



16780
December 30, 2002

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00003742
[REDACTED]
Unnamed ([REDACTED])
\$375.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00003742, which includes your appeal as owner of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$500.00 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.	\$500.00

The violation was observed on September 3, 2000, when Coast Guard boarding officers boarded the recreational vessel [REDACTED] while it was underway in the Intracoastal Waterway, near Morehead City, North Carolina.

On appeal, you do not deny the violation, but request that the civil penalty assessed by the Hearing Officer be either "eliminated" or "reduced." You assert that you "have never received any wildlife or marine citation, State or Federal, during...[your]...lifetime." You further note that you "paid the State of North Carolina a substantial fine and court cost based on this conviction, plus attorney fees" and add that you were "completely cooperative" during the Coast Guard boarding of your vessel. Finally, you assert that "[t]he \$500 penalty, plus the fines and fees already paid...places a financial hardship" on you and your family. You mention that you were "informed" that, on appeal, the Commandant would "review the entire case record" in reaching his decision. In the instance of fairness, I have reviewed the entire record for evidence to support the Hearing Officer's decision. Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

I first note that the actions of the State of North Carolina have no impact on my decision in the instant case. 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 the Intracoastal Waterway are subject to concurrent Federal

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and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against you, without regard to any action by the State of North Carolina. 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, even though the State of North Carolina prosecuted you for this incident, it is appropriate for the Coast Guard to commence an administrative action against you for the same conduct. However, it is important to note that it is within the purview of the Hearing Officer to consider any fines or penalties that you have already paid in establishing the appropriate amount of the monetary civil penalty assessed.

I will now address the intoxication charge assessed against you. 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 shows that you had a “moderate” odor of alcoholic beverage on your breath, that your speech was “slurred” and that you were “slow to react” to the boarding officers. Although the record indicates that you were “cooperative” with the boarding officer, it nonetheless evidences that your face was “flushed” and your eyes were “bloodshot.” The record further shows that you performed poorly on four of the five Field Sobriety Tests (FST’s) administered by the Coast Guard boarding officers. On the “ABC Test,” you missed letters, repeated letters and hesitated. On the “Count from 25 to 1,” you missed numbers, repeated numbers and hesitated. On the “Finger Count,” you did not speed up and improperly touched fingers. Finally, on the “Finger to Nose Test,” you missed your nose. 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 regarding 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 between .147% and .155% based upon the two ALCO Sensor III tests 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 September 3, 2000.

Having determined that there is sufficient evidence in the record to support the Hearing Officer’s determination that you were intoxicated, the only issue remaining before me is whether further mitigation of the penalty is appropriate under the circumstances of this case. I believe that it is. While I note that the Hearing Officer specifically stated, in his letter dated May 17, 2001, that he considered the fact that you had “no record of prior Coast Guard violations...[were] cooperative with the boarding officers, entered a plea related to the charge in State Court and paid a fine and Court

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costs” when he mitigated the penalty from \$750.00 to \$500.00, I nonetheless note that the Commander of the Fifth Coast Guard District has recommended that the penalty assessed by the Hearing Officer be further mitigated to \$375.00. Under the circumstances of this case and in light of the evidence contained in the record, I will do as the Commanding Officer of the Fifth Coast Guard District requested and mitigate the penalty to \$375.00.

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 a penalty of \$375.00, rather than the \$500.00 assessed by the Hearing Officer or \$5,500.00 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 **\$375.00** 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