



REDACTED  
REDACTED  
REDACTED

16780  
March 31, 2008

RE: Case No. REDACTED  
REDACTED  
REDACTED  
\$800.00

Dear Mr. Eidus:

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 an \$800.00 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.	\$800.00

The violation is alleged to have been observed on August 13, 2005, after law enforcement officers from the Kirkland Police Department commenced a boarding of the REDACTED while it was being operated on Lake Washington, near Kirkland, Washington.

On appeal, you deny the violation and argue that the Hearing Officer's decision must either be reversed or dismissed. To that end, you raise four arguments on appeal, summarized as follows: 1) the Hearing Officer's decision was not based on substantial evidence in the record; 2) the presumption of intoxication based on a refusal to submit to a chemical test is impermissible under the law; 3) the Hearing Officer's decision to impose a monetary penalty over three times the "recommended fine" is arbitrary and capricious; and, 4) in finding the violation proved, the Hearing Officer "disregarded and gave no weight to probative evidence that was uncontested." Your appeal is denied for the reasons discussed below.

Before I address your appeal arguments, I believe that it would be beneficial to briefly address both the intent of the Coast Guard's civil penalty process and the applicable procedural regulations. The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded administrative due process during informal adjudicative proceedings. The rules have been both

March 31, 2008

sanctioned by Congress and upheld in Federal courts. See H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

I will now address the arguments that you raise on appeal. You first contend that the Hearing Officer's "imposition of a [c]ivil [p]enalty is not based on substantial evidence in the [r]ecord." To that end, you assert that "there is no substantial evidence in the record indicating that...[you]...operated...[your]...vessel illegally under the influence of intoxicants" and insist that, as a consequence, this case must be dismissed. Addressing the evidence contained in the record, you note that "[t]he Hearing Officer summarized the extent of the record evidence as slurred speech, bloodshot and watery eyes, a flushed face, and an odor of alcohol on...[your]...breath." You assert that the Hearing Officer's findings, in this regard, do not constitute substantial evidence, "particularly when the Hearing Officer herself discounted three out of the four indicators of intoxication" when she found that evidence as to your eyes and face were "far from definitive for a boater." At the same time, you note that the Hearing Officer addressed the "inherent subjectivity of using 'slurred speech' as an identifier when the arresting officer was unfamiliar with...[your]...speech in general." In addition, you note that the Hearing Officer commented as to the lack of "any evidence of belligerent behavior and erratic or unsafe operation of...[your]...vessel" and conclude that her findings "leave...solely the odor of alcohol on...[your]...breath" which you assert can, "in no way, shape, or form...be considered 'substantial' evidence of legal intoxication." Finally, you note that "the Hearing Officer herself found that the government had 'a weak [sic] case supporting the charge,' and applied the wrong evidentiary standard to her ruling." To that end, you contend that "it is unfathomable that the evidence presented by the government can at the same time be both 'weak' and 'substantial.'" In the same vein you assert that the Hearing Officer's decision was based on a preponderance of the evidence standard, rather than the "governing regulation's requirement that a civil penalty be based on 'substantial evidence'." I do not find your assertions in this regard persuasive.

I will begin by addressing your assertions with regard to the standard of proof applicable to the instant proceeding. As you correctly note, the Coast Guard's civil penalty procedural rules mandate that civil penalty cases be proved by "substantial evidence." 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 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." 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).

As you note in your appeal, in the instant case, the Hearing Officer found the violation proved by a preponderance of the evidence. The preponderance of the evidence standard involves the

March 31, 2008

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; this standard requires only that the evidence offered in favor of a party is 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). Accordingly, while the Hearing Officer may have erred in applying the preponderance of the evidence standard to your case, such error was harmless. In applying the preponderance of the evidence standard, the Hearing Officer made it more difficult for the Coast Guard to prove its case against you. As such, you were not prejudiced by the error.

Having addressed the standard of proof, I will now address the remaining portion of your first appeal argument: that the record does not contain “substantial evidence” to support a conclusion that a violation occurred.

The record shows that, in her Final Letter of Decision, in addition to noting that you did “not deny drinking before getting underway,” the Hearing Officer addressed the evidence in the record as follows:

The arresting officer stated that Mr. Eidus’s speech was heavily slurred, his eyes were bloodshot and watery, his face was flushed, and a strong odor of alcohol was detected on his breath. I agree that the condition of his eyes and face is far from definitive for a boater. The assessment of slurred speech is perhaps more indicative, but still subjective, especially without being familiar with his normal speech. However, they may serve as reasonable cause to direct a chemical test. Mr. Eidus did refuse a chemical test. I find that there was reasonable cause to direct a chemical test.

