



16780

January 30, 2009

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2616276
[REDACTED]
[REDACTED]
\$1,200.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2616276, which includes your appeal as operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,200.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 USC 2033(b) (Rule 33)	Failure to have some means of making an efficient sound signal for a vessel less than 12 meters in length.	\$100.00
33 USC 2020(b) (Rule 20)	Failure to comply with rules concerning lights and shapes (sunset to sunrise); no others exhibited which might be mistaken, impair, etc.	\$100.00
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$1,000.00

The violations are alleged to have occurred on March 16, 2006, after Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was being operated on the Indian River near New Smyrna Beach, Florida.

On appeal, although you do not specifically address the violations, you state that you "object" to the Hearing Officer's determination in the case. Having carefully reviewed the case file for

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substantial evidence to support the Hearing Officer's conclusions, your appeal is denied for the reasons set forth below.

Before I address the violations at issue, I will address both the intent of the Coast Guard's civil penalty process and the procedural progression of the case. The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection 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 found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded due process during informal administrative proceedings. The procedures in 33 CFR 1.07 have been sanctioned by Congress and upheld in Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

I will now discuss the procedural progression of the case. The record shows that the Hearing Officer issued her Preliminary Letter of Assessment on December 11, 2007. In addition to describing the alleged violations, stating the maximum penalties available for those violations and informing you that the Hearing Officer had found *prima facie* evidence of the violations in the record, the Hearing Officer informed you that, in accordance with the procedures set forth in 33 CFR Part 1.07, you would have thirty days from receipt of that letter to either admit the penalties and pay the penalty amount initially assessed, submit written evidence in lieu of a hearing, or to request a hearing in the case. The record shows that you failed, in all respects, to respond to the Hearing Officer's initial notification and, as a result, after leaving the case open for significantly longer than the thirty-day period required by Coast Guard regulation, the Hearing Officer issued her Final Letter of Decision in the matter on April 8, 2008. Via that letter, the Hearing Officer informed you that because you had failed to respond to his Preliminary Letter of Assessment, the preliminarily assessed penalty was assessed as the final penalty in the case. Because 33 CFR 1.07-70(a) states that only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal, and the record shows that you did not submit any issues to the Hearing Officer for consideration prior to the issuance of a final decision, your right to have such issues considered has now been waived. Irrespective of that fact, however, in the interest of fairness, I have reviewed the entire record to ensure that there is substantial evidence to support the Hearing Officer's decision.

In that vein, I will now address the violations at issue, beginning with the alleged violations of the Inland Rules, 33 USC 2033(b) (Rule 33) and 33 USC 2020(b) (Rule 20). 33 USC 2033(b) (Rule 33) states that “[a] vessel of less than 12 meters in length shall not be obliged to carry the sound signaling appliances prescribed in paragraph (a) [whistle, bell, and gong] of this Rule but if she does not, she shall be provided with some other means of making an efficient sound signal.” The applicability portion of the Inland Rules makes clear that the rules—including Rule 33—apply to “all vessels upon the inland waters of the United States.” *See* 33 USC 2001. Moreover, 33 USC 2072(a) makes clear, in relevant part, that “[w]hoever operates a vessel in violation of...[the Inland Rules]...is liable to a civil penalty.”

The Coast Guard Form 4100 Boarding Report of the incident shows that you were operating the [REDACTED] at the time of the relevant boarding. In addition, the Boarding Report shows that the vessel is 14 feet in length. As a result, because the vessel is less than 12 meters in length, it is required to have some means of making an efficient sound signal on board. The Boarding Report shows—and you have not denied—that the vessel did not have any type of sound producing device on board at the time of the violation. Accordingly, I find that the record contains substantial evidence to support the Hearing Officer’s conclusion that the violation occurred and that you, as the operator of the vessel, are an appropriate party to be charged with the violation. Since the record does not contain any evidence to suggest that the vessel has been brought into compliance with respect to the violation, I will not mitigate the penalty assessed by the Hearing Officer for the violation.

I will now turn my attention to the alleged violation of Rule 20. 33 USC 2020(b) makes clear that “[t]he Rules concerning lights shall be complied with from sunset to sunrise, and during such times no other lights shall be exhibited, except such lights as cannot be mistaken for the lights specified in these Rules or do not impair their visibility or distinctive character, or interfere with the keeping of a proper lookout.” The Enforcement Summary contained in the record shows that although “[t]he vessel was observed after sunset underway making way with energized navigational running lights,” “the vessel’s combination red and green bow light was displaying the lights backward, displaying the red light to starboard and the green light to port.” The record does not contain any evidence to suggest either that you deny the violation or that the violation, itself, has been corrected. Given the evidence contained in the case file and the fact that a violation of the Inland Rules may properly be assessed against the operator of a vessel, I find that the Hearing Officer did not err in finding the violation proved and I will not disturb the penalty assessed by the Hearing Officer for the violation.

I will now address the alleged violation of 46 USC 2302(c). 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 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.” The Field Sobriety Test Report of the incident shows that during the boarding, you had a strong odor of alcohol on your breath, your speech was slurred, and that eyes were bloodshot and watery. In addition, the test report shows that you performed poorly on four of the seven Field Sobriety Tests administered by the boarding officers. Although you completed the Alphabet Test, Backwards Count, and Finger to Nose tests satisfactorily, you performed poorly on the four remaining tests administered: on the “Finger Count” test, slid your fingers and failed to speed up; on the “Palm Pat” test, you slid your hand and failed to speed up; on the “One Leg Stand” test, you improperly raised your arms; and, on the “Horizontal Gaze Nystagmus” test, you showed distinct nystagmus at maximum deviation, onset prior to 45 degrees, in both eyes. While each of these factors, alone, might not have been sufficient to support a conclusion that you were operating a vessel while under the influence of alcohol on the evening of the boarding, taken together, I am

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persuaded that the results of your Field Sobriety Tests and the personal observations of the Coast Guard boarding officer regarding your manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were “under the influence” under the standard articulated at 33 CFR 95.020(c).

Although I have concluded that there was substantial evidence in the record to support the Hearing Officer’s determination that you operated a vessel while under the influence based upon recorded observations of your manner, disposition, muscular movement, and behavior, I believe that a discussion of your chemical test is also important to the administration of this case. The record shows that, at the time of the boarding, Coast Guard boarding officers asked you to submit to chemical testing which you refused.

33 CFR 95.040(a) states:

If 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, 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.

Reasonable cause exists when “[t]he individual is suspected of being in violation of the standards in §§ 95.020 or 95.025.” *See* 33 CFR 95.035(a)(2). The standard applicable to the instant case is found at 33 CFR 95.020(c): “[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.” As I have already discussed, the observations of the boarding officers of your speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were “under the influence” under the standard articulated at 33 CFR 95.020(c). Under such circumstances, the boarding officers undoubtedly had reasonable cause to request that you submit to the administration of a chemical test. Because you refused to submit to the administration of a properly directed chemical test, the presumption of intoxication found at 33 CFR 95.040(a) applied to you. Therefore, since you have not provided any evidence to rebut the presumption of intoxication created by Coast Guard regulation, I find that the Hearing Officer did not err in finding that the record contained substantial evidence to support a conclusion that you operated a vessel while under the influence of alcohol based on your refusal to submit to chemical testing.

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. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Moreover, I find the \$1,200.00 penalty assessed by the Hearing Officer to be appropriate under the circumstances of the case.

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Payment of **\$1,200.00** 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 1.0% 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