



[REDACTED]
[REDACTED]
[REDACTED]

16780
December 30, 2002

RE: MV00003461
[REDACTED]
[REDACTED]
\$1,350.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00003461, which includes your appeal as owner of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,350.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 175.15(a)	No person may use a recreational vessel unless at least one Type I, II, or III PFD is on board for each person.	\$350.00
46 USC 2302(c)	Operating a vessel while intoxicated.	\$1000.00

The violations were observed on July 15, 2000, when Coast Guard boarding officers boarded the unnamed recreational vessel [REDACTED] while it was underway in Port Washington Harbor, on Lake Michigan, near Port Washington, Wisconsin.

On appeal, you deny the violation of 46 USC 2302(c), but admit the violation of 33 CFR 175.15(a). With respect to the intoxicated operation charge, you contend that you were "not even operating" your vessel on the evening in issue and state that you were simply "standing in the bow...the whole time." You further assert that while your vessel was docked, you "drank the operator's beer and another beer...while...[you]...sat and whated (sic) fire works in the harbor before he [the Coast Guard boarding officer] gave...[you an]...intoxication test." You further assert that you were "appualed" (sic) when your case went to court in Wisconsin. Finally, you contend that you have "four other adult whitwesses (sic) and 6 minor and child whitwesses (sic) who will support your version of the events in question. Your appeal is denied for the reasons discussed below.

December 30, 2002

Before I begin, I believe a brief recitation of the facts is in order. The record indicates that while the Coast Guard was maintaining a security zone for the Port Washington fireworks display, it was informed by the Ozaukee County rescue boat that a vessel was suspected of being overloaded. The Coast Guard approached the vessel and determined that you were its owner/operator. Upon further investigation, the Coast Guard came to suspect that you were under the influence of alcoholic beverages and asked you whether you had been drinking that evening. At the time, you indicated that you had consumed two beers. The Coast Guard then asked your passengers if they had been drinking. When one passenger indicated that he had not, the Coast Guard suggested that that passenger assume operation of your vessel. Shortly thereafter, the Coast Guard observed the vessel's subsequent "erratic movement" and determined that it would be safer to take the vessel in side tow to a fuel pier. After mooring to the fuel pier, the Coast Guard boarding officers removed the children from aboard your vessel and allowed them to sit aboard the Coast Guard vessel during the fireworks display. The Coast Guard decided to wait until after the fireworks display to conclude their boarding. At some point thereafter, you were observed drinking a canned beverage that was later determined to be soda. Following the arrival of local law enforcement officers and upon completion of the fireworks display, the Coast Guard conducted a boarding of your vessel and subsequently determined that you were intoxicated.

Since you do not deny the violation of 33 CFR 175.15(a), I consider it proved. As such, I will neither mitigate nor dismiss the violation and its resultant civil monetary penalty. Therefore, the issue remaining before me is whether there is sufficient evidence in the record to support a conclusion that you operated your vessel while intoxicated on the evening of July 15, 2000. I believe there is.

First, I note that pursuant to 33 C.F.R. 1.07-70(a), only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. Since you did not assert that you were not the operator of the vessel to the Hearing Officer before he issued his final decision, your right to have it considered has been waived. I note, however, that even if the self-serving statements that you submitted to support your assertion were considered, the record contains sufficient evidence to allow me to conclude that you were the operator of the vessel [REDACTED] on July 15, 2000. Indeed, the statements of four Coast Guard boarding officers and the report of the Port Washington Police Department all indicate that you were the operator of the vessel on that evening.

I also believe that it is necessary to further clarify the issue of double jeopardy. Although you do not specifically raise double jeopardy as a defense on appeal, you make considerable mention of the proceedings that occurred at your municipal trial in Wisconsin. Specifically, you contend that you have "never been in such a kangaroo court in...[your]...life" and add, "[i]t was arraignment, trial and sentencing in just 45 minutes." You further assert that you were "not given a chance to call...witnesses and it was not even presided over by a judge, it was a commissioner." To make it explicitly clear, this is simply not the correct forum for you to raise your concerns regarding your state trial. As the Hearing Officer noted, 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 Michigan are subject to concurrent Federal and state jurisdiction. As such, the Coast

December 30, 2002

Guard has jurisdiction to assess a civil penalty against you, without regard to any action by the State of Wisconsin. 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).

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, 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. The Coast Guard boarding report shows that you 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 eyes were “watery” and “bloodshot” and that you were both “talkative” and “cooperative.” The report further indicates that you performed poorly on all eight Field Sobriety Tests administered: (1) In the “A-B-C Test,” you sang and “stopped at P;” (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 your fingers; (4) In the “Palm Pat,” you did not speed up and slid your hands; (5) In the “Finger to Nose,” you did not use the proper finger and hesitated; (6) In the “Horizontal Gaze Nystagmus,” you showed a distinct nystagmus at max deviation and nystagmus onset before 45 degrees in both eyes; (7) in the “Walk and Turn,” you could not keep your balance, missed heel-toe during the first nine steps and, during the next nine steps you stepped off the line and raised your arms; and, (8) in the “One Leg Stand,” you swayed, raised your arms, hopped and put your foot down. 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 the Coast Guard determined that you were intoxicated based upon the administration of a chemical test. The record indicates that your Blood Alcohol Content (BAC) was determined to be .151% via the ALCO Sensor 4 Test administered by the Coast Guard. Given that 33 CFR 95.030(b) makes clear that a person may be deemed intoxicated based upon the result of a chemical test, I find that, even absent consideration of your FST results, there is sufficient evidence in the record to allow me to conclude that you were intoxicated on July 15, 2000.

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

RE: CIVIL PENALTY

16780

December 30, 2002

\$1,350.00 penalty assessed by the Hearing Officer, rather than the \$6,100.00 maximum penalty permitted by statute to be appropriate in light of the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$1,350.00** 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 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