



16731
February 02, 2009

[REDACTED]
Attn: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2405585
[REDACTED]
[REDACTED]
Dismissed

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2405585, which includes your appeal on behalf of [REDACTED] as alleged operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1,000.00 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 under the influence of alcohol or a dangerous drug. | \$1,000.00 |

The violation is alleged to have occurred on May 28, 2005, when Coast Guard boarding officers commenced a boarding of the [REDACTED] after observing it underway on Lake Erie approximately 1 nautical mile east of Marblehead Light.

On appeal, you deny the violation and raise three assignments of error: 1) that the Hearing Officer erred in finding, based on the presumption of intoxication set forth in 33 CFR 95.040, that [REDACTED] was under the influence of alcohol; 2) that the Hearing Officer erred in finding that evidence presented by the Boarding Officers constituted reasonable cause to suspect that [REDACTED] had a blood alcohol concentration exceeding legal standards; and, 3) that the Hearing Officer erred in finding that [REDACTED] was the operator of a vessel at the time of the boarding. Your appeal is granted for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the boarding. The record shows that on May 28, 2005, at approximately 5:30 p.m., Coast Guard personnel engaged in a law enforcement patrol observed a vessel (later determined to be the [REDACTED])

operating without any numbering or name displayed. As a result of this observation, the vessel was summoned to stop. The record shows that although it took approximately two minutes for the vessel to stop, the stop eventually occurred and a boarding was commenced. At that time, [REDACTED], who was believed to be the operator of the vessel, exited the cabin and stated that he was “sorry” it took so long to stop the vessel and explained that the delay occurred because he had been “on the phone with his wife.”

The record shows that when boarding officers boarded the vessel, they immediately observed a “large amount” of beer just outside the cabin, as well as three or four open cans of beer on the deck outside the cabin window and a cup of beer inside a box that was full of additional beer cans (estimated to contain approximately one and one-half to two cases of beer). Although only minor violations, such as a failure to have a copy of the navigation rules on board the vessel, were observed during the administrative portion of the boarding, the boarding officers quickly surmised that some or all of the vessel’s five passengers had been drinking alcoholic beverages prior to the boarding. The record further shows that after the administrative portion of the boarding was concluded, the boarding officer “mistakenly” began asking the vessel’s identified owner the pre-test questions required before the administration of Field Sobriety Tests (hereinafter “FSTs”). At that time, the vessel owner became angry and informed the boarding officer that he had not been operating the vessel. When the boarding officer further inquired as to who had been operating the vessel, all parties aboard the vessel remained silent and no person acknowledged prior operation. In an attempt to determine—for the sake of safety—the person who would be subsequently responsible for the operation of the vessel, the boarding officer asked who would be taking the vessel to the dock when the boarding was completed. Again, all parties aboard the vessel remained silent. When the boarding officer inquired further and stated that someone would have to take the vessel to the dock, the vessel’s owner finally answered the boarding officer, stating that the vessel was going to be anchored so that the parties aboard could fish, even though no fishing equipment was observed aboard the vessel.

At this time, the record shows that the boarding officer returned to the Coast Guard vessel and conferred with his fellow boarding team members regarding the circumstances surrounding the boarding. On further discussion, the boarding officers noted that they had observed a man wearing blue jeans and a brown fleece jacket operating the vessel and the boarding officer responsible for conducting the boarding then remembered that a man fitting that description had apologized for being on the phone when the stop initially commenced. As a consequence, the boarding officer commenced asking [REDACTED] the FST pre-test questions. In response, [REDACTED] asserted that he was not the operator of the vessel and the boarding officer reminded him that he had been on the phone when the boarding commenced. When the boarding officer subsequently asked [REDACTED] for his identification, he responded emphatically that he did not have any identification with him but, nonetheless, provided his full name and date of birth. During this discussion, the boarding officer noticed a “moderate odor” of alcohol on [REDACTED]’s breath and saw that [REDACTED]’s eyes were “watery.” Although [REDACTED] declined to answer most of the FST pre-test questions, he did inform the boarding officer that he had defects in his knees. The record shows that [REDACTED] appeared to be willing to submit to FST testing until the vessel owner told him not to do so. Thereafter, and presumably on this advice, [REDACTED] refused all FST testing.

