



[REDACTED]
[REDACTED]
[REDACTED]

16780
December 30, 2002

RE: MV00002353
[REDACTED]
Unnamed ([REDACTED])
\$250.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00002353, 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 \$250.00 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.	\$250.00

The violation was observed on June 9, 2000, approximately one and one half miles off Cedar Point, on Lake Erie, near Marblehead, Ohio, when Coast Guard boarding officers boarded the unnamed recreation vessel [REDACTED] while it was disabled.

On appeal, you deny the violation. You contend that you did not operate the vessel and challenge the Coast Guard's conclusion that you were intoxicated following the admission of sobriety tests administered after the vessel was towed to Marblehead Station. You further contend that you were "only slightly over the legal limit and know that was from the beer...[you]...drank while being towed in." You further contend that the boarding officer "knew there was beer on board and never said that...[you]...couldn't drink any." In your supplemental letter, dated November 1, 2001, you further request a "chance to explain the facts of this matter in court." Your appeal is denied for the reasons described below.

First, I believe a brief recitation of the circumstances surrounding the violation is in order. On June 6, 2000, you and [REDACTED] were on board the unnamed recreational vessel [REDACTED]. At approximately 6:00 p.m., the vessel ran out of gas and became stranded approximately one and one-half miles off Cedar Point, Ohio. Although you and [REDACTED] made several attempts to contact passing boaters, no one came to your aid. After several hours had passed and fearing that you would be stranded on the vessel for the rest of the evening, you fired several flares in an attempt to gain the attention of vessels in the area. You contend that, while waiting for help, you dropped the vessel's anchor and drank some beer, because you were

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“very hot and there was nothing else to eat or drink on board.” You further note that, when you saw the Coast Guard approaching, you pulled up the vessel’s anchor and waited for further assistance. The Coast Guard then towed the vessel to Marblehead Station, where sobriety tests were performed on both you and [REDACTED].

First, I will address your request for a “chance to explain the facts of this matter in court.” Your request fails to acknowledge the informal nature of the Coast Guard’s civil penalty process. The applicable law and procedures for the assessment of civil penalties are contained in Part 1.07 of Title 33 of the Code of Federal Regulations (33 CFR 1.07). After a thorough review of the entire record, I am persuaded that prior to the assessment of the civil penalty in the instant case, the Hearing Officer followed all regulatory procedures and ensured that you were fully apprised of and had the opportunity to exercise your rights in this matter. You were given the appropriate notice of the initiation of the Coast Guard’s civil penalty action, advised of your right to request a hearing, provide any written evidence and argument in lieu of a hearing, or pay the amount specified in the notice as being appropriate. The record shows that rather than requesting a hearing, you submitted written evidence that you believed was relevant to the issues at hand. The record further shows that the Hearing Officer carefully considered your correspondence before issuing his January 25, 2001, final decision. In accordance with 33 CFR 1.07-65(b), you also were advised of your right to appeal the Hearing Officer’s decision, which the record shows you have done. Under 33 CFR 1.07, there are no provisions for a hearing on appeal. Furthermore, since the penalty in issue is administrative in nature, and not criminal, you have no right to a formal court proceeding with respect to the violation. Nevertheless, in response to your appeal, I have carefully reviewed the entire record to ensure there is substantial evidence to support the Hearing Officer’s final decision.

I will now address the violation in issue. The record indicates that although you do not deny being intoxicated during the administration of field sobriety tests, you deny being intoxicated while operating the vessel [REDACTED]. You admit that you consumed three beers while the Coast Guard towed you to station Marblehead and conclude that it was the drinking of those beers that lead you to your being “slightly over the limit” when you took a Coast Guard administered Breathalyzer test. You insinuate that, if the Coast Guard had administered sobriety tests when they first arrived at your vessel, you would not have been found to be intoxicated. I do not agree.

46 USC 2302(c) makes clear that “an individual who is under the influence of alcohol, or a dangerous drug [is] in violation of a law of the United States when operating a vessel.” For the purposes of Coast Guard regulation, a person is considered to be operating a vessel when that person “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.” 33 CFR 95.015. Furthermore, 33 CFR 95.010 makes clear that a vessel is considered to be under way when it is “not at anchor, or made fast to the shore, or aground.” According to this definition, the recreation vessel [REDACTED] was clearly “underway” both while under tow and when the Coast Guard first approached it.

I do not agree with your assertion that you became intoxicated while the vessel was under Coast Guard tow. Although you contend that you drank three beers while the vessel was being towed

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to Station Marblehead, there is nothing in the record to substantiate your version of the events. Conversely, the statements of three Coast Guard boarding officers indicate that, during the tow, both the vessel and its passengers were closely watched and that, at no time was anyone seen ingesting alcoholic beverages. Furthermore, although you contend that “the [boarding] officer knew there was beer on board and never said...[you]...couldn’t drink any,” there is nothing in the record to substantiate that claim. Regardless of whether you drank alcohol during the tow, or not, I am confident that there is sufficient evidence to conclude that you were intoxicated when the Coast Guard first boarded your vessel. 33 CFR 95.030 makes clear, in relevant part, that “[a]cceptable evidence of intoxication includes, but is not limited to...[p]ersonal observation of an individual’s manner, disposition, speech, muscular movement, general appearance, or behavior.” The record indicates that, during the initial boarding of the vessel, Coast Guard boarding officers noticed the smell of alcoholic beverages on both your and the other passenger’s breath. The record further indicates that, at that time, both you and [REDACTED] admitted to operating the vessel and to having consumed alcoholic beverages that evening. Finally, the record indicates that both you and [REDACTED] were uncooperative with the Coast Guard at all times during the boarding.

Pursuant to Federal Regulation, the Coast Guard has reasonable cause to administer a chemical test when an “individual is suspected of being in violation of the standards in §§95.020 or §95.025.” 33 CFR 95.035(a)(2). 33 CFR 95.020(c) makes clear that a person is 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.” Under the circumstances of this case, I believe that the Coast Guard had reasonable cause to administer a chemical test when they first boarded the vessel. Due to the fact that the vessel was stranded and given the time that the Coast Guard arrived on scene, I do not think that it was inappropriate for the Coast Guard to administer either the field sobriety tests or a Breathalyzer test until after the vessel had been towed to shore. Furthermore, given that there is no evidence in the record, other than your own self serving statement, to indicate that you consumed alcoholic beverages while under tow, I believe that it was appropriate for the Hearing Officer to conclude that you were, in fact, intoxicated when the Coast Guard first came to your assistance. Furthermore, given the Coast Guard’s definition of “operating a vessel,” as discussed above, even if I did agree with you that you consumed alcoholic beverages while the vessel was under Coast Guard tow, I would still conclude that, in light of your performance on both the field sobriety tests and the Breathalyzer test, you were intoxicated while operating the vessel.

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 \$250.00 rather than the \$1,000.00 initially assessed or the \$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 **\$250.00** 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

16780

December 30, 2002

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