



16780

[REDACTED]
[REDACTED]
[REDACTED]

October 9, 2002

RE: MV00002426
[REDACTED]
Unnamed ([REDACTED])
\$500.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00002426, which includes your appeal as owner/operator 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 173.21(a)(1)	Use of a vessel without a valid Certificate of Number or temporary certificate on board.	Warning
46 USC 2302(c)	Operation of a vessel while intoxicated.	\$500.00

The violation was observed on June 9, 2000, when Coast Guard boarding officers boarded your recreational vessel [REDACTED] while it was underway in Black Creek, Michigan.

On appeal, you do not deny the alleged violation of 33 CFR 173.21(a)(1), but deny the violation of 46 USC 2302(c). While you admit to consuming alcoholic beverages on the day of the boarding, you contend that the "consumption does not constitute intoxication by any measurable guidelines since less than one beverage was consumed in one hours time." You further contend that the Coast Guard violated your constitutional rights by refusing to give you a blood test in lieu of the Breathalyzer test when you requested the same. You further contend that because the boarding was "a 'random boarding' with no irregular boating activities sighted...jurisdiction, and ultimate authority is with the [REDACTED] department" who chose to "unconditionally" release you. Citing the testimony of two witnesses, you contend that "cooperation was given and all sobriety tests were undoubtedly passed" and add that, through out the boarding, Coast Guard boarding officers "treated this case in a biased prejudicial manner." You conclude that "both standards [of intoxication] stated in [the] Federal Regulations at 33 CFR 95.040(a) were not violated and not proved." Your appeal is denied for the reasons described below.

October 9, 2002

Since jurisdictional issues may obviate review of other, substantive issues, I will first address your contention that the Coast Guard does not have jurisdiction to bring the instant civil penalty case against you. In essence, you contend that because “the boarding took place while the Coast Guard was on land” and because “no irregular boating activities [were] sighted, mentioned or written [in the Coast Guard report]...jurisdiction, and ultimate authority is with the [REDACTED] Department.” I do not agree. In your letter dated December 1, 2000, you indicate that Coast Guard boarding officers were on land, evidently “flagging” vessels over to them to conduct “spot checks.” I also note that the Boarding Officer’s statement indicates that he was on patrol in a Coast Guard 41-foot vessel at the time of the boarding. Your conclusion that the Coast Guard does not have jurisdiction in the instant case because the boarding officers were not actually “on the water” during the boarding is completely without merit. 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 (11th Cir.1983); *United States v. Clark*, 664 F.2d 1174, 1175 (11th Cir.1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5th 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, 64 L. Ed. 2d 815 (1980). Furthermore, 14 USC 89(a) affords the Coast Guard broad authority to board *any vessel at any time* for the “prevention, detection, and suppression of violations of laws of the United States.” Indeed, 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 you will note, there is no requirement that the Coast Guard be “on the water” during the boarding of the vessel. Rather, the key jurisdictional element in Coast Guard enforcement is that the vessel in issue be on the navigable waters of the United States. In the instant case, your vessel was clearly on the navigable waters of the United States and, as such, the Coast Guard properly had jurisdiction over it.

I further note that any action, taken or not, by the [REDACTED] Department with respect to the violation in issue does not preclude the Coast Guard from initiating administrative civil penalty action. The Coast Guard's actions in this case are in no way barred by any action taken or not taken by the State of Michigan. The waters of Black Creek, Michigan 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 Michigan. 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. 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). Therefore, regardless of whether the State of Michigan or the [REDACTED] department chose to bring criminal charges against you for the incident in issue, such action is appropriate on the part of the Coast Guard.

I will now address the violations in issue. Because you do not deny the violation of 33 CFR 173.21, I consider it proved. Next, I address your alleged violation of 46 USC 2302(c). Your main contention on appeal is that you did not refuse to submit to a chemical test, but, rather, that

October 9, 2002

your constitutional rights were violated when you were not allowed to submit to a blood alcohol test. In your letter dated December 1, 2000, you note that you “have always doubted the validity of a breath-a-liser (sic) test” and further note that you “undoubtedly passed” all of the sobriety tests administered by the Coast Guard. You conclude that “both standards [of intoxication]...at 33 CFR 95.040(a) were not violated and not proved.” I do not agree. Indeed, I am confident that even absent the presumption of intoxication that operated upon your refusal to submit to the Breathalyzer test, there is sufficient evidence in the record to allow me to conclude that you were intoxicated while operating your vessel on the evening of June 9, 2000.

