, the Hearing Officer stated both that [REDACTED]'s "explanation for refusing to submit to the chemical test...[was]...not sufficient to rebut the presumption of being under the influence" and that "all of the information taken together and considered in the light most favorable to your client is insufficient to rebut the presumption." Considering the evidence—most notably [REDACTED] admission, in effect, that he did not know whether he could "pass" the chemical test—I do not find the Hearing Officer's determination to be in error. Therefore, because [REDACTED] did not present sufficient evidence to rebut the presumption that he was under the influence of alcohol at the time of the boarding created by his refusal to

submit to a chemical test, I find the violation proved and I 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 [REDACTED] is the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$1,000.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$1,000.00** 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 4.00% 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