



[REDACTED]
[REDACTED]
[REDACTED]

16780
MAR 07 2007

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

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 as owner/operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$500.00 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.	\$500.00

The violation was observed on September 11, 2004, after Coast Guard boarding officers commenced a boarding of your vessel after observing it underway on the Illinois River, near Morris, Illinois.

On appeal, you do not deny that you operated your vessel after consuming alcoholic beverages, or contest the breathalyzer test result that revealed that your Blood Alcohol Content (hereinafter "BAC") was .112% at the time of the boarding. Instead, you argue that the imposition of a civil penalty is inappropriate in this case because you only operated the vessel for "a very short period," solely for the purpose of trailering it. Your appeal is denied for the reasons set forth below.

A careful review of the record shows that the facts of your case are not in dispute. The record shows that you do not deny operating your vessel on September 11, 2004, immediately prior to putting it on its trailer and removing it from the Illinois River. The record further shows that, after your vessel was removed from the water, Coast Guard personnel commenced a safety inspection of your vessel. Because Coast Guard boarding officers noticed both that there were several empty bottles of wine and cans of beer onboard the vessel during the inspection and that you had a strong odor of alcohol on your breath, you were asked to submit to first, Field Sobriety Tests (hereinafter "FSTs") and, thereafter, a breathalyzer test. The record shows that you performed poorly on 3 of the 5 FSTs administered and that a breathalyzer test revealed that you had a BAC of .112% at the time of the boarding.

The key issue presented on appeal is whether there is substantial evidence in the record to support the Hearing Officer's conclusion that you operated your vessel while under the influence of alcohol on September 11, 2004. Pursuant to Coast Guard regulation, "an individual is considered to be operating a vessel when...[t]he 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." See 33 CFR 95.015. 33 CFR 95.010 makes further clear that a vessel is considered to be "underway" when it is "not at anchor, or made fast to the shore, or aground." On appeal, you expressly state that you "openly admit to driving the boat for a very short distance" and add that your "time at the helm was less than a couple of minutes and the distance was less than 50 yards at idle speed." These statements show that, on the day of the boarding, you "had an essential role in the operation of a recreational vessel" that, because it was not at anchor or made fast to the shore, was "underway." Therefore, regardless of the duration of your time at the helm, I find that the Hearing Officer did not err in determining that there was sufficient evidence in the case file to support a conclusion that you operated a vessel on September 11, 2004. As a consequence, the sole issue remaining for determination is whether the Hearing Officer was correct to conclude that you operated your vessel while under the influence of alcohol.

Pursuant to 33 CFR 95.030, "[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." 33 CFR 95.020(c) further provides that an individual is considered to be under the influence of alcohol or a dangerous drug 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." Pursuant to 33 CFR 95.020(a), a person is under the influence of alcohol if his or her BAC is .08% or more.

The Field Sobriety Test Report for the incident shows that, at the time of the boarding, you had both a strong odor of alcohol on your breath and bloodshot eyes. In addition, as I noted above, you performed poorly on 3 of the 5 FSTs administered to you. Although you were able to successfully complete the "Alphabet Test" and the "Palm Pat" test, you failed to follow instructions on the "Backwards Count" test, failed to speed up and improperly touched your fingers on the "Finger Count" test and lacked smooth pursuit in both eyes on the "Horizontal Gaze Nystagmus" test. The record further shows, as I have already noted, that a breathalyzer test administered to you during the boarding revealed that your BAC was .112%. Based upon the totality of the circumstances of the boarding, including your poor performance on the FSTs and your failure to pass the breathalyzer test, I find that the Hearing Officer was correct to conclude that the record contained substantial evidence to support a conclusion that you operated your vessel while under the influence of alcohol under both 33 CFR 95.030(a) and 33 CFR 95.030(b).

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 decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. I find the \$500.00 penalty assessed by the Hearing Officer, rather than the \$1,000.00 penalty

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initially assessed or \$5,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the violation.

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 1.00% 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