I will begin by addressing your contention that your constitutional rights were violated when the Coast Guard refused to allow you to take a blood alcohol test rather than a Breathalyzer test. Initially, I note that constitutional issues are not resolved at administrative proceedings. *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 39 L. Ed. 2d 389, 94 S. Ct. 1160, 1974 U.S. LEXIS 108 (1974); *Oestereich v. Selective Serv. System Local Bd. No. 11*, 393 U.S. 233, 21 L. Ed. 2d 402, 89 S. Ct. 414, 1968 U.S. LEXIS 1 (1968) (Harlan, J., concurring in the result). As such, the Commandant is not vested with the authority to decide constitutional issues; that is exclusively within the purview of the Federal courts. I have, nonetheless, reviewed the record with the constitutional issue that you raise in mind and find that argument to be unpersuasive. Simply put, there is no Constitutional right to have a specific kind of blood alcohol testing. While you doubt the validity of Breathalyzer tests, I note that that the Coast Guard considers the ALCO SENSOR III to be a valid chemical test that provides substantial evidence of one’s level of blood alcohol content. Therefore, I am confident that your constitutional rights were not violated when the Coast Guard refused to test your blood alcohol level by means of a blood test.

I will now address the violation in issue. 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.” The record clearly indicates that there is substantial evidence to support the Hearing Officer’s determination that you were intoxicated, even without consideration of your failure to submit to the chemical test. The Boarding Report of the incident indicates that you had a “strong” odor of alcohol on your breath, that your speech was “slurred,” and that your eyes were “bloodshot.” You were also found to have an “indifferent” and “insulting” attitude. Although you contend that all field sobriety tests were “undoubtedly passed,” the Coast Guard boarding report indicates that you performed poorly on all of the tests administered. You “sang” during the “Alphabet Test,” hesitated during the “Backwards Count,” and improperly touched your finger during the “Finger Count.” In the “Palm Pat,” you slid your hand, improperly counted and were unable to complete the test. Finally, in the “Horizontal Gaze Nystagmus,” you showed a lack of smooth pursuit in both eyes, distinct nystagmus at max Deviation and Nystagmus onset before 45 degrees. While I agree that each of these factors, alone, might not have been sufficient cause for a conclusion of intoxication, taken together, I am confident that the results of the Field Sobriety tests, as well as the personal observations of the Coast Guard boarding officers constitute substantial evidence of intoxication under 33 CFR 95.030.

October 9, 2002

Although I have concluded that there was substantial evidence in the record to support a conclusion of intoxication absent the administration of a chemical test, I believe a discussion of the chemical test in issue is relevant to the disposition of this case. The record indicates that you refused to take the chemical test, thus invoking the Coast Guard's presumption of intoxication. 33 CFR 95.040(a) provides that "[i]f an individual refuses to submit to 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 any administrative proceeding and the individual will be presumed to be intoxicated." Given the facts stated above, the record is clear that pursuant to 95.035, the Boarding Officers had sufficient reasonable cause to direct that you submit to the chemical test. Because you refused to do so, a presumption of intoxication arose. The record indicates that, to rebut the Coast Guard's presumption of intoxication, you have noted several discrepancies in the boarding report that you contend indicate that the boarding officer "treated this case in a biased and prejudicial manner." Specifically, you contend that your height and weight are incorrectly noted on the Coast Guard sobriety test report and that the shorts you wore on that day were not "plaid" as indicated in the report but, rather, were striped. You further contend that the report incorrectly indicates that a taxi was called to pick you and the other persons aboard the vessel up following the Coast Guard's termination of your voyage. Contrarily, you contend that your passenger called a friend for a ride. While I acknowledge that the report may contain some errors, I am confident that those errors are harmless. Indeed, the descriptive information contained in the report is to ensure that violators are properly identified for further administrative proceedings. Given that you provided the boarding officers with a copy of your Michigan driver's license during the boarding, I am confident that you are the responsible party and that you have been properly identified. Furthermore, the other errors that you cite in the report, including the issue of whether or not a taxi was called for you, have no bearing on the violation in issue. While you contend they show a bias on the part of the Coast Guard boarding officers, I do not agree. Furthermore, it is the responsibility of the Hearing Officer to assess the reliability and credibility of the information contained in the record. After a thorough review of that evidence, I see no abuse on the part of the Hearing Officer. Therefore, I agree with the Hearing Officer that you have provided no credible evidence to rebut the Coast Guard's presumption of intoxication. As a consequence, I believe that the Hearing Officer would be correct to conclude that you were intoxicated based upon either 33 CFR 95.030(a) or 33 CFR 95.030(b).

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 \$900.00 preliminarily assessed or the \$5,000.00 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 **\$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. It appears from the case file that you may already have paid this penalty. If so, no further action is required. If not, send your payment to:

RE: CIVIL PENALTY

16780

October 9, 2002

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
Commander, Finance Center