



16780

March 21, 2003

[Redacted]

RE: MV01003571

[Redacted]

Unnamed ([REDACTED])

\$750.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV01003571, which includes your appeal as operator of the 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)	Operation of a vessel while intoxicated.	\$750.00

The violation was observed on July 29, 2001, when Coast Guard boarding officers witnessed your vessel exceeding a posted manatee slow speed zone in the Intracoastal Waterway near Hollywood, Florida.

On appeal, you contend that the penalty assessed by the Hearing Officer is "unjustified." In support of your assertion, you provide supplemental evidence indicating that, at a jury trial in Broward County, Florida, you were found "not guilty of operating a vessel under the influence of alcohol, drugs or any wrong doing." Your appeal is denied for the following reasons.

As a preliminary matter, I note that under 33 C.F.R. 1.07-70(a), only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. Therefore, since the issues that you present on appeal were not submitted to the Hearing Officer before the issuance of his final decision, your right to have those issues considered has been waived. I note, however, that even if I did consider the fact that a jury in [Redacted], Florida found you not guilty of operating a vessel under the influence of alcohol, there would be substantial evidence in the record to support the Hearing Officer's decision.

First, your contention that this civil penalty action is "unjustified" because of the Order of the Broward County Court is without merit. The Coast Guard's actions in this case are in no way barred by any of the proceedings in the related state action. The waters of the Intracoastal

Waterway are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against you 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 in this case. In addition, the standard of proof necessary to impose a civil penalty at an administrative proceeding is less than what is necessary for a finding of guilt at a state or federal criminal proceeding. Because of the more serious consequences associated with a criminal trial, due process requires that an individual can only be convicted by proof beyond a reasonable doubt of every element which constitutes the offense. This has generally been described as proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. This is the highest standard of proof in the American judicial system. However, at administrative proceedings, the burden of proof is not as strict. At Coast Guard administrative proceedings, the Coast Guard must prove its case only by a preponderance of the evidence. Preponderance of the evidence means the trier of fact, here the Hearing Officer, is persuaded that the points to be proved are more probably so than not. Stated another way, the trier of fact must believe that what is sought to be proved is more likely true than not true. For the reasons set forth below, I am convinced that the Coast Guard proved its case by a preponderance of the evidence.

Upon a careful review of the record, I find that there is sufficient evidence to support the Hearing Officer's finding that you were intoxicated at the time of the boarding. 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. The Boarding Report of the incident in question indicates that you had a "strong" odor of alcohol on your breath, that your eyes were "bloodshot" and "watery," that your speech was "slurred" and that your face was "flushed." The record further shows that you performed poorly on three of the four Field Sobriety Tests (FSTs) administered by the Coast Guard. While you completed the "Palm Pat" test satisfactorily, on the "Finger Count" you "miscounted" and "did not speed up;" on the "Finger to Nose" test, you lost your balance and swayed during the test; and, during the "Horizontal Gaze Nystagmus," you showed a lack of smooth pursuit and distinct nystagmus at max deviation in your left eye. 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 obtained during your FSTs 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 under 33 CFR 95.030.

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

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penalty of \$750.00 rather than 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 **\$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 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