



16780

[REDACTED]  
[REDACTED]  
[REDACTED]

August 19, 2002

RE: MV00003808  
UNNAMED  
([REDACTED])  
[REDACTED]  
\$500.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00003808, including your appeal as owner of the UNNAMED recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$500.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 173.27(a)(1)	Failure to have vessel's number, as required by 173.15, painted on or permanently attached to each side of the forward half of the vessel.	WARNING
33 CFR 95	Operating a vessel while intoxicated.	\$500.00

The violations were observed on June 17, 2000, when Coast Guard Boarding Officers conducted a safety inspection of your recreational vessel while it was located at the Seabrook Boat Launch on Lake Ponchatrain, near New Orleans, Louisiana.

On appeal, you do not raise any specific issues and simply assert that you are "formally filing an appeal" to the Hearing Officer's decision." Therefore, I have reviewed the file for substantial evidence to support the Hearing Officer's conclusions. Your appeal is denied for the reasons described below.

I will begin by addressing your alleged violation of 33 CFR 173.27(a)(1). The record evidences that you commented on this violation both at your hearing and in your written correspondence dated March 14, 2001. In the latter, although you acknowledged that "[a]ccording to...[your]...boat registration the number is [REDACTED]" while you acknowledge that the "boat has numbers [REDACTED]" painted on it, you contend that those numbers were already affixed to the vessel when you purchased it. You further

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assert that, upon a review of the “mounting detail instructions it shows the decal goes within 6 inches of the numbers (which is LA xxx (3 digits) xx (2 letters).” The Hearing Officer’s notes from the hearing held on July 6, 2001, further indicate that you also asserted that during a previous boarding of your vessel, no mention was made of the incorrect numbering and that you have subsequently corrected the problem. Finally, you asserted that, at the time that you registered your vessel, the State of Louisiana gave you a diagram depicting how the numbers should be placed on the vessel. You provided a copy of that diagram which was marked as Exhibit #1 by the Hearing Officer. As you noted at the hearing, the mounting instruction clearly reflects a vessel numbered with only three digits, as your vessel was numbered.

33 CFR 173.27(a)(1) makes clear that each vessel number required by 33 CFR 173.15 must “[b]e painted on or permanently attached to each side of the vessel.” 33 CFR 173.15 states that “no person may use a vessel...unless...[i]t has a number issued on a certificate of number by the issuing authority in the State in which the vessel is principally used.” The Louisiana Boat Registration Certificate issued for your vessel clearly indicates that the vessel’s Louisiana Number is [REDACTED]. Therefore, to be in compliance with the Coast Guard’s regulations, that number must be appropriately affixed to the vessel. Furthermore, while I acknowledge that the mounting instructions given to you by the State of Louisiana clearly contemplate a vessel with only three numerals in its state number, I do not believe that that instruction is conclusive on the issue at hand. The mounting instruction does not specifically refer to the placement of a vessel’s number, but rather is meant to instruct a vessel owner as to the proper location for the decal indicating the date of expiry of the vessel’s state documentation certificate. Therefore, I find the violation proved and will not dismiss the “warning” assessed by the Hearing Officer.

I will now address your contentions with respect to the boating while intoxicated charge, beginning with the procedural concerns that you raised in your letter of March 14, 2001. In your initial letter to the Hearing Officer, you noted that “[t]he Department of Public Safety and Corrections (Public Safety Services) cleared and re-instated...[your]...Driving Privileges without any type of penalty or fine” and that “the [REDACTED] has dismissed the Driving Under the Influence of Alcohol charges” assessed against you. You conclude that this case “is possibly Double Jeopardy.” I do not agree.

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 Lake Ponchartrain 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 taken by the State of Louisiana. 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 the instant case. Indeed, the Federal government is not precluded from imposing both criminal and civil sanctions for the same conduct. See, *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489 (1972).

