

U.S. Department
of Transportation

United States
Coast Guard



COMMANDANT
U. S. Coast Guard

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16780
October 31, 2002

Mr. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00000993
Mr. [REDACTED]
M/V [REDACTED]
\$100.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00000993, which includes your appeal as owner/operator of the recreational vessel [REDACTED] ([REDACTED]). The appeal is from the action of the Hearing Officer in assessing a \$100.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2302(c)	Operation of a vessel while intoxicated.	\$100.00

The violation was first observed on August 17, 1999, when Coast Guard boarding officers boarded your vessel to assist you in freeing it from a pound net in the Chesapeake Bay, Maryland.

On appeal, you do not raise any specific issues. Therefore, I have reviewed the file for substantial evidence to support the Hearing Officer's conclusions. Your appeal is denied for the following reasons.

As a preliminary note, a review of the record indicates that the Coast Guard Boarding Report and the subsequent case file incorrectly indicate that the name of your vessel is the M/V [REDACTED], while you assert that the actual name of the vessel is the M/V [REDACTED]. I also note that the Boarding Report incorrectly noted the date of the incident as August 17, 1997, rather than the correct date of August 17, 1999. Because I am convinced that you have been adequately apprised of the nature of the violation in issue, I conclude that these errors are harmless.

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I will now address your alleged violation of 46 USC 2302(c). 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 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 eyes were “bloodshot.” Your speech was “slurred” and “confused” and your face was “pale.” Finally, you were “indifferent” and laughing frequently. The record further shows that you refused to submit to all of the Coast Guard’s Field Sobriety Tests except the Horizontal Gaze Nystagmus Test. 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. 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 Horizontal Gaze Nystagmus Test and the personal observations of the Coast Guard boarding officers regarding your manner, disposition, 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. The Hearing Officer determined that, “based on a preponderance of evidence” you were intoxicated during the relevant boarding. The record indicates that you were found to have refused to take the chemical test, thus invoking the Coast Guard’s presumption of intoxication. Contrary to the findings of the Boarding Officers, you assert that your poor performance on the Breathalyzer test was because you had “injured your ribs and neck because of some ones (sic) negligence.” 33 CFR 95.040(a) provides that, “[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, evidence of the refusal is admissible in any administrative proceeding and the individual will be presumed to be intoxicated.” Given the facts stated above, the record is clear that pursuant to 95.035, the Boarding Officers had sufficient reasonable cause to direct that you submit to the chemical test. Although you contend that you were unable to perform appropriately on the test because of injuries incurred during the incident, you have provided no evidence to support that assertion. Therefore, I conclude that you did, in fact, refuse to submit to the chemical test. Your subsequent refusal, through you actions, leads to a presumption of intoxication. I further find that you have not provided sufficient evidence to rebut the Coast Guard’s presumption of intoxication, and as a consequence, I believe that the Hearing Officer would be correct to conclude that you were intoxicated based upon either 33 CFR 95.030(a) or 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 violation 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

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penalty of \$100.00 rather than the \$750.00 preliminarily assessed to be 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 **\$100.00** 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 3% 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