



[REDACTED]
[REDACTED]
[REDACTED]

16780
14 MAR 2007

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$1,350.00

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 owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,350.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR 28.140	Failure to maintain, inspect, or have lifesaving equipment readily accessible and ready for immediate use.	\$250.00
46 CFR 67.315	Failure of person in command of documented vessel to produce current and original Certificate of Documentation upon demand of person acting in official public capacity.	\$100.00
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$1,000.00

The violations are alleged to have occurred on September 27, 2004, after Coast Guard boarding officers boarded the [REDACTED] while it was on the Merrimack River, near Newburyport, Massachusetts.

On appeal, although you do not contest the alleged violation of 46 CFR 67.315, you deny the violations of 46 CFR 28.140 and 46 USC 2302(c). With respect to the latter violations, on appeal, you reassert the arguments that you made before the Hearing Officer. To that end, with respect to the safety violation, you assert that you did not operate your vessel outside the 12 nautical mile Boundary Line and imply that, as a result, you were not required to have a life raft. You further note that your vessel has three immersion survival suits on board, a Coast Guard

approved “float coat,” and that you and your personnel wear “CO2 activated float belts while fishing or mooring.” Finally, you contend that the boarding officer’s statements indicating that your EPIRB was expired are incorrect because you “had a battery installed at the beginning of the season.” Finally, you indicate that, following the violation, you had the flare kit replaced and intended to have the life raft serviced. Addressing the operating under the influence violation, although you admit that you consumed “three beers on the way in,” you contend that you did not “feel impaired in any way” and add that you “would never endanger...[your]...crew and vessel by operating impaired.” You further assert that you did not, at any time, refuse a sobriety test from the Newburyport police and contend that the Newburyport officers did not believe that you were intoxicated on the evening of the violation. Your appeal is denied for the reasons discussed below.

Given the evidence contained within the record and the fact that you do not deny operating your vessel without a valid Certificate of Documentation on board, I find the alleged violation of 46 CFR 67.315 proved and the \$100.00 penalty assessed by the Hearing Officer for that violation to be appropriate under the circumstances of the case.

I will now turn my attention to the violations that you contest, beginning with the alleged violation of 46 CFR 28.140. I begin by noting that the Coast Guard’s primary purpose in enforcing its regulations is to ensure maritime safety and to protect the environmental quality of the navigable waters of the United States. Compliance with Coast Guard regulations helps prevent environmental damage, loss of life, personal injury and property damage. The Coast Guard’s regulation of fishing vessels, like the [REDACTED], is particularly important because of the inherent dangers associated with the commercial fishing industry. Your failure to comply with the Coast Guard’s regulations, if found proved, could have resulted in serious consequences for your vessel, your crew and yourself. Accordingly, such violations are viewed as serious occurrences by the Coast Guard.

46 CFR 28.140(a) makes clear, in relevant part, that “[t]he master...of a vessel must ensure that each item of lifesaving equipment must be in good working order, ready for immediate use, and readily accessible before the vessel leaves port and at all times when the vessel is operated.” The statements of the boarding officers show that, at the time of your boarding, your flares were expired, your life jackets were not marked and did not have whistles attached, your vessel’s life raft and hydrostatic release were overdue for inspection by at least two years, and that the sticker on your EPIRB was expired. As I stated above, in correspondence with the Hearing Officer, you implied that you were not required to have a life raft onboard your vessel because you did not operate it outside the Boundary Line. Given the fact that your vessel is less than 36 feet in length and was operated with less than three persons aboard at the time that the alleged violation was observed, your conclusion would be correct if you did not operate outside the Boundary Line. On this point, I note that the record contains conflicting evidence. Although you deny operating your vessel outside the Boundary Line, the Enforcement Activity Summary Sheet indicates that you did so. Even if I accepted your contentions with respect to the operation of the vessel, however, I would not find sufficient cause to dismiss the alleged violation. That is because the record shows that there were numerous other safety violations observed at the time of the boarding that would also constitute violations of 46 CFR 28.140. In addition to the fact that you do not deny that your visual distress signals were expired at the time of the boarding, the record

contains substantial evidence to support a conclusion that your personal flotation devices were not in a serviceable condition and that your EPIRB was expired. Given both the evidence contained in the case file and the severity of the violation, I find that the Hearing Officer did not err in finding the violation proved and I will not mitigate the \$250.00 penalty assessed by the Hearing Officer for the violation.

I will now turn my attention to the alleged violation of 46 USC 2302(c). At the outset, I note that the standard of proof necessary to impose a civil penalty at an administrative proceeding like this one 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 against you by a preponderance of the evidence.

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.” Moreover, according to 33 CFR 95.040, when an individual refuses to take a timely chemical test when directed to by a law enforcement officer upon reasonable cause, it is presumed that the individual is under the influence of alcohol or dangerous drugs.

The record shows that, at the time of the boarding, you admitted consuming at least three beers, had a moderate odor of alcohol on your breath, and that your speech was slurred. The statements of the boarding officers who conducted the boarding of your vessel further show that you were observed fumbling as you attempted to retrieve documentation and other information requested during the Coast Guard’s inspection of your vessel. Given this evidence, I find that the boarding officers’ observations of your manner, disposition, speech, muscular movement, general appearance and behavior provided reasonable cause for you to be directed to submit to chemical testing under 33 CFR 95.035. Although you asserted in correspondence with the Hearing Officer that you did not refuse to submit to chemical testing, the statements of the boarding officers present during the incident all indicate the contrary. As such, I find sufficient evidence in the record to support a conclusion that you did, in fact, refuse to submit to chemical testing on the evening of the incident. 33 CFR 95.040 makes clear, in relevant part, that “[i]f an individual refuses to submit to...the administration of a timely chemical test when directed by a law enforcement based on reasonable cause, evidence of the refusal is admissible in evidence in any

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administrative proceeding and the individual will be presumed to be under the influence of alcohol or a dangerous drug.” Since you do not deny consuming alcoholic beverages on the evening of the boarding and because, as I noted above, there is sufficient evidence in the record to support a conclusion that you refused to submit to chemical testing, I find substantial evidence in the record to support the Hearing Officer’s conclusion that the violation occurred. The evidence that you present is simply insufficient to rebut the presumption that you were under the influence of alcohol that was created by your refusal to submit to chemical testing.

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 decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. I find a total penalty of \$1,350.00 instead of the maximum penalty of \$23,000.00, to be reasonable in light of the circumstances of the violations.

Payment of **\$1,350.00** 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. Payment should be directed to:

U.S. Coast Guard - Civil Penalties
P.O. Box 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 4.0% 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