In your letter dated March 14, 2001, you also argued that your arrest in this case was in violation of your Miranda rights. To that end, you asserted that you were neither read your rights nor informed that your refusal to submit to a chemical test would have “possible consequences” on your driver’s license. Your arguments regarding the Coast Guard’s failure to advise you of your rights are without merit. Miranda applies only to criminal proceedings. The Coast Guard civil penalty procedures are administrative civil penalty procedures. Therefore, the Coast Guard boarding officers were not required to advise you of your rights under Miranda. See, *U.S. v. Ward*, 448 U.S. 242, 248 (1980); *Villegas-Valenzuela v. INS*, 103 F.3d 805, 813 (9<sup>th</sup> Cir, 1996); and *U.S. v. Independent Bulk Transport, Inc.*, 480 F.Supp. 474 (S.D.N.Y. 1979).

I will now address the violation in issue. 33 CFR 95.030 makes clear that “[a]cceptable evidence of intoxication includes, but is not limited to: (a) Personal observation of an individual’s manner,

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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.” Contrary to your assertions, the record indicates that there is substantial evidence to support the Hearing Officer’s determination that you were intoxicated at the time of the boarding, even absent considerations of your refusal to submit to a chemical test. The Coast Guard Boarding Report indicates that you had a “strong” odor of alcoholic beverage on your breath and that your speech was “mumbled,” “slurred” and “stuttered.” The report further indicates that your face was “pale,” your eyes were “bloodshot” and that you were “belching.” In addition, the report indicates that, during the boarding, you were both “talkative” and “indifferent.” The report further indicates that you preformed poorly on six out of seven of the Field Sobriety Tests (FST’s) administered: (1) In the “A-B-C Test,” you hesitated; (2) In the “Count from 25 to 1,” you hesitated; (3) In the “Finger Count,” you miscounted, slid your fingers, did not speed up and improperly touched and counted your fingers; (4) In the “Palm Pat,” you slid your hands; (5) In the “Walk and Turn,” you could not keep your balance, missed heel-toe, stepped off the line, raised your arms and made an improper turn; and (6) In the “Horizontal Gaze Nystagmus,” you showed a lack of smooth pursuit in both eyes and distinct nystagmus at max deviation and nystagmus onset before 45 degrees in both eyes. 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 of the 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.

Furthermore, under 33 CFR 95.040, if an individual refuses to submit or cooperate in the administration of a timely chemical test when directed by a law enforcement officer, based on reasonable cause, evidence of the refusal is admissible in evidence in any administrative proceeding and the individual will be presumed to be intoxicated. That presumption is, however, a rebuttable one.

It is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and resolve conflicts in evidence. I find no abuse of discretion in his conclusion that the presumption of intoxication operated in this case. While the presumption created by your refusal to submit to the chemical test is a rebuttable one, the evidence that you have provided on your behalf simply has not overcome that presumption. By electing to not take the test, you voluntarily placed yourself in the position of having the presumption operate against you. Once the presumption was created, the burden to provide substantial evidence to rebut the presumption rested with you. Although, in your letter dated March 14, 2001, you asserted that you were never asked to submit to a chemical test, the record contains clear evidence to the contrary. Both the written statement of boarding officer [REDACTED] and the report of the [REDACTED] indicate that you refused to submit to a Breathalyzer test. In light of the CG-4100 Boarding Report and because you admit that you were drinking on the day of the incident, I am not persuaded that the Hearing Officer erred when he found the presumption was not sufficiently rebutted by your own self-serving statements. Furthermore, for the purposes of 33 CFR 95.020(c), as discussed above, there is enough evidence in the record to find you intoxicated absent the Coast Guard’s presumption. Therefore, I find the violation proved and will not mitigate the penalty assessed by the Hearing Officer.

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 penalty of \$500.00 rather than the \$1,350.00 preliminarily assessed by the Hearing Officer or the \$7,200.00 maximum permitted by statute appropriate in light of the seriousness of the violation.

RE: CIVIL PENALTY

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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 100160  
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % 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, U.S. Coast Guard Hearing Office (GC-HO)  
Commander, Finance Center (OGR)