The record shows that the boarding was concluded when Coast Guard personnel called the Ottawa County Sheriff's department to take custody of [REDACTED]. Sheriff's department personnel arrived on scene at approximately 6:30 p.m. and, after the boarding officers explained the circumstances surrounding the boarding, [REDACTED] was taken into police custody. When that occurred, he handed over his identification without hesitation. Due, likely to the uncooperative nature of the remaining persons aboard the vessel and suspicions that all parties aboard the vessel were under the influence of alcohol, a commercial salvage company was called to tow the vessel to the dock.

Because a violation of 46 USC 2302(c) may only be assessed against an individual who is operating a vessel, I will begin by addressing your contention that the Hearing Officer erred in finding that [REDACTED] was operating the [REDACTED] at the time of the boarding. On appeal, you contend that the facts in the record do not support a conclusion that [REDACTED] was operating the vessel. To that end, you contend that although the reports submitted by the Coast Guard boarding officers show that [REDACTED] was observed exiting the vessel's cabin, the boarding officers have not presented any evidence to show that they personally observed [REDACTED] operating the vessel. At the same time, you note that the record contains evidence to show that another individual—later determined to be “in charge of the crew”—was observed moving in and out of the cabin before the stop actually occurred and insist that this person later instructed [REDACTED] not to submit to sobriety testing because he knew that [REDACTED] had not been operating the vessel. You conclude that “[g]iven these circumstances, there is simply insufficient evidence in the record from which to conclude...[that [REDACTED]was]...the operator of the vessel, by a preponderance of the available evidence.”

I will begin by discussing the standard of proof applicable to the instant civil penalty case. Pursuant to our procedural rules at 33 CFR 1.07, the Hearing Officer's decision must be “based upon substantial evidence in the record.” See 33 CFR 1.07-65(a). The Supreme Court defined substantial evidence, both affirmatively and negatively, in *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938). The affirmative definition makes clear that “substantial evidence” “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 229. In the negative, the Court stated that “[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.” *Id.* at 230. Later court decisions have clarified the definition, stating that “substantial evidence” is the quantum and quality of relevant evidence that is more than a scintilla but *less than* a preponderance and that “a reasoning mind would accept as sufficient to support a particular conclusion.” (Emphasis added) See *LeFebvre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984) (overruled on other grounds); see also *United Seniors Ass'n v. Social Sec. Admin.*, 423 F.3d 397, 404 (4th Cir. 2005).

By contrast, the preponderance of the evidence standard involves the consideration of the evidence both in support of, and contrary to, a proposition and the weighing of each type of evidence (supporting and contrary) to determine which represents the preponderance; this standard requires that all the evidence be examined in relation to the other to determine the balance. The substantial evidence standard, on the other hand, focuses only on the evidence in support of a position or ruling and does not require any comparison or weighing. As such, the

substantial evidence standard requires only that the evidence offered in favor of a party or proposition be such that a reasonable person might accept it as adequate regardless of the type or quantity of evidence submitted in opposition to it. The substantial evidence standard does not require the balancing of conflicting evidence, as does the preponderance of the evidence standard, but is a different standard which requires a different approach and may result in an easier threshold for the party offering the evidence to prove an issue of fact. *See, e.g., Chiles v. Bowen*, 695 F.Supp 357 (S.D. Ohio 1988).

Having identified the appropriate standard of proof, I must now determine whether the Hearing Officer erred in finding that there was substantial evidence in the record to support a conclusion that [REDACTED] was operating the [REDACTED] at the relevant time. The record shows that in his Final Letter of Decision, the Hearing Officer addressed the issue as follows:

You deny that you were operating the vessel at the time of the boarding. From your letter, you imply that there was another person in the cabin with you who was operating the vessel, but you fail to identify this person.

It is the standard practice that boarding teams identify the operator on all vessels prior to making contact with the boat. This is done by sighting physical features and clothing of the operator. I have signed statements from the boarding officer, the boarding team member and the assistant boarding officer that the operator of the [REDACTED] was described as wearing a tan fleece jacket, blue jeans and sunglasses. After the boarding team came aboard the MICHELLE LYNN, you were identified from the clothes you wore as the operator.