\* \* \*

The question remains whether he was “under the influence” of it [alcohol]. Even if the presumption to that effect is a weak one, there is nothing opposing it. All recorded observations corroborate the presumption, however weakly. You point out the lack of indicators such as erratic or unsafe operation, or uncooperative actions. Such behavior, if present, would strengthen the case, but its absence does not, in my view, tend to refute the charge. In short, the government is left with a weak case supporting the charge, but nevertheless a case that I find proved by a preponderance of the evidence.

As I have already stated, you contend that the recorded subjective observations of your manner, disposition, speech, muscular movement, general appearance, and behavior, when combined with the Hearing Officer’s ultimate conclusion that the Coast Guard’s case that you were

operating your vessel while under the influence of alcohol was “weak” do not constitute substantial evidence to support a conclusion that the violation occurred. I do not agree.

In “operating under the influence” cases such as 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.” See 33 CFR 95.030 (emphasis added). The applicable regulations further provide that an individual is considered to be under the influence of alcohol 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.” See 33 CFR 95.020(c). Moreover, according to 33 CFR 95.040, when an individual refuses to take a timely chemical test when directed to by a law enforcement officer upon reasonable cause, it is presumed that the individual is under the influence of alcohol or dangerous drugs. A careful review of the Hearing Officer’s decision shows that she found the violation proved due to the presumption of intoxication created by your refusal to submit to a chemical test. In effect, her finding that you operated your vessel while under the influence of alcohol was based not on evidence of your manner, disposition, speech, muscular movement, general appearance or behavior—evidence under 33 CFR 95.030(a)—but rather, due to your performance (or lack thereof) on the requested chemical test—evidence under 33 CFR 95.030(b). While I will separately address your assertions with regard to the presumption of intoxication more fully below, I note that after a thorough review of the record, I do not agree with the Hearing Officer’s conclusion that the government presented a “weak case” supporting the charge. Instead, after a thorough review of the record, I find that there is substantial evidence to support a conclusion that you operated your vessel while under the influence of alcohol under 33 CFR 95.030(a).

In addition, as the Hearing Officer noted, to the fact that you not only admitted to consuming alcoholic beverages prior to the relevant boarding, your speech was heavily slurred, your eyes were bloodshot and watery, your face was flushed, and you had a strong odor of alcohol on your breath, the record also shows that you refused to submit to all requested Field Sobriety Tests (FSTs). More importantly, the record shows that the Hearing Officer failed to consider your recorded poor performance on a Horizontal Gaze Nystagmus (HGN) test administered during the boarding of your vessel. Indeed, the arresting officer’s report shows that when a HGN test was administered to you, you were found to have a lack of smooth pursuit and distinct nystagmus onset prior to 45 degrees in both of your eyes. Because there is a causal connection between the ingestion of alcohol and the detectable presence of exaggerated horizontal gaze nystagmus in a person’s eyes, the HGN test is generally accepted as providing scientific evidence that can be indicative of intoxication. See e.g., *U.S. v. Horn*, 185 F. Supp. 2d 530 (D.Md. 2002); *U.S. v. Daras*, 1998 WL 726748 (4<sup>th</sup> Cir. 1998) (unreported); *Hulse v. State*, 961 P.2d 75 (Mont. 1998); *State v. Superior Ct.*, 718 P.2d 1358 (Ariz.App.1989); *Whitson v. State*, 863 S.W.2d 794 (Ark. 1993); *State v. Duffy*, 778 A.2d 415 (N.H. 2001); *State v. O’Key*, 899 P.2d 663 (Or. 1995); *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997); *Smith v. State*, 11 P.3d 931 (Wyo. 2000). While your HGN test results, in and of themselves, would not be sufficient to constitute substantial evidence of operating under the influence under 33 CFR 95.030(a), when those test results are viewed in light of the totality of the circumstances of the boarding, including recorded observations of your manner, disposition, speech, muscular movement, and behavior, and your admission to consuming alcohol in the hours prior to the boarding, I believe that the Hearing Officer would

have been correct to find that you operated your vessel while under the influence of alcohol under the standard of intoxication articulated at 33 CFR 95.020(c) even without considering the presumption of intoxication created by the applicable regulations. Accordingly, I am not persuaded by your first argument on appeal.

Your next appeal argument centers on the presumption of intoxication that arises when an individual refuses to submit to a chemical test in Coast Guard operating under the influence cases. To that end, you assert that “the mere refusal of a breath test do not make it ‘so probable’ that...[you were]...intoxicated as to be a fair and permissible presumption under federal caselaw [sic]” and, as a result, contend that “[r]efusal of a breath test does not alone indicate, support, or in anyway relate to the actual question of whether a person is intoxicated.” To support your assertion, you rely heavily on your reading of *Holland Livestock Ranch v. U.S.*, 714 F.2d 90 (9<sup>th</sup> Cir. 1983). Citing *Holland*, you note that the courts have determined that the validity of a presumption depends on “whether a sound factual connection exists between the facts giving rise to the presumption and the facts then presumed” and assert that “[w]hen a presumed fact is based on a known fact from which it does not logically flow, and that presumed fact is the sole basis for assessing a civil penalty, that presumption—and the civil penalty—cannot stand.” In the same vein, you assert that “[t]here is no good faith distinction between the presumption in *Holland Livestock Ranch* and the presumption in this case” and insist that both presumptions “presume that the given one fact, entirely unrelated and sanctionable [sic] conduct actually occurred.” For the reasons discussed below, your arguments regarding the Coast Guard’s presumption of intoxication are not appropriated raised in this forum.

