

MV00004636

16780

U.S. Department  
of Transportation

United States  
Coast Guard



COMMANDANT  
U. S. Coast Guard

March 3, 2003

2100 Second Street, SW  
Washington, DC 20593-0001  
Staff Symbol: G-LMI  
Phone: (202) 267-1527  
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March 3, 2003

Mr. [REDACTED]  
[REDACTED]  
[REDACTED]

RE: MV00004636  
Mr. [REDACTED]  
M/V [REDACTED]  
\$250.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00004636, which includes your appeal as the operator of the recreation vessel M/V [REDACTED] ([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)	Operating a vessel while intoxicated	\$750.00

The violation was observed on November 3, 2000, when Coast Guard boarding officers boarded your vessel while it was underway on Urbanna Creek, Virginia.

On appeal, you contend that you were not in fact the operator of the vessel and were "temporarily holding the rudder of the dinghy because the owner/operator of the dinghy was looking for a flashlight." This matter, however, was not submitted to the Hearing Officer in your response to his preliminary notification letter. Therefore, the right to have this issue considered on appeal has been waived. (See 33 CFR 1.07-70(a)). In the interest of fairness, I have reviewed the entire record to ensure there is substantial evidence to support the Hearing Officer's decision. Your appeal is denied for the following reasons.

As a preliminary matter, I believe a brief recitation of the facts is in order. At approximately 6:15 p.m. on November 3, 2000, officers from the Virginia Marine Resource Commission (VMRC), local police and the Coast Guard observed you

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operating a vessel on Urbanna Creek, Virginia without proper navigation lights. When the officers approached your vessel, they could smell alcohol on your breath. The officers subsequently escorted your dinghy back to the owner's sailboat. During the boarding, officers could smell alcohol on your breath from approximately five feet away. You asserted that you had only had one beer an hour prior to operating the vessel. The officers proceeded to take you to land and perform a sobriety test.

I will now address your alleged violation of 46 USC 2302(c). 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 "moderate" odor of alcohol on your breath and that your eyes were "watery." Your speech was "slurred" your face was "flushed." Furthermore, the Boarding Report indicates that you had a .081 Blood Alcohol Concentration (BAC) and performed poorly on all of the Field Sobriety Tests (FST's) administered. The Boarding Report outlined your performance in each of the FSTs: (1) In the "A-B-C Test," you hesitated in your recitation; (2) In the "Counting Test," you hesitated while counting backwards from 25 to 1; (3) In the "Finger Count," you miscounted in addition to improperly counting and touching your fingers; (4) In the "Palm Pat," you did not speed up and slid your hands; (5) In the "Finger to Nose," you missed your nose, used a searching pattern and hesitated; (6) In the "Horizontal Gaze Nystagmus," you moved your head; (7) In the "Walk and Turn," you stepped off the line and executed improper turns; and (8) In the "One Leg Stand," you swayed for over eleven seconds and had to raise your arms. While I agree that each of these factors, alone, might not have been sufficient cause for a conclusion of intoxication, taken together, they are. I am persuaded that the results of the chemical test, FST's and the personal observations of the Coast Guard boarding officers concerning your manner, disposition, speech, muscular movement, and behavior constituted substantial evidence for the Hearing Officer to conclude that you were intoxicated.

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, I am inclined to further mitigate the penalty based upon the evidence you submitted on your behalf. I particularly note your many years of safe and responsible boating, as well as your recent medical problems and the costs associated therewith. Therefore, I believe a penalty of \$250 vice a \$750 civil penalty is appropriate for this offense.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$250.00** by check or money order

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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