



16780  
June 1, 2006

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

RE: Case No. [REDACTED]  
[REDACTED]  
[REDACTED]  
\$1,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED] which involved the assessment of a civil penalty against your client, [REDACTED], for allegedly operating his unnamed recreational vessel [REDACTED] under the influence of alcohol. Although you did not file an appeal on your client's behalf, upon finding that the evidence you submitted following the issuance of the Hearing Officer's Final Letter of Decision was insufficient to support mitigation of the assessed penalty, the Hearing Officer took the extraordinary step of treating your subsequent comments regarding the case as an appeal of the matter. I will do the same here and, as such, the appeal is from the action of the Hearing Officer in assessing a \$2050.00 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 under the influence of alcohol or a dangerous drug.	\$2000.00
33 CFR 173.21(a)(1)	Operation of a vessel without the required Certificate of Number on board.	\$50.00

The violations were observed on September 3, 2001, when Coast Guard boarding officers boarded [REDACTED] recreational vessel while it was underway on the Detroit River near Grosse Ile, Michigan.

As I stated above, you have not filed an appeal of the Hearing Officer's decision. However, due to the fact that a hearing did not occur in the case prior to the issuance of the Hearing Officer's Final Letter of Decision, as the Hearing Officer informed you via his April 7, 2004, your letter dated March 25, 2004, has been treated as your appeal. In that letter, you did not deny that the violation occurred; rather, you requested "some consideration" of the fact that your client spent

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more than \$1,200.00 in response to the related state court action. Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

First and foremost, I feel it necessary to comment on the administration of your client's case by the Coast Guard. The record shows that the Hearing Officer issued his Preliminary Assessment Letter in [REDACTED] case on June 14, 2002. Via a letter dated July 25, 2002, you informed the Hearing Officer both that you would be representing [REDACTED] in the case and requested a hearing in the matter. Thereafter, on December 11, 2002, the Hearing Officer informed you that the hearing was scheduled for January 13, 2003, in Cleveland, Ohio. On January 3, 2003, your office contacted the Hearing Officer and informed him that you would be unable to attend the scheduled hearing.

On April 24, 2003, the Hearing Officer called your office and left an answering machine message indicating that the Hearing Officer would be holding hearings in Cleveland the week of May 5, 2003. You returned the Hearing Officer's call on April 24, 2003, and informed him that you would not be available that week. The Hearing Officer told you that he would contact you prior to the next round of scheduled hearings in Cleveland, Ohio. On September 22, 2003, the Hearing Officer called you and left a voice mail message indicating his desire to schedule a hearing in October. The following day, the Hearing Officer sent you a letter notifying you that the hearing was scheduled for October 22, 2003. In mid October, 2003, your office called the Hearing Office several times and indicated that you were having difficulty contacting your client. Nonetheless, the hearing remained scheduled for October 22, 2003. On October 17, 2003, you called the Hearing Officer and informed him that, at that point, you still had been unable to reach your client. The Hearing Officer's notes indicate that, during that conversation, you agreed to call the Hearing Officer prior to the scheduled hearing or, in the event that you would be unable to attend, waive your client's right to a hearing.

The Hearing Officer issued his Final Letter of Decision in the matter on November 21, 2003. In that letter, the Hearing Officer stated that although he made "numerous" phone calls to you prior to traveling to Cleveland for the hearing, and specifically requested that you contact him the day before the hearing to confirm your attendance, you failed to do so and, ultimately, failed to attend the hearing. Your letter to the Hearing Officer dated January 12, 2004, indicates that you feel there was some confusion on the part of the Hearing Officer regarding your ability to attend the hearing. To that end, you contend that you informed the Hearing Officer on the date of the hearing that you would be unable to attend. The Hearing Officer responded to your letter on January 16, 2004, and in his response emphatically stated that he did not hear from you regarding your inability to attend the hearing. In addition, the Hearing Officer informed you that, in the interest of fairness, he would re-open the case to allow you to submit evidence in response to the violations on your client's behalf.

