



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

16780
March 17, 2003

RE: MV01002432
[REDACTED]
M/V [REDACTED]
\$750.00

Dear Ms. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV01002432, which includes your appeal on behalf of [REDACTED], owner/operator of the vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,000.00 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.	\$1,000.00

The violation was first observed on July 1, 2001, when Coast Guard boarding officers boarded the M/V [REDACTED] while it was moored at the Harbor View Yacht Club on the Maumee River in Toledo, Ohio.

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 granted, in part, and denied, in part, for the following reasons.

Before I begin, I would like to briefly discuss the Coast Guard's civil penalty process. In your letter to the Hearing Officer, dated October 3, 2001, you asserted that you were "stunned by the military tribunal nature of the way the charged lodged against...[Mr. [REDACTED]]...has been addressed and the summary finding of guilt without there having been a review of all evidence prior to such a finding." I agree with the Hearing Officer that your assertion is without merit. The use of informal administrative processes to adjudicate violations of law is a common practice for both federal and state regulatory agencies. When laws are violated, a variety of enforcement options may exist for governmental authorities. On one end of the spectrum is criminal prosecution. Criminal sanctions must be sought in federal courts and are subject to the full due process requirements of the U.S. Constitution. These due process requirements include the right to a jury trial, representation by counsel, the right to examine and cross-examine witnesses, and so on. Other types of sanctions may be within the control of the regulatory

agency, such as the assessment of civil penalties, revocation or suspension of licenses, and similar sanctions. These agency sanctions are also subject to the due process requirements under the Constitution, but not necessarily the same due process as is required for criminal cases. For example, an adjudication on these types of sanctions does not have to be before a jury. The due process that is applicable at administrative proceedings varies and is normally determined by the Administrative Procedure Act (5 USC 552) and the legislation under which the regulatory agency exercises its enforcement authority.

Even for administrative proceedings, the level of due process may vary. Formal adjudications, presided over by an Administrative Law Judge, mirror very closely a trial in federal court. However, with the growth of the federal regulatory function, the need to conduct full, trial-type administrative hearings for the possibly thousands of civil penalty cases that an agency may be investigating came into question. To avoid the significant time and manpower requirements associated with formal, on-the-record hearings, informal hearing procedures were developed. In spite of their informality, these proceedings are required to provide the respondent with notice, an opportunity to be heard, a right to present evidence at an informal hearing, and a right of appeal. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court set forth guidelines that distinguish between formal and informal proceedings. Since *Mathews*, courts and Congress have generally concluded that the need for a formal administrative adjudication before an Administrative Law Judge is not legally required in cases where the monetary interests of the respondent were all that was at stake. In 1978, the Coast Guard published its civil penalty procedures at 33 CFR 1.07. These regulations establish procedures for the assessment of civil penalties for violations of laws and regulations enforced by the Coast Guard. These procedures are remedial in nature and reflect an appropriate balance between the needs of the Coast Guard in addressing a caseload numbering in the several thousands with the need to provide all respondents with due process rights that are consistent with the monetary sanction being considered. Contrary to your assertion, the Coast Guard's system complies with all legal requirements and has specifically been upheld in *U.S. v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (1979). The record evidences that Mr. [REDACTED] was adequately apprised of both his procedural rights and the nature of the civil penalty process by the Hearing Officer's Preliminary Letter of Assessment dated September 5, 2001. There is simply no evidence in the record to indicate that Mr. [REDACTED]'s rights, with respect to this process, have, in any way, been violated.

I will now address the violation. 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 Mr. [REDACTED] was intoxicated, even absent consideration of his refusal to submit to a chemical test. The Coast Guard Boarding Report of the incident in question indicates that Mr. [REDACTED] has a "strong" odor of alcohol on his breath and that his speech was "mumbled" and "slurred." Furthermore, Mr. [REDACTED]'s face was "flushed" and his eyes were "bloodshot." The record further shows

March 17, 2003

that Mr. [REDACTED] performed poorly on all six of the Field Sobriety Tests (FSTs) administered. On the "Alphabet Test," Mr. [REDACTED] "sang," missed and repeated letters and hesitated. On the "Finger Count" Test, he "started before told" and "used both hands." Likewise, on the "Backwards Count" Test, Mr. [REDACTED] "hesitated after 14, 12 and 9." On the "Palm Pat" Test, Mr. [REDACTED] "started before told" and "did not speed up," while on the "Finger to Nose" Test, he opened his eyes and "did not drop arms after touch." Finally, on the "Horizontal Gaze Nystagmus" Test, Mr. [REDACTED] lacked smooth pursuit in both eyes, and had distinct nystagmus at max deviation, onset prior to 45 degrees, in both eyes. 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 officer regarding Mr. [REDACTED]'s manner, disposition, speech, muscular movement, and behavior and the results obtained on his FSTs constituted substantial evidence for the Hearing Officer to conclude that he was intoxicated under the definition established by 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 agree with the Hearing Officer that a discussion of Mr. [REDACTED]'s refusal to submit to a chemical test is important in the administration of this case. The Hearing Officer determined that "[n]othing in the record overcomes...[the]...presumption [on intoxication]" that arose when Mr. [REDACTED] refused to submit to the chemical test requested by the Coast Guard. 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 33 CFR 95.035, the Boarding Officers had sufficient reasonable cause to direct Mr. [REDACTED] to submit to the chemical test. In your letter to the Hearing Officer, dated October 3, 2001, you asserted that "Mr. [REDACTED] was only following the advice of past counsel, and such advice is given by a very large number of attorneys all over the country, since among other reasons for refusal, the equipment or operator may be unreliable." Regardless of the veracity of your assertion, you fail to acknowledge the clear intent of the Coast Guard's regulations with respect to the presumption of intoxication. I agree with the Hearing Officer 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 was correct in concluding that Mr. [REDACTED] was 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. However, given the fact that Mr. [REDACTED] was "very cooperative" during the boarding and because the Coast Guard unit initiating the instant civil penalty case recommended a penalty of \$750.00, I will mitigate the penalty assessed by the Hearing Officer to \$750.00.

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

March 17, 2003

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 4.25% 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