

U.S. Department
of Transportation

**United States
Coast Guard**



COMMANDANT
U. S. Coast Guard

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16731

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

June 5, 2002

RE: MV00002748
[REDACTED]
Unnamed ([REDACTED])
\$1,850.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00002748, which includes your appeal on behalf of the owner of the twenty-foot Searay, [REDACTED]. The appeal is from the action of the Hearing Officer in assessing an \$1,850.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 173.21(a)(1)	Use of a vessel without a valid Certificate of Number or temporary certificate on board.	\$50.00
33 USC 2020(a) (Rule 20)	Failure to comply with rules concerning lights and shapes (in any weather).	\$50.00
46 USC 2302(c)	Operating a vessel while intoxicated.	\$1,000.00
33 CFR 177.05	Failure of vessel operator, directed by CG Boarding Officer, to correct hazardous condition or suspend use of boat until correction is made.	\$250.00

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46 USC 2302(a)	Operation of a vessel in a negligent manner in interference with the safe operation of a vessel so as to endanger the life, limb or property of a person.	\$500.00
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The violations were observed on July 1, 2000, when Coast Guard boarding officers boarded the recreational vessel [REDACTED] while it was underway on the Connecticut River, near Old Saybrook, Connecticut.

On appeal, you contend that [REDACTED] “strongly disagrees with the preliminary determination made and the civil penalty assessed against him.” You note that the “main charge against [REDACTED] is operating a vessel while intoxicated.” In defense of that charge, you cite the [REDACTED]’s involvement in the case and assume that, since “[REDACTED] was released by the [REDACTED] within fifteen minutes,” he could not have been intoxicated. You conclude that “[t]he [REDACTED] did not make an arrest because they did not have probable cause.” You further contend that the Breathalyzer test administered in the case “cannot be considered valid” because it was administered by Coast Guard boarding officers who were being trained in how to use the apparatus. You add that “without a second [Breathalyzer] test, no one can determine what the BAC for [REDACTED] was at the time he was operating his vessel.” You also contend that [REDACTED] did not violate 33 CFR 177.05. You assert that “[s]ince the [REDACTED] released [REDACTED] because he was not intoxicated, the order that [REDACTED] not drive the vessel due to his intoxication was invalid.” Likewise, you contend that [REDACTED] did not operate his vessel in a negligent manner in violation of 46 USC 2302(a). You contend that, “[a]t the time the Coast Guard stopped [REDACTED]’s vessel, he was traveling fast because the manifold had sprung leaks on his trip back and there was water in the cylinders” and add that “[REDACTED] had cut his right arm and blood was running out of this gash.” You contend that “the [REDACTED] telling him he was not intoxicated led [REDACTED] to the reasonable belief that he could operate his boat again.” You conclude that “he was not in violation of Chapter 6 (46 USC 2302(a)). Your appeal is denied for the reasons described below.

First, I believe a brief recitation of the facts is in order. On July 1, 2000, Coast Guard boarding officers observed [REDACTED] operating his vessel inbound on the Connecticut River. [REDACTED] was operating the vessel at a high rate of speed, without running lights, in an area that was highly congested because of a fireworks display. Before being stopped, [REDACTED] came close to colliding with the Coast Guard boarding officers’ vessel. [REDACTED]’s vessel was boarded and following the administration of several Field Sobriety Tests and a Breathalyzer test, it was determined that he was intoxicated. The Coast Guard called the [REDACTED] and informed [REDACTED] that his voyage had been terminated because of his intoxication and because he had operated the vessel without a stern light or a valid registration on board. Upon arriving at the scene, the [REDACTED] took [REDACTED] into custody. He was taken to the

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police station and later released into the custody of his mother. Shortly thereafter, [REDACTED] returned to the Dock and Dine pier and, upon seeing the Coast Guard tying his boat up, insisted that he would care for his vessel. After the Coast Guard boarding officers returned to their vessel, [REDACTED] threw the lines from his vessel and got underway. [REDACTED] then headed up river at a high rate of speed. The Coast Guard boarding officers soon lost sight of him and were unable to conduct another boarding of his vessel.

I will begin by addressing the alleged violations of 33 CFR 173.21(a)(1) and 33 USC 2020(a). The record indicates that [REDACTED] has neither denied these violations nor presented any evidence that the alleged deficiencies were corrected. While you have stated that you would “discuss the other civil penalties,” you failed to do so. Therefore, I find the violations proved. Because no evidence has been presented to allow me to conclude that [REDACTED] has either placed a Certificate of Registration onboard the vessel or ensured that its stern light operates correctly, I will not mitigate either of the penalties assessed.

I will next address your concerns regarding the intoxicated operation charge. You contend that the Field Sobriety Tests and Breathalyzer test administered in this case are insufficient evidence to conclude that [REDACTED] was intoxicated. With regard to the former, you contend that the Field Sobriety Tests were administered when [REDACTED] was in a “wounded and vulnerable position” and that a “completely dry person would not have passed under those circumstances.” You further contend that the Breathalyzer Test results obtained against [REDACTED] “cannot be considered valid” because the officers who administered the test were inexperienced and “fumbled around” forcing [REDACTED] to “blow numerous times” into the testing apparatus. You conclude, “without a second test, no one can determine what that BAC for [REDACTED] was at the time he was operating his vessel.” I am not persuaded by your assertions.

