



[REDACTED]
[REDACTED]
[REDACTED]

16731
January 3, 2002

RE: MV00003125
[REDACTED]
Unnamed ([REDACTED])
\$750.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00003125, 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 \$750.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2302(c)	Operating a vessel while intoxicated.	\$750.00

The violation was observed on July 27, 2000, when Coast Guard boarding officers boarded your vessel [REDACTED] while it was underway near Heart Island in the St. Lawrence River.

On appeal, you deny being intoxicated and contend that Coast Guard members act as if they are "above the law" and "above the Constitution." You contend that your constitutional rights were violated because you were stopped "for no apparent reason" and "inspected at night." You further assert that you were unable to correctly perform field sobriety tests (FST's) because you are both disabled and diabetic and add that the sole reason that the Coast Guard stopped and ticketed you was to harass you because you earlier publicly denounced their behavior. You argue that the Coast Guard's actions in this incident violate the 1st Amendment, the 4th Amendment, and the Americans with Disabilities Act and conclude that the FST's currently used by the Coast Guard are unreliable indicators of intoxication. Your appeal is denied for the reasons described below.

First, I believe a brief recitation of the facts is in order. On July 27, 2000, the Coast Guard sighted your recreational vessel, the [REDACTED], adjacent to Boldt Castle on the St. Lawrence River and believed it to be floating "dead in the water." The Coast Guard approached your vessel and offered assistance. At that time, boarding officers noticed that your speech was "slurred" and sighted an open bottle of beer in a beverage holder next to the helm. Although the Coast Guard vessel initially pulled away from your vessel, they quickly decided to board it under

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the suspicion that you were intoxicated. Following the administration of FST's, the Coast Guard asked you to take a Breathalyzer test. You refused to take the test and were subsequently ticketed for operation of a vessel under the influence of alcohol.

I will now address the issues that you raise on appeal. Initially, I note that constitutional issues are not resolved at administrative proceedings. *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 39 L. Ed. 2d 389, 94 S. Ct. 1160, 1974 U.S. LEXIS 108 (1974); *Oestereich v. Selective Serv. System Local Bd. No. 11*, 393 U.S. 233, 21 L. Ed. 2d 402, 89 S. Ct. 414, 1968 U.S. LEXIS 1 (1968) (Harlan, J., concurring in the result). As such, the Commandant is not vested with the authority to decide constitutional issues; that is exclusively within the purview of the Federal courts. I have, nonetheless, reviewed the record with the constitutional issues that you raise in mind and find them to be unpersuasive. In addition, your contention that the Coast Guard's boarding in this case violated the Americans with Disabilities Act (ADA) is, likewise, without merit. According to 33 CFR 1.07-70(a), only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. Since you did not address the alleged violation of the ADA before the Hearing Officer before his final decision, your right to have it considered has been waived. However, even if you had raised this issue with the Hearing Officer, the boarding of your vessel in no way violates the ADA. Next, I will address your contention that the Coast Guard violated your 4th Amendment rights by stopping your vessel on the evening of July 27, 2000. In support of your assertion, you rely on *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979), which held that the random stopping and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance constitutes a violation of the Fourth Amendment. Your reliance on *Piner* is misplaced.

The courts have long held that the Coast Guard may, consistent with the Fourth Amendment, exercise plenary authority under 14 U.S.C. 89(a) to stop and board vessels on the navigable waters of the United States to conduct safety and documentation inspections even in the complete absence of suspicion of criminal activity. *See e.g. United States v. Kubiak*, 704 F.2d 1545, 1547-48 (11th Cir.1983); *United States v. Clark*, 664 F.2d 1174, 1175 (11th Cir.1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir.1978) (en banc), *cert. denied*, 446 U.S. 956, 100 S. Ct. 2928, 64 L. Ed. 2d 815 (1980); *see also United States v. Marino-Garcia*, 679 F.2d 1373, 1385 (11th Cir.1982) (court specifically rejects the reasoning in *United States v. Piner*), *cert. denied*, 459 U.S. 1114, 103 S. Ct. 748, 74 L. Ed. 2d 967 (1983).

