U.S. Department of Transportation
United States Coast Guard

COMMANDANT
U. S. Coast Guard

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16780

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

November 14, 2002

RE: MV00002133
[REDACTED]
[REDACTED]
$1,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00002133, which includes your appeal as owner of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a $1,000.00 penalty for the following violation:

LAW/REGULATION	NATURE OF VIOLATION	ASSESSED PENALTY
46 USC 2302(c)	Operation of a vessel while intoxicated.	$1,000.00

The violation was observed on February 7, 2000, when Coast Guard boarding officers boarded your vessel while it was underway on the Atlantic Ocean near Miami Beach, Florida.

On appeal, you do not deny the violation but contend that because you were "found not guilty by a Judge…[this matter has been]…officially resolved in court." Furthermore, you contend that the Hearing Officer was incorrect in his determination that the Coast Guard's presumption of intoxication operated against you because a "presumption is never to be considered proof." In the same vein, you assert that "law school 101 teaches students that the burden of proof lies with the person(s) making the claim" and conclude that the Coast Guard has not met its burden in this case. Your appeal is denied for the following reasons.

I will begin by addressing your contention that this matter was "resolved" when the [REDACTED] acquitted you of the boating under the influence charge assessed against you. In essence, you are raising the defense of double jeopardy. The Coast Guard's action in this case is in no way barred by any of the proceedings in the related state action. The waters of the Atlantic Ocean are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess an administrative civil penalty against the operator of the vessel without regard to any action by the state of Florida. Neither the applicable statute nor any known theory regarding the enforcement authority of the Federal and state governments precludes the Coast

Guard from assessing a civil penalty. Indeed, the Federal government is not precluded from imposing both criminal and civil sanctions for the same conduct. See, *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U. S. 232, 93 S. Ct. 489 (1972). Therefore, the fact that the [REDACTED] found you not guilty has no bearing on the instant case.

I will now address your alleged violation 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 your refusal to submit to a 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" and "watery." Your speech was "slurred" and "confused" and your face was "flushed." Finally, you were "combative" and "indifferent". The record further shows that you refused to submit to all of the Coast Guard's Field Sobriety Tests. 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 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 record indicates that you refused to submit to a chemical test three times, thus invoking the Coast Guard's presumption of intoxication. Contrary to your assertions, 33 CFR 95.040(a) makes clear 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. Furthermore, I agree with the Hearing Officer that you have not provided sufficient evidence to rebut the Coast Guard's presumption of intoxication. Indeed, the only evidence that you have provided to support your assertion is the self-serving statements of yourself and your passenger. With this in mind, it is my opinion that while the presumption created by your refusal to submit to the chemical test is a rebuttal one, the presumption simply has not been overcome by the evidence that you have provided. By electing to not take the tests, you voluntarily placed yourself in the position of having the presumption operate against you. Contrary to your understanding, once the presumption was created, the burden to provide substantial evidence to rebut the presumption shifted to you.

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 penalty of $1,000.00 rather than the $2,000.00 preliminarily assessed $5,000.00 maximum permitted by statute 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 **$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 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,

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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