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 [REDACTED] was intoxicated, even without consideration of the chemical test. The Boarding report shows that he had a “strong” odor of alcoholic beverage on his breath and that his speech was “slurred.” His face was “flushed” and his eyes were “watery” and “bloodshot.” The record further indicates that [REDACTED] performed poorly on six out of seven of the FST’s that the Coast Guard administered: (1) In the “A-B-C Test,” he missed and repeated letters and hesitated; (2) In the “Finger Count,” he miscounted, slid his fingers, did not speed up and improperly touched and counted his fingers; (3) In the “Palm Pat,” he slid his hands, improperly counted and did not speed up; (4) In the “Horizontal Gaze Nystagmus,” he showed a lack of smooth pursuit in both eyes and distinct nystagmus at max deviation; (5) In the “Walk and Turn,” he started too soon, did not keep his foot planted during turning, and missed heel-toe; (6) and in the “One Leg Stand,” he swayed, raised his arms, put his foot down, and was unable to complete the test. While I agree that each of these factors, alone, might not have been

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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 officers regarding [REDACTED]'s manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that he was intoxicated. I further note that the pre-test questions clearly indicate that [REDACTED] was not suffering from any physical defects nor was he injured.

I will now address your concerns regarding the administration of the chemical test. In addition to finding substantial evidence of intoxication based upon [REDACTED]'s behavior, the Hearing Officer found conclusive evidence from the Breathalyzer test to conclude that he was intoxicated while operating his vessel in violation of 46 USC 2303(c). The Breathalyzer test registered a blood-alcohol reading of .176%. This is more than double the legal limit. While you contend that this test result should not be considered conclusive because of the inexperience of the boarding officers in using it, you have provided no evidence, other than [REDACTED]'s affidavit, to support this assertion. Therefore, I am not persuaded by your assertion. Indeed, even if the Coast Guard boarding officers were being trained in how to use the Alco Sensor test, I do not believe that that fact alone would have any consequence as to the validity of the test. All things considered, [REDACTED] should not have been operating his vessel on the evening of July 1, 2000. However, even absent the chemical test, there was sufficient evidence to find that [REDACTED] was intoxicated.

I will now address [REDACTED]'s alleged violation of 33 CFR 177.05. 33 CFR 177.05 makes clear that "[a]n operator of a boat who is directed by a Coast Guard Boarding Officer to take immediate and reasonable steps necessary for the safety of those aboard the vessel...shall follow the direction of the Coast Guard Boarding Officer." The Coast Guard Boarding Report indicates that [REDACTED] "...got...back underway after being instructed that the voyage was terminated and he was not to get back underway." Furthermore, the statement of Petty Officer [REDACTED] notes, "[REDACTED] was informed that his voyage...[was]...terminated and that he needed to get a registration on the vessel and he needed to repair the stern light." Petty Officer [REDACTED] also stated that he "informed [REDACTED] that the vessel was to stay moored at the Dock and Dine Restaurant for the evening because it had no stern light." The statements of the other boarding officers, SN [REDACTED] and BM3 [REDACTED] likewise note that Petty Officer [REDACTED] instructed [REDACTED] that his voyage was terminated for the evening. You contend that "[s]ince the [REDACTED] released [REDACTED] because he was not intoxicated, the order that [REDACTED] not drive the vessel due to intoxication was invalid." I do not agree with your contention. As has already been discussed, there is ample evidence in the record to support a conclusion that [REDACTED] was intoxicated and that, therefore, he should not have been operating a vessel. Furthermore, [REDACTED] was told that he could not operate the vessel that evening because the stern light was not operational and because the vessel's registration was not on board. It is uncontested that [REDACTED] neither fixed the vessel's stern light nor placed the vessel's registration on board. Because [REDACTED] was informed that the stern light had to be fixed and the registration replaced prior to operation of the vessel, his failure to do so represents a clear violation of 33 CFR 177.05. His perception of the incident has no bearing on his failure to fix the conditions specified by the Coast Guard. Therefore, I find the violation proved and will not mitigate the penalty.

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Finally, I will address your contention that [REDACTED] did not operate his vessel in a negligent manner in violation of 46 USC 2302(a). As used in 46 USC 2302(a), negligence is the failure to use that care which a reasonable person would exercise under similar circumstances. It is the operator's breach of that standard of care that endangers the life, limb, or property of a person and constitutes a violation of the law. In the instant case, I am convinced that [REDACTED] operated his vessel in a negligent manner and would conclude so even if he were not intoxicated on the evening in question. The record indicates that the Connecticut River was congested with a great number of vessels on the evening of July 1, 2000. [REDACTED] was seen operating his vessel at a high rate of speed without an operational stern light. When [REDACTED] resumed operation of the vessel following the boarding, Coast Guard boarding officers observed him operating at a high speed through a no wake zone. You contend that [REDACTED] could not have operated his vessel in a negligent manner because "what would have been reckless behavior from another individual due to that individual's inexperience or skill level...was not reckless behavior for someone as skilled as [REDACTED]." You further contend that when the [REDACTED] informed [REDACTED] that he was not intoxicated, he was "led...to the reasonable belief that he could operate his boat again which he did do" and conclude that "he was not in violation of Chapter 6 (46 USC 2302(a))." Your arguments are without merit. It is uncontested that [REDACTED] operated his vessel at a high rate of speed, at night, in a crowded area, without the proper navigational lights. The engine problem only compounds the situation. These actions exhibit a breach of the standard of care required by prudent seamanship. Indeed, on a holiday weekend with a fireworks display recently completed, [REDACTED] should have been operating his vessel with additional care. The fact that he failed to do so, regardless of his intoxication, was negligent and represents a clear violation of 46 USC 2302(a). [REDACTED]'s actions could have led to disastrous results and whether his engine was failing or not, those actions were clearly negligent.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that [REDACTED] is the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the \$1,850.00 penalty assessed by the Hearing Officer to be appropriate in light of the seriousness of the violations in issue.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$1,850.00** 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.

RE: CIVIL PENALTY

16731
June 5, 2002

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