



REDACTED  
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REDACTED

16780  
March 31, 2008

RE: Case No. REDACTED  
REDACTED  
REDACTED  
\$1,000.00

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 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)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$1,000.00

The violation is alleged to have occurred on June 19, 2005, when Coast Guard boarding officers boarded the REDACTED at the New Jersey State Police Barracks on the Pt. Pleasant Canal.

On appeal, although you do not expressly deny consuming alcoholic beverages on the evening of the boarding, you deny operating the SUMMER OFFICE III while under the influence of alcohol and imply that the Coast Guard acted improperly in administering a chemical test to you during the relevant boarding. To support your assertions with regard to the propriety of the administration of your chemical test, you cite portions of a Memorandum (presumably between the Coast Guard and the State of New Jersey) which states that Coast Guard boarding officers should not administer breathalyzer tests to boaters without first discussing enforcement options with New Jersey Police Officers. In addition, you imply that breathalyzer test results obtained during the incident are unreliable because the breathalyzer test was malfunctioning at the time of the test's administration. Finally, to support your assertions, you have provided a statement from Mr. Jason M. Mendes, one of your vessel's passengers and a New Jersey State Police Officer. Your appeal is denied for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the violation. The record shows that Coast Guard personnel commenced a boarding of your vessel on June 19, 2005, after

allegedly observing you violate a “No Wake Zone” in the vicinity of the Rt. 35 Bridge on the Port Pleasant Canal. At the time of the boarding, there were 7 passengers aboard your vessel, in addition to yourself. The Coast Guard’s Enforcement Summary for the incident shows that Coast Guard boarding officers observed “numerous open alcoholic containers” aboard your vessel and that, as a result of that observation, Field Sobriety Tests (“FSTs”) were subsequently administered to you. The instant civil penalty case, alleging that you operated the SUMMER OFFICE III while under the influence of alcoholic beverages, was initiated as a result of the boarding.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are proved. The Coast Guard’s civil penalty procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded adequate due process during informal adjudicative proceedings. These procedures have been sanctioned by Congress and upheld in Federal courts. See H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

A thorough review of the record reveals that while your case was pending before the Hearing Officer, you questioned the propriety of the boarding of your vessel, itself. While you do not reassert this issue on appeal, I believe that it is beneficial to note that the courts have long held that the Coast Guard may exercise plenary authority under 14 USC 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 (11<sup>th</sup> Cir. 1983); *United States v. Clark*, 664 F.2d 1174, 1175 (11<sup>th</sup> Cir. 1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5<sup>th</sup> 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 (1980). Furthermore, 14 USC 89(a) makes clear that “[f]or such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.” As such, there can be no question as to the Coast Guard’s authority to stop and board your vessel on the evening of June 19, 2005.

I will now address the violation. As I have already stated, although you do not deny consuming alcoholic beverages on the evening of the incident, you assert that the instant civil penalty case should be dismissed because a breathalyzer test was administered to you in violation of procedures set forth in a New Jersey Memorandum. To support your assertion in this regard, you have provided copies of a portion of a memorandum that is neither signed, nor dated and does not even identify the parties to the agreement.

The record shows that the Hearing Officer addressed your assertions regarding the memorandum of agreement as follows:

...the page of the New Jersey State Police memorandum you provided is an interesting read, but the single page, itself is not useful as evidence. A copy of the complete document might be more useful. It appears, though, from the page you have provided that the memorandum provides only internal guidance to state police officers for dealing with the Coast Guard in cases involving possible boating under the influence charges. Internal guidance developed by local authorities concerning working with the Coast Guard is not binding on the Coast Guard and so is not persuasive evidence that the FST or the breathalyzer test were not properly administered.

In your appeal, you contend that you attached the “only two points in the memorandum that matter to this case” and state that you “can’t understand why” the Hearing Officer determined that the memorandum was not “sufficient” to support your assertions. In Coast Guard civil penalty actions, it is the Hearing Officer’s responsibility to decide the reliability and credibility of evidence and resolve any conflicts present in the evidence. Upon a thorough review of the document that you provided, I do not find that the Hearing Officer erred in viewing the document as not credible. In addition to the fact that the document is, as I have already stated, wholly incomplete, the record does not contain any evidence to show either that the Coast Guard is, in fact, a party to the memorandum or, more importantly, that the memorandum was signed by either the Coast Guard or the State of New Jersey. Under such circumstances, the Hearing Officer’s determination with regard to the credibility of the document is not arbitrary or capricious.

I will now address the violation, itself. The record shows that your appeal arguments center on the breathalyzer test administered to you during the boarding of your vessel. In that vein, in addition to asserting that the Coast Guard lacked the authority to administer a breathalyzer test to you (due to the contents of the New Jersey memorandum that you provided), you question the reliability of the breathalyzer, itself. Your arguments fail to acknowledge that the breathalyzer test result is not the only probative evidence in the record to support a conclusion that you operated your vessel while under the influence of alcohol on the evening of the boarding. Indeed, Coast Guard regulations make clear that “[a]cceptable evidence of when a vessel operator is under the influence of alcohol...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.” *See* 33 CFR 95.303. 33 CFR 95.020(c) further provides that an individual is under the influence of alcohol 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.” A review of the record shows that there is substantial evidence to support the Hearing Officer’s determination that you operated your vessel while under the influence of alcohol under the standard articulated at 33 CFR 95.020(c).

In addition to the fact that boarding officers observed “numerous open alcoholic [beverage] containers” aboard your vessel when the boarding commenced, you admitted that you had consumed four beers over the course of the evening. More over, a review of the Field Sobriety Test Performance Report for the incident shows that, in addition to having a “strong” odor of alcohol on your breath, your speech was “slurred,” your face was “flushed” and your eyes were “bloodshot.” In addition, the report shows that you performed poorly on seven of eight FSTs administered to you: although you completed the “Backwards Count” test satisfactorily, you sang during the “Alphabet Test,” miscounted, slid your fingers and improperly counted your fingers during the “Finger Count” test, you slid your hands during the “Palm Pat” test, missed your nose and failed to use the proper finger during the “Finger to Nose” test, you showed a lack of smooth pursuit and distinct nystagmus onset prior to 45 degrees in both eyes on the “Horizontal Gaze Nystagmus” test, were unable to keep your balance, missed heel-to-toe, stepped off the line, and used your arms to balance during the “Walk & Turn” test, and you swayed and used your arms to balance during the “One Leg Stand” test. On appeal, you have—for the first time—provided a statement from New Jersey State Police Officer Jason M. Mendes to refute the boarding officer’s conclusions with regard to your performance on the FSTs. Since the applicable procedural regulations, at 33 CFR Part 1.07, mandate that I only consider “those issues specified in the appeal which were properly raised before the Hearing Officer,” it is improper for me to now consider Officer Mendes’ statement in reaching my decision. *See* 33 CFR 1.07-70(a). Therefore, in light of the evidence contained in the record, I do not believe that the Hearing Officer was either arbitrary or capricious in determining that you were operating a vessel while under the influence of alcohol under 33 CFR 95.030(a)—regardless of your breathalyzer test results—based upon the totality of the circumstances of the boarding, including your FST results and the personal observations of the Coast Guard boarding officer regarding your manner, disposition, speech, muscular movement, and behavior.

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 \$1,000.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$1,000.00** 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

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% 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

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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,

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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