In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L. Ed. 2d. 660 (1979), the Supreme Court held that random stops of automobiles violated the Fourth Amendment absent "articulable and reasonable suspicion" that the motorist was engaged in a violation of the law. The Ninth Circuit extended the rationale of *Prouse* to vessels on the high seas. In *United States v. Piner*, 608 F.2d. 358 (9th Cir. 1979), a divided panel concluded that a random stop and safety inspection of an American vessel at night without reasonable suspicion of noncompliance with safety ordinances transgressed the Fourth Amendment.

In sharp contrast to the Ninth Circuit, the former Fifth Circuit refused to extend the reasoning of *Prouse* to vessels on the high seas. In *United States v. Williams*, 617 F. 2d 1063 (5th Cir. 1980),

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cert. denied, 450 U.S. 983, 101 S. Ct. 983, 101 S. Ct. 1520, 67 L.Ed. 2d 818 (1981), the Court en banc rejected the applicability of "land-based" Fourth Amendment law to seizures on the high seas. *Accord, United States v. Shelnut*, 625 F.2d 59, 61 (5th Cir. 1980), *cert denied*, 450 U.S. 983, 101 S.Ct. 1520, 67 L.Ed. 2d 818 (1981) ("We have recently reaffirmed our long-standing position that seizures and searches on the high seas are fundamentally different from those on land."). The Court in *Williams* determined that the Fourth Amendment did not require reasonable suspicion before a vessel could be stopped at sea. 617 F.2d at 1081-82; *see also United States v. Warren*, 578 F.2d 1058, 1064 (5th Cir 1978). Thus, unlike the automobile search in *Prouse*, the Coast Guard did not need reasonable suspicion of an ongoing violation in order to stop and board your vessel. *See, United States v. Williams, supra*, 617 F. 2d at 1081-82; *see also United States v. Espinosa-Cerpa*, 630 F.2d 328, 334 (5th Cir. 1980); *United States v. Hayes*, 653 F. 2d 8, 11 (1st Cir. 1981); *United States v. Hilton*, 619 F.2d 127, 132 (1st Cir. 1980), *cert. denied*, 449 U.S. 887, 101 S. Ct. 243, 66 L.Ed. 2d 113 (1981).

The record indicates that the Coast Guard first approached your vessel under the suspicion that it was disabled. Although you contend that you were under way and not drifting, as has been discussed above, the Coast Guard has plenary authority to board your vessel. The Coast Guard contends, and you have not denied, that they saw an open bottle of beer aboard your vessel and that you had a "moderate" odor of alcohol on your breath. Although the Coast Guard did not cite you for intoxication during their initial contact with you, they quickly determined that you had exhibited signs of intoxication and returned to board your vessel. The initial observations of the Coast Guard undoubtedly justified the second stop of your vessel. Consequently, I am convinced that no Fourth Amendment violation has occurred in this case.

I will now address your concerns regarding the intoxicated operation charge assessed against you. Although you performed poorly on several of the FST's administered by the Coast Guard, you contend that the results are unreliable because the Coast Guard failed to account for the effects that your medical state played on those results. The record indicates that you are permanently disabled due to a chronic condition of your left leg. You have also provided a signed letter from your doctor indicating that you have diabetes, a condition that could cause "tremulousness and diminished position sense" and "a mild degree of vibratory sensation impairment which predicts some degree of impairment of proprioception." Your doctor concluded that "[t]hese impairments would make the standard sobriety test of dubious value in testing for impairment." However, even if I accept your contentions regarding your poor FST results, I must conclude that there is ample evidence in the record to support a finding of intoxication.

The Coast Guard's regulations governing the operation of a vessel while intoxicated are found in Part 95 of Title 33 of the Code of Federal Regulations (33 CFR Part 95). Under 33 CFR 95.020(c), an individual is considered intoxicated when the 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 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."

