



16780

January 18, 2007

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. [REDACTED]
[REDACTED]
Unnamed [REDACTED]
\$500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal as operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing both warnings and a \$500.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 175.15(a)	No person may use a recreational vessel unless at least one Type I, II, or III PFD is on board for each person.	WARNING
33 USC 2033(b)(Rule 33)	Failure to have some means of making an efficient sound signal for vessel less than 12 meters in length.	WARNING
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$500.00

The violations are alleged to have occurred on July 2, 2003, when Coast Guard boarding officers boarded the [REDACTED] while it was underway on the Atlantic Intracoastal Waterway near Ocean Isle, North Carolina.

On appeal, although you do not contest the warnings assessed by the Hearing Officer for the violations of 33 CFR 175.15(a) and 33 USC 2033(b)(Rule 33), you request further consideration of the \$500.00 penalty assessed for the operating under the influence violation. To that end, in addition to contending that "the battery of tests that were conducted...may not have been carried out to Coast Guard [s]tandards," you note that your cooperation during the boarding was "documented" by the boarding officers. You further note that "any financial penalty would add

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to...[your]...family's financial struggle" and will cause your family a severe financial burden. Your appeal is denied for the reasons discussed below.

I will begin by addressing the violations of 33 CFR 175.15(a) and 33 USC 2033(b)(Rule 33). The record shows that, at no point during these proceedings, did you contest these violations. Instead, in correspondence to the Hearing Officer, you provided evidence—namely a receipt for 2 personal flotation devices and a whistle from Shallotte Marine Supplies—to show that you had corrected the deficiencies noted during the boarding. In his final letter of decision, the Hearing Officer commended your subsequent attempt to achieve compliance with the regulations and, as a result of that fact, mitigated the assessed penalties for both of the violations to warnings. Given the evidence contained in the record and the fact that you do not contest the Hearing Officer's decision to assess warnings for the violations on appeal, I find that the Hearing Officer did not err in either finding the violations proved or in assessing warnings for the violations.

I will now address your assertions with respect to the alleged violation of 46 USC 2302(c). On appeal, in addition to seeking further mitigation of the penalty assessed by the Hearing Officer for the violation, you seem to imply that the results you achieved during the field sobriety tests conducted during the boarding were inaccurate because the tests "may not have been carried out to Coast Guard [s]tandards." A careful review of your appeal shows that you have not now, nor have you at any time during these proceedings, provided evidence to support such an assertion. The record shows that, in finding the violation proved, the Hearing Officer carefully considered the evidence contained within the case file. Indeed, in his Final Letter of Decision, the Hearing Officer addressed the violation as follows:

Pursuant to 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 Field Sobriety Test Performance Report contained in the record shows that, at the time of the boarding, your breath had a "faint" odor of alcohol, your speech was "stuttered," and your eyes were "bloodshot." While you passed the Afloat Test Battery tests, on the Horizontal Gaze Nystagmus Test, you showed a lack of smooth pursuit, distinct nystagmus at maximum deviation, and, nystagmus onset before 45 degrees, in both eyes. After terminating your voyage and remaining ashore the required amount of time, you failed both the Ashore Test Battery tests. Based upon your statements to the Boarding Officer concerning your having been drinking and the personal observations of the Boarding Officer regarding your manner, disposition, speech, muscular movement, and behavior, I believe the Boarding Officer had probable cause to proceed with administration of the BAC test with the Alco Sensor IV. The test result of 0.156% was nearly twice the legal limit, well in excess of the minimum acceptable level and I believe the machine was calibrated properly. It is my opinion that the Boarding Officer was correct in concluding that you were

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intoxicated under 33 CFR 95.030 and the violation of operating a vessel while under the influence of alcohol has been proven.

Since there is no evidence in the case file to suggest that the Hearing Officer erred in relying on the test results contained in the case file to conclude that you operated the vessel while under the influence of alcohol on the evening of the boarding and given the fact that you do not deny consuming alcohol beverages on the evening of the boarding, I find that the Hearing Officer did not err in finding the violation proved. Therefore, the sole issue remaining before me is whether the penalty assessed by the Hearing Office is appropriate under the circumstances of the case.

With respect to the amount of the assessed penalty, on appeal, you do not raise any new issues. Instead, you seek further consideration of the financial hardship that would be caused by the imposition of a \$500.00 penalty against you. The record shows that the Hearing Officer carefully considered your assertions in mitigation when he reduced the initially assessed penalty by 50% from \$1,000.00 to \$500.00. In so doing, the Hearing Officer stated as follows:

The maximum fine for this offense is \$5,500.00. The decision on the final fine was made after reviewing the entire case file and determining an appropriate level. I very much appreciated your forthright response and I noted your cooperative attitude and the fact that you were not observed operating your vessel in a negligent manner. However, I also took into account the fact that you had another passenger on board whom you were responsible for, along with the safety of your fellow boaters. I will mitigate the originally recommended penalty of \$1,000.00 and assess a penalty of \$500.00 for the serious and potentially fatal violation of operating a vessel while under the influence of alcohol or a dangerous drug.

Since the record clearly shows that the Hearing Officer considered your arguments in mitigation when he mitigated the initially assessed penalty, under the circumstances of the case, I do not believe that further mitigation is appropriate.

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. For the reasons discussed above, I find the \$500.00 penalty assessed by the Hearing Officer, rather than the \$1,150.00 originally assessed for the violations to be appropriate under the circumstances of this case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$500.00** 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 70945
Charlotte, NC 28272

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Payments received within 30 days will not accrue interest. However, interest at the annual rate of 4.00% 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.

Should you still believe that you are financially unable to pay the penalty, you may request establishment of a payment plan. Requests for relief should be directed to the Chief, Claims Branch, Maintenance and Logistics Command Pacific, Coast Guard Island, Alameda, California 94501-5100.

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