



16780
MAR 07 2007

[REDACTED]
[REDACTED].
[REDACTED]

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$750.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal as operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing both a \$750.00 penalty and a warning 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.	\$750.00
33 CFR 175.15(c)	No person may operate a recreational vessel underway unless each child under 13 years old is wearing an appropriate Coast Guard approved PFD, or the child is below decks or in an enclosed cabin.	Warning

The violations are alleged to have occurred on June 27, 2005, after Coast Guard boarding officers commenced a boarding of the recreational vessel [REDACTED] after finding it underway on the Milwaukee River, near Milwaukee, Wisconsin.

On appeal, although you do not deny the alleged violation of 33 CFR 175.15(c), you deny operating the recreational vessel [REDACTED] while under the influence of alcohol. To that end, although you do not deny consuming alcoholic beverages on the day of the incident, you contend that you did not refuse to take a chemical test and insist, contrary to the statements of the

boarding officer, that you merely informed the boarding officers that you would be unable to perform a breathalyzer test due to a medical condition that prevented you from taking the deep breaths required during the test. You further note that you informed the boarding officers that you would be willing to “take a blood test to show that...[you were]...not under the influence.” You conclude by asserting that if you had been allowed to submit to a blood test, your assertion that you were not under the influence of alcohol at the time of the boarding “would have been proved.” Your appeal is denied for the reasons discussed below.

I will begin by addressing the alleged violation of 33 CFR 175.15(c). The record shows that you have not, at any stage during the instant proceedings, contested this violation. Since Coast Guard regulations make clear that “[t]he only issues which will be considered on appeal are those issues specified in the appeal and which were properly raised before the Hearing Officer,” I consider the violation proved and will not disturb the warning assessed by the Hearing Officer for the violation.

I will now address the alleged violation of 46 USC 2302(c). Pursuant to 33 CFR 95.030, “[a]cceptable evidence of when a vessel operator is under the influence of alcohol or a dangerous drug 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.” (emphasis added) 33 CFR 95.020(c) further provides that an individual is considered to be under the influence of alcohol or dangerous drugs 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 shows that, at the time of the boarding, you admitted that you had consumed alcoholic beverages prior to the boarding and that you had a “moderate” odor of alcohol on your breath, your face was “flushed,” and that your eyes were both “bloodshot” and “watery.” In addition, the Field Sobriety Test Performance Report for the incident shows that you performed poorly on five of the six Field Sobriety Tests (“FSTs”) administered to you during the boarding. Indeed, the report shows that although you completed the “Alphabet Test” satisfactorily, you hesitated during the “Backwards Count” test, miscounted, improperly touched fingers and failed to speed up during the “Finger Count” test, failed to speed up during the “Palm Pat” test, missed your nose and used a searching pattern during the “Finger to Nose” test, and showed a lack of smooth pursuit and distinct nystagmus onset prior to 45 degrees in both eyes during the “Horizontal Gaze Nystagmus” test. Irrespective of whether you refused to submit to a chemical test during the boarding, this evidence is sufficient to support a conclusion that you operated a vessel while under the influence of alcohol under the standard articulated at 33 CFR 95.020(c). Accordingly, I find that the record contains substantial evidence to support the Hearing Officer’s conclusion that you operated a vessel while under the influence of alcohol and I will neither mitigate nor dismiss the \$750.00 penalty assessed by the Hearing Officer for the violation.

Although I have found that there is sufficient evidence in the record to support a conclusion that you operated your vessel while under the influence of alcohol under 33 CFR 95.030(a), I believe it necessary to address your assertions with respect to your failure to submit to a chemical test. As is stated above, on appeal, you contend that you did not refuse to submit to a chemical test in this case, but rather, you simply requested that you be allowed to submit to a different test (a

blood test) than the breathalyzer test offered by the boarding officers. You contend that if you had been allowed to take a blood test as you requested, you would have been able to prove your innocence of the charge. I do not find your assertions in this regard persuasive. First and foremost, Coast Guard boarding officers are not trained in the administration of blood alcohol tests; instead, they are trained in the use of, and regularly use, breathalyzer testing machines to perform chemical testing when reasonable cause for such testing is found. The blood alcohol testing that you requested is simply not performed by the Coast Guard and there is no requirement that alternative testing methods be provided by the Coast Guard. However, that fact does not prevent individuals, like you, from arranging for alternative testing methods when they feel that they are, for some reason, unable to successfully complete the offered breathalyzer test. In this case, you could have taken steps to ensure that a blood alcohol test was performed after the boarding, and, thereafter, submitted any available test results to the Hearing Officer for consideration. The record shows that you did not do so.

The record shows that, on appeal, you provided a copy of a medical report that was compiled after you submitted to a medical examination on January 16, 2006. The report indicates that, following that examination, you were diagnosed with an enlarged uterus. Although the report indicates that you have a history of "enlarged uterus," it does not show either that you suffered from that condition at the time of the boarding or that your condition would have limited your ability to blow into the breathalyzer. In fact, a careful review of the record indicates that prior to the examination of January 16, 2006, you were unaware of the condition. Indeed, in your January 2, 2006, letter to the Hearing Officer, you stated that you did not "know why...[you]...were unable to blow hard enough for the chemical test to register." However, for the reasons discussed above and because the Hearing Officer expressly stated that he did not make "a finding that you refused to take the test," I find sufficient evidence in the record to support the Hearing Officer's conclusion that you operated a vessel while under the influence of alcohol on June 27, 2005, irrespective of your assertions regarding the offered chemical test.

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. For the reasons discussed above, I find the \$750.00 penalty assessed by the Hearing Officer, rather than the \$1,100.00 initially assessed or \$6,600.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

Payment of **\$750.00** 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. Payment should be directed to:

U.S. Coast Guard - Civil Penalties
P.O. Box 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.0% 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