



[REDACTED]  
[REDACTED]  
[REDACTED]

16780  
December 30, 2002

RE: MV01002612  
M/V [REDACTED]  
[REDACTED]  
\$950.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV01002612, which includes your appeal as operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$950.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2302(c)	Operating a vessel while intoxicated.	\$750.00
46 USC 2302(a)	Operation of a vessel in a negligent manner or interference with the safe operation of a vessel so as to endanger the life, limb or property of a person.	\$200.00

The violations were observed on July 4, 2001, when Coast Guard Boarding Officers boarded the M/V [REDACTED] while it was underway on Lake Erie, near Fairport, Ohio.

On appeal, you deny the intoxicated operation charge, but make no direct mention of the negligent operation charge. With specific regard to the alleged violation of 46 USC 2302(c), you contend that you were "very nervous and not feeling well" during the Coast Guard boarding of the vessel. You assert that you were given "poor instructions from the boarding officer" as to the Field Sobriety Tests (FST's) administered and your rights with respect to the administration of a chemical test. You add that you did not understand that you could "dispute that...[you were]...very nervous and not feeling well on the performance report pre test question section," and note that you "did not have enough time to acknowledge refusal [of the chemical test] from the officer." You contend that your hesitation in taking the test was the result of the fact that you

December 30, 2002

were “nervous.” You add that you would have taken the test “if the boarding officer would of come back to...[you]...after he jumped to give the test to [REDACTED].” To that end, you assert that “the boarding officer did not follow complete guid[e] lines” with respect to the administration of the FST’s and note that “it seemed like he was in training.” You conclude that “the final penalty of \$950.00 is outrageous...[and add that you]...do not have that kind of money.” Your appeal is denied for the reasons described below.

Since you do not contest the Hearing Officer’s conclusion that a violation of 46 USC 2302(a) occurred, I find the violation proved. Given the seriousness of the violation, compounded by the fact that your vessel did not have a sufficient number of life jackets on board, I will neither mitigate nor dismiss the monetary civil penalty assessed by the Hearing Officer.

I will now address the intoxicated operation charge. 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, 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 Boarding report shows that you he had a “strong” odor of alcoholic beverage on your breath and that your speech was both “slurred” and “confused.” The report further indicates that your face was “flushed” and that your eyes were “watery.” In addition, the report indicates that, during the boarding, your were “talkative,” “hiccupping,” “belching,” and “laughing.” The boarding report also makes clear that you performed poorly on all FST’s administered: (1) In the “A-B-C Test,” you sang and missed letters; (2) In the “Backwards Count,” you missed and repeated numbers and hesitated; (3) In the “Finger Count,” you miscounted, failed to speed up and improperly counted your fingers; (4) In the “Palm Pat,” you did not speed up and were unable to complete the test; (5) In the “Finger to Nose,” you hesitated; (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; and, (7) In the “Walk and Turn,” you were unable to keep your balance, missed heel-to-toe, stepped off the line and used your arms to balance. 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, I note that it is the responsibility of the Hearing Officer to assess the reliability and credibility of evidence and to resolve any conflicts in the evidence. Although you contend that your poor FST results were the result of poor instructions, nervousness and sickness, the record evidences that you were given proper instruction as to the FST’s. Furthermore, the boarding report makes clear that you were asked whether you were sick or injured before the

December 30, 2002

administration of FST's and that you answered in the negative. Therefore, I see no abuse of the Hearing Officer's discretion in basing his decision on your FST results.

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. In the light of the facts contained in the record, I am not persuaded that the presumption was sufficiently rebutted.

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 appropriately 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 you contend that you were not given the opportunity to refuse the chemical test, the Coast Guard Boarding Report offers a view of the incident and of your behavior that is decidedly different. 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 violations 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 \$950.00 rather than the \$6,100.00 maximum permitted by statute appropriate in light of the seriousness of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$950.00** 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 3% 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

RE: CIVIL PENALTY MV01002612

16780

December 30, 2002

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