One month later, on February 16, 2004, you sent a letter to the Hearing Officer within which you sought mitigation of the assessed penalty due to the considerable expenses that your client incurred as a result of the related state criminal prosecution. On February 26, 2004, the Hearing Officer sent you a letter which indicated that he did not find the evidence that you submitted on your client's behalf sufficient to necessitate the mitigation of the assessed penalty. As a result, the Hearing Officer stated that he considered the matter closed and informed you that you would have until March 26, 2004, to appeal his decision. On March 25, 2004, you sent an additional

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letter to the Hearing Officer. In that letter, you did not request an appeal of the case; rather you provided information to support your previous assertions with respect to the amount of money your client paid in the related state court action. Based upon your submission of that evidence, you requested further “consideration” of the matter by the Hearing Officer. As I mentioned above, the Hearing Officer refused to re-open the matter and, instead, elected to treat your March 25, 2004, letter as an appeal of his decision.

Having addressed the Hearing Officer’s administration of the case, at the outset, I wish to comment on the charged offenses. A review of the case file shows that the boarding of your client’s vessel resulted in two chargeable offenses, a violation of 46 USC 2302(c) and a violation of 33 CFR 173.21(a)(1). Apparently, however, when the case package was forwarded to the Hearing Officer for action, the alleged violation of 33 CFR 173.21(a)(1) was omitted from the Marine Violation Charge Sheet that the Hearing Officer sent to your client as notice of the alleged violations. Indeed, a review of the charge sheet shows that the Hearing Officer only assessed a preliminary penalty (of \$2,000.00) for your client’s alleged violation of 46 USC 2302(c). Nonetheless, the Hearing Officer’s Preliminary Assessment Letter indicated that the total preliminarily assessed penalty was \$2,050.00. I believe that the additional \$50.00 amount noted in the Hearing Officer’s Preliminary Assessment Letter included the assessment of a \$50.00 penalty for your client’s alleged violation of 33 CFR 173.21(a)(1). However, because your client was not afforded notice of the alleged violation, I will dismiss the \$50.00 penalty that the Hearing Officer assessed for that violation, leaving the \$2,000.00 penalty assessed by the Hearing Officer for your client’s alleged violation of 46 USC 2302(c) open for further consideration here.

First and foremost, the record shows that the Hearing Officer complied with the applicable procedural rules, at 33 CFR Part 1.07, in the administration of your client’s case. Indeed, the record shows, as is discussed above, that the Hearing Officer spent the better part of two years attempting to schedule a hearing in this case. In addition, the record shows that the Hearing Officer’s letter dated September 23, 2003, expressly informed you that a further “request to change the date and/or time [of the hearing] must be made at least ten days in advance of the hearing date” and that your “[f]ailure to contact...[the Hearing Office]...at least ten days in advance” could result “in waiving your right to a hearing.” The record shows that you did not reschedule the matter within the ten day time-period outlined by the Hearing Officer and that you failed to appear for the hearing. Given these facts, and the numerous other occasions that you rescheduled the matter, I do not find that the Hearing Officer erred in concluding that you had waived your client’s right to a hearing. Irrespective of that fact, the record shows not only that the Hearing Officer re-opened the case to allow you to submit evidence in mitigation on your client’s behalf, but also that you did so. Accordingly, I do not find that the Hearing Officer infringed on your client’s right to due process in any way during the administration of this case.

Given the evidence contained in the case file—including the Coast Guard Field Sobriety Test Report Form which shows that your client had a Blood Alcohol Concentration of .243% at the time of the boarding—and the fact that your client has not, at any time, denied the violation, I find sufficient evidence in the case file to support the Hearing Officer’s conclusion that the violation occurred. Therefore, the sole issue remaining for consideration is whether mitigation of the assessed penalty is appropriate under the circumstances of the case.

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The record shows that you submitted evidence to show that your client expended more than \$1,200.00 in response to the related state action. The Hearing Officer found your assertions, in that regard, unpersuasive, because you did not provide any evidence to show that your client actually paid the amounts that you alleged. While I do not find that the Hearing Officer erred in so concluding, I find the evidence that you subsequently submitted sufficient to support mitigation of the penalty assessed by the Hearing Officer. Therefore, in consideration of the further evidence provided, I will mitigate the assessed penalty by \$1,000.00.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation of 46 USC 2302(c) occurred and that [REDACTED] is the responsible party. The Hearing Officer's decision with respect to that violation was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find a penalty of \$1,000.00 rather than the \$2,000.00 assessed by the Hearing Officer or \$5,000.00 maximum permitted by statute to be 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 **\$1,000.00** 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 4.25% 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