In addition, I note that the record shows—and neither you nor [REDACTED] have denied—that when the boarding of the [REDACTED] first commenced, [REDACTED] exited the vessel's cabin and immediately apologized for the vessel's slow stop by explaining that he had been on the phone with his wife (which apparently prevented him from immediately stopping the vessel). In Coast Guard civil penalty cases, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts presented in the evidence. In this case, the Hearing Officer found substantial evidence in the record to support a conclusion that [REDACTED] was operating the [REDACTED] at the time of the boarding. While I acknowledge that the boarding officer's statements do not expressly state that they observed a person fitting [REDACTED]'s description at the vessel's helm, the statements contain substantial evidence to, nonetheless, support a conclusion that [REDACTED] was operating the [REDACTED] at the relevant time. Accordingly, I am not persuaded by your arguments with regard to [REDACTED]'s operation of the vessel.

I will now address the operating under the influence violation, itself. You raise two arguments with regard to the alleged violation: 1) that the Hearing Officer erred in finding that the Coast Guard's regulatory presumption of intoxication for refusal to submit to chemical testing operated in [REDACTED]'s case; and 2) that the Hearing Officer erred in finding that the Boarding Officers had reasonable cause to suspect that [REDACTED] had a blood alcohol concentration in excess of the legal limit at the relevant time.

After a careful review of your appeal arguments, I believe that it would be beneficial to begin by addressing the Coast Guard's operating under the influence regulations in general terms. 46 USC 2302(c) makes clear, in relevant part, that "[a]n individual who is under the influence of alcohol, or a dangerous drug in violation of a law of the United States when operating a vessel, as determined by standards prescribed by the Secretary by a regulation...is liable to the United States Government for a civil penalty." In that regard, 33 CFR 95.030 states that "[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—and you have not denied—that at the time of the boarding, [REDACTED] was uncooperative; he refused to answer questions asked by the Coast Guard boarding officers and refused to provide the boarding officers with a copy of his identification (although he later provided the same to Ottawa County Sheriff's deputies with no hesitation, at all). Moreover, the record shows that [REDACTED] had a "moderate" odor of alcohol on his breath and that his eyes were "watery." While [REDACTED] initially indicated that he would avail himself to Field Sobriety testing, after another passenger aboard the vessel told him not to submit to testing, he refused to submit to any testing, whatsoever. In addition, the record shows that throughout the course of the boarding, the boarding officers observed numerous open beer containers in the vicinity of the vessel's cabin as well as a large box that contained one and one-half to two cases of beer. These factors lead the boarding officers to conclude that "everyone on board the vessel appeared to be drinking." Indeed, in his Final Letter of Decision, the Hearing Officer summarized this evidence as follows:

Up to the point of requesting to perform field sobriety tests, the relevant evidence presented by the boarding officer was as follows. You had a moderate odor of alcohol on your breath, your eyes were watery and your attitude was indifferent. The boarding officer stated that he noticed a large amount of beer just outside the cabin when he stepped on board the vessel. Taken together, I find that these facts constituted reasonable cause to suspect that you had a blood alcohol content exceeding legal standards. At this point, it is clear that the boarding officer did so suspect. He requested that you take the field sobriety tests to which you refused all tests. Refusal of the chemical test, if reasonable cause for one exists, results in a presumption that the individual is under the influence.

The weight of the evidence proves to me that you were operating the [REDACTED] at the time of the boarding. Based on the presumption set forth in 33 CFR 95.040, I find that you were under the influence of alcohol.

On appeal, your arguments center, in effect, on the Hearing Officer's determination that the presumption of operating under the influence created by [REDACTED]'s refusal to submit to chemical testing, set forth at 33 CFR 95.040, operated in this case. Your assertions, in that regard, fail to acknowledge that in operating under the influence cases such as this one, evidence of "under the influence" may come from either the boarding officer's personal observations of an individual or through the chemical test. A careful review of the Hearing Officer's decision shows that he did not expressly find that there would be sufficient evidence in the record to support a conclusion that [REDACTED] operated a vessel while under the influence of alcohol based on the personal observations of the boarding officers. Instead, the Hearing Officer's conclusion rested on a determination that [REDACTED]'s refusal to submit to chemical testing created a presumption of operating under the influence that [REDACTED] failed to rebut through the submission of evidence.

As I noted above, "[a]cceptable evidence of when a vessel operator is under the influence of alcohol...includes, but is not limited to...[p]ersonal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior." The record shows, as the Hearing Officer noted, that [REDACTED] had a moderate odor of alcohol on his breath, that his eyes were watery, and that he was uncooperative with the boarding officers. In that respect, [REDACTED] refused to provide the boarding officers with his identification and, ultimately, refused to submit to all forms of sobriety testing. A careful review of the Hearing Officer's decision supports a conclusion that the Hearing Officer did not find this evidence, by itself, to be sufficient to support a conclusion that [REDACTED] operated a vessel while under the influence of alcohol under the standard set forth at 33 CFR 95.020(c). Since it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts presented in the evidence, I do not find that the Hearing Officer erred in so concluding.