In challenging the propriety of the operative presumption of intoxication, you are asserting what amounts to a constitutional challenge of a Coast Guard regulation. In effect, you are stating that your right to due process has been violated by an errant presumption. Such a challenge is inappropriately raised here. Indeed, constitutional challenges are the sole purview of the federal courts. That being said, I believe it would be beneficial to address the Coast Guard’s “Operating Under the Influence” regulations generally here.

The Coast Guard’s presumption of intoxication regulation was promulgated, along with all of the other regulations set forth in 33 CFR Part 95, via a notice and comment rulemaking. All of the regulations in 33 CFR Part 95, including the presumption of intoxication with which you take issue, were implemented to combat the problems associated with drug and alcohol use by individuals operating recreational vessels. Indeed, the Advanced Notice of Proposed Rulemaking that announced the Coast Guard’s intention to promulgate its “Operating Under the Influence” regulations (formerly referred to as “Operating While Intoxicated”) are now codified at 33 CFR Part 95, the Coast Guard announced that:

Data on recreational boating accidents compiled by the Coast Guard indicates that alcohol consumption is a causal or contributing factor in approximately ten percent of the more than 1200 fatalities which result from boating accidents each year.

\* \* \*

In the recreational boating area, the Coast Guard has concentrated on educational efforts to combat the problem. The Coast Guard and State enforcement officials

have recognized that the consumption of alcoholic beverages among recreational boaters is widespread. Drinking is facilitated because there are no laws prohibiting consumption of alcoholic beverages while underway in a boat; picnic coolers or galley facilities are frequently available to store and serve alcoholic beverages; and, whether fishing, cruising, or sailing, there are lengthy periods of time when boaters, including the operator, are not fully occupied. The slow speed of most boating activity, compared to the operation of an automobile, and the relatively unconfined nature of most waterways have contributed to a lack of awareness of the risks involved. The educational effort has concentrated on making boaters aware that “Boating and alcohol don’t mix.”

*See* Operation of Vessel While Intoxicated; Advance Notice of Proposed Rulemaking, 51 Fed. Reg. 18,900, 18,900-901 (May 23, 1986) (to be codified at 33 CFR pt. 95). There can be no question that the operation of vessels by persons who are “under the influence” of alcohol presents a dangerous—and often deadly—situation that the Coast Guard rightfully addressed via the regulations in 33 CFR Part 95.

While it is, as I have already stated, beyond my authority to assess the validity of the presumption at issue, or any other regulation promulgated by the Coast Guard—actions reserved to the federal courts—I note that your assertions with regard to the presumption, itself, are not likely to be persuasive. While there are numerous cases addressing the propriety of agency presumptions, *Chemical Manufacturers Assoc. v. DOT*, 105 F. 3d 702 (D.C. Cir. 1997), would likely illuminate any court’s decision with respect to the validity of the Coast Guard’s presumption of intoxication. In *Chemical Manufacturers*, the D.C. Circuit Court made clear that “challenges to administrative presumptions” should be treated “in the same manner as other equal protection challenges that do not involve suspect classes” and should be upheld as long as the agency articulates “a rational basis for its rule.” 105 F.3d at 706. When reviewed under a rational basis analysis, I have no doubt that the Coast Guard’s presumption of intoxication would survive judicial scrutiny.

Although it is inappropriate for me to determine whether the presumption, itself, is legally valid, it is appropriate for me to determine whether the Hearing Officer’s conclusions with regard to the operation of the presumption were valid. As I have already stated, in “operating under the influence” cases “[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.” *See* 33 CFR 95.030 (emphasis added). Moreover, as the Hearing Officer properly noted, under 33 CFR 95.040(a):

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.

33 CFR 95.035(a) makes further clear, in relevant part that “reasonable cause exists when...[t]he individual is suspected of being in violation of the standards in §§ 95.020 or 95.025.”

Accordingly, if an 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,” reasonable cause would exist to allow a law enforcement officer to direct the individual to submit to a chemical test. As I have already noted, the record shows that, at the time of the boarding of your vessel, you admitted to consuming alcoholic beverages, your speech was heavily slurred, your eyes were bloodshot and watery, your face was flushed, and you had a strong odor of alcohol on your breath. Given this evidence, I find that the Hearing Officer was correct to conclude that reasonable cause existed to allow a law enforcement officer to require you to submit to a chemical test. Accordingly, since the record shows that you do not deny refusing to submit to the test, if