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The record contains sufficient evidence to support the Coast Guard boarding officer's suspicions that you were operating your recreational vessel while intoxicated. The record shows that, during the Coast Guard's initial observations, your speech was "slurred," you had a moderate to strong smell of alcohol on your breath, and there was an open bottle of beer sitting next to the helm of your vessel. The Field Sobriety Performance Test Report indicates that you had a "moderate" odor of alcohol on your breath, your speech was "slurred," "confused," "mumbled," and "stuttered," that your eyes were "bloodshot," and that you were "talkative," "combative," "indifferent," and "insulting" during the boarding. While the report indicates that you informed the Coast Guard of your disabled hip, you did not inform the boarding officers that you were diabetic. The record further shows that you performed poorly on several of the FST's administered by the Coast Guard boarding officers. During the "Alphabet Test," you "sang," missed letters and hesitated. During the "Finger to Nose Test," you "missed" your nose, used a "searching pattern," opened your eyes and hesitated. During the "Horizontal Gaze Nystagmus," you showed a "lack of smooth pursuit in both eyes, distinct nystagmus at max [and] Deviation and Nystagmus onset before 45 degrees." During the "Walk & Turn," you started too soon, stopped walking, "missed heel-to-toe," and used your arms to balance. Finally, during the "One Leg Stand," you "swayed," used your arms to balance, hopped, "put your foot down" and were unable to successfully complete the test. 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 officers regarding your manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were intoxicated. As I have stated above, even if I disregard the individual tests effected by your diabetes and disability, (the "Walk & Turn" and "One Leg Stand"), ample evidence remains to support the Hearing Officer's conclusion that you were intoxicated. In particular, the Gaze Nystagmus test is particularly telling. Gaze nystagmus, an involuntary movement of the eyeballs when an individual looks to the side, is, according to the article that you submitted by the [REDACTED], a viable (although not infallible) method of determining intoxication that is not caused by diabetes or hypoglycemia. Thus, your failure of that test, when combined with the other Coast Guard observations supports a finding of intoxication.

Furthermore, under 33 CFR 95.040, if an individual refuses to submit 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 evidence in any administrative proceeding and the individual will be presumed to be intoxicated. That presumption is, however, a rebuttable one. In the light of the facts contained in the record, I am not persuaded that the presumption was sufficiently rebutted.

I am convinced that the boarding officers informed you of the Coast Guard's presumption of intoxication during the boarding of your vessel. The statement of BM3 [REDACTED] indicates that you were informed that a refusal to submit to a chemical test "could be considered an admission of guilt." Although both you and your passenger, [REDACTED], contend that you were not informed of the Coast Guard's presumption of intoxication, I have no reason to believe your statements over those of a Coast Guard officer, especially in light of the fact that boarding officers observed [REDACTED] attempting to destroy evidence by throwing your beer bottle overboard. Furthermore, it is the Hearing Officer's responsibility to decide the reliability and

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credibility of evidence and resolve conflicts in evidence. I find no abuse of discretion in his conclusion that the presumption appropriately operated in this case. While the presumption created by your refusal to submit to the chemical test is a rebuttable one, that presumption simply has not been overcome by the evidence that you have provided on your behalf. By electing to not take the tests, you voluntarily placed yourself in the position of having the presumption operate against you. Once the presumption was created, the burden to provide substantial evidence to rebut the presumption rested with you. While your statements support your version of the incident, the Coast Guard Boarding Report and the signed statements of the Coast Guard Boarding Officers offer a view of the incident and of your behavior that is decidedly different. In light of the statements of the boarding officers and the CG-4100 Boarding Report, I am not persuaded that the Hearing Officer erred when he found the presumption was not sufficiently rebutted by your own self-serving statements. Furthermore, for the purposes of 33 CFR 95.020(c), as discussed above, there is enough evidence in the record to find you intoxicated absent the Coast Guard's presumption. Therefore, I find the violation proved and will not mitigate the penalty.

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. I find the penalty of \$750.00 rather than the \$5,000.00 maximum permitted by statute appropriate in light of the seriousness of the violations.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$750.00** 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

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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