I will now address the Hearing Officer's findings with regard to the presumption of operating under the influence set forth at 33 CFR 95.040(a). On appeal you make two arguments regarding the presumption, first that there is no evidence in the record to suggest that [REDACTED] was asked to submit to a chemical test and, second, that the Hearing Officer erred in finding that the boarding officer's had reasonable cause to request that [REDACTED] submit to the administration of a chemical test.

As I have already noted, in "operating under the influence" cases like this one, "[a]cceptable evidence of when a vessel operator is under the influence of alcohol...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." Moreover, 33 CFR 95.040(a) makes clear that:

If 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 evidence in any administrative proceeding and the individual will be presumed to be under the influence of alcohol or a dangerous drug.

As I noted above, the Hearing Officer found the violation proved upon determining that [REDACTED]'s "refusal to submit to testing" created a presumption that he was under the influence of alcohol. I believe that the Hearing Officer's conclusion, in that regard, was flawed. As I noted above, the regulation cited by the Hearing Officer, 33 CFR 95.040, expressly states that a refusal to submit to *chemical testing* creates a presumption that a party is under the influence. The term "chemical test" is defined as "a test which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use." *See* 33 CFR 95.010. In cases such as this one, the chemical test contemplated by the regulation would typically come in the form of a breathalyzer test.

After a careful review of the evidence contained in the record, I do not find that the Hearing Officer erred in concluding that [REDACTED] refused to submit to the Field Sobriety Tests requested by the boarding officer. That being said, however, I note that the record does not contain substantial evidence to support a conclusion that [REDACTED] refused to submit to chemical testing during the boarding. While I note that the FST Performance Report indicates that [REDACTED] refused chemical testing, a careful review of the statements of the boarding officers who conducted the boarding does not support a conclusion that he was expressly offered the opportunity to submit to breathalyzer testing. While I suspect that [REDACTED]'s interaction with the boarding officers and the overall tone of the boarding, itself, may have led the boarding officers to conclude that he would have refused all sobriety testing, including the chemical test, their assumption in that regard cannot justify the operation of the presumption of under the influence. That is because the operative regulation, at 33 CFR 95.040, expressly requires that the chemical test be "directed by a law enforcement officer," for the presumption to operate. In short, if the boarding officers do not ask a party to submit to chemical testing—as opposed to sobriety testing in general, the presumption cannot operate. Therefore, because the record does not support a conclusion that [REDACTED] refused to submit to chemical testing during the boarding, the Hearing Officer erred in finding that a presumption of under the influence operated in this case. Absent operation of the presumption, there is, as I have already discussed insufficient evidence in the record to support the Hearing Officer's conclusion that the violation occurred. Accordingly, I will dismiss the violation and associated \$1,000.00 penalty assessed by the Hearing Officer.

Having addressed the violation, however, I will conclude by commenting on the general nature of the boarding. I suspect—and the record supports a conclusion—that [REDACTED] was under the influence of alcohol at the time of the boarding and that, as a consequence of his awareness of that fact, he took deliberate action, including the withholding of his identification and a general refusal to cooperate with the boarding officers, in an attempt to thwart the boarding officer's efforts to protect the safety of life at sea. Operating a vessel under the influence of alcohol is a very dangerous endeavor that can lead to catastrophic consequences for not only the vessel operator, but also his passengers and the general marine community at large. In this case, the record does show—beyond question—that the Coast Guard boarding officers involved in this case maintained a level of professionalism and demeanor that should be commended, especially when one considers the overwhelming circumstances of the boarding and the understandable frustration that undoubtedly resulted from [REDACTED]'s actions during the boarding. Coast Guard boarding officers work long hours and face many dangers as maritime law enforcement

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officers. Their job is made more difficult by individuals who do not respect their authority and who actively obstruct the Coast Guard's right to conduct vessel safety inspections. I sincerely hope that, through the process of the administration of this case, [REDACTED] will gain a better understanding of the role of the U.S. Coast Guard in promoting boating safety and that he will be more cooperative should he be boarded by the Coast Guard in the future.

In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 1.07, this decision constitutes final agency action.

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