

U.S. Department
of Transportation

United States
Coast Guard



COMMANDANT
U. S. Coast Guard

2100 Second Street, SW
Washington, DC 20593-0001
Staff Symbol: G-LMI
Phone: (202) 267-1527
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16731

November 27, 2001

[REDACTED]

[REDACTED]

[REDACTED]

RE: MV00002963

[REDACTED]

Unnamed ([REDACTED])

\$400.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00002963, which includes your appeal as owner of the eight-foot Seaworthy dinghy ([REDACTED]). The appeal is from the action of the Hearing Officer in assessing a \$500.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 175.15(a)	No person may use a recreational vessel unless at least one Type I, II, or III PFD is on board for each person	\$50.00
33 USC 2033(b) (Rule 33)	Failure to have some means of making an efficient sound signal for vessel less than 12 meters in length.	\$50.00
46 USC 2302(c)	Operating a vessel while intoxicated.	\$400.00

The violations were observed on July 30, 2000, when Coast Guard boarding officers boarded the recreational vessel [REDACTED] vessel while it was near [REDACTED], in Newport Harbor, Newport, Rhode Island.

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On appeal, you contest the three violations and assert that you are “disappointed” with the Hearing Officer’s decision. You contend that you “corrected” the violations of 33 CFR 175.15(a) and 33 USC 2033(b) and contend that the Hearing Officer “removed” these violations from the charge sheet, inferring that they had been dismissed. You further contend that the assessed violation of 46 USC 2302(c) is “very unjustified.” You contend that you were always very honest with the Coast Guard boarding officers and had nothing to “hide.” While you admit to having “consumed some beer,” you contend that “[t]hirty days earlier...[you]...would have been under the legal limit.” You further contend that, during the Field Sobriety Tests, you were tired and only intended to travel a short distance to return to your main vessel. You finally assert that your “perfect record on the water” is “very important” to you and reassert that you were not doing anything wrong. Your appeal is denied for the reasons described below.

I will begin by addressing the alleged violations of 33 CFR 175.15(a) and 33 USC 2033(b). The record indicates that you have not denied these violations. In fact, in your letter dated January 1, 2001, you asserted that you “take full responsibility for not having a sound producing device and 1 child life jacket where an adult one should have been.” You further asserted that you have corrected these violations and that you have “attached a Coast Guard approved whistle to [your] dinghy.” However, you contend that, at the Hearing, the Hearing Officer stated that “he had heard enough and that these violations would be removed.” You further contend that he crossed the violations off the charge sheet and effectually stated: “let’s discuss why we are really here, the third violation,” inferring that the sole focus of the hearing would be the intoxicated operation charge. The record indicates that the Hearing Officer failed to respond to this assertion. When afforded the opportunity to address the issues that you raised on appeal, he simply wrote “none.” While I will not dismiss the violations because you have admitted them, I will, nonetheless, mitigate the penalties to “Warnings.” The record contains sufficient evidence to allow me to conclude that you corrected the violations and, furthermore, I have no reason to doubt your assertion that the main focus of the appeal was the intoxicated operation charge discussed more fully below.

I will next address your concerns regarding the intoxicated operation charge. You assert that your poor results on the FST’s were simply due to the fact that you were tired and you suggest that the Coast Guard would not have found you intoxicated if the boarding had occurred 30 days earlier (when the legal BAC limit in Rhode Island was .10, rather than .08). You point to the small amount that your blood alcohol content was above the legal limit and assert that you “thought [you] were o.k.” because you “thought the limit was .10.” You further contend that you had the presence of mind to “go into the wheelhouse to assist the [Coast Guard] Captain” in locating your vessel “five piers south of the dinghy dock.” You contend that the Coast Guard should not have found you guilty of a violation of 46 USC §2302(c) because you were unaware of the lowered legal blood alcohol limit and because you considered yourself not to be intoxicated.

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,

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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 chemical test. The Boarding report shows that you had a “strong” odor of alcoholic beverage on your breath and that your speech was both “slurred” and “confused.” Your face was “pale,” your eyes were “watery” and “bloodshot” and you appeared to be “sleepy” and “indifferent.” The record further shows that you performed poorly on five out of seven of the FST’s administered: (1) In the “Finger Count,” you miscounted, did not speed up, and improperly touched and counted your fingers; (2) In the “Palm Pat,” you slid your hands and improperly counted; (3) In the “Horizontal Gaze Nystagmus,” you showed a lack of smooth pursuit in both eyes, distinct nystagmus at max Deviation and Nystagmus onset before 45 degrees; (4) In the “Walk and Turn,” you were unable to keep your balance and took too many steps; (5) and in the “One Leg Stand,” you swayed and could not maintain your balance.” 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 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 intoxicated.

I will now address your concerns regarding the administration of the chemical test. In addition to finding substantial evidence of intoxication based upon your behavior, the Hearing Officer found conclusive evidence from the Breathalyzer test to conclude that you were intoxicated and that you were, therefore, in violation of 46 USC §2303(c). The Breathalyzer test registered a blood-alcohol reading of .096%. You indicate that had the boarding occurred one month earlier, you would have been below the standard. I find that reasoning to be totally unpersuasive. Our tolerance for impaired operation of automobiles and vessels has been lowered because of the consequences such operation can provoke. You even admit that you knew that you were close to the limit. All things considered, you should not have been operating your inflatable that evening. However, even absent the chemical test, there was sufficient evidence to find you intoxicated even absent the Chemical test. Thus, your arguments regarding the change in the Rhode Island legal limit are moot.

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. As discussed above, I have mitigated the penalties for your alleged violation of 33 CFR 175.15(a) and 33 USC 2033(b) (Rule 33) to “Warnings.” With regard to the remaining violation, I find a penalty of \$400.00 rather than the \$800.00 preliminarily assessed or \$5,000.00 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 **\$400.00** 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:

RE: CIVIL PENALTY

16731

November 27, 2001

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 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, U.S. Coast Guard Hearing Office
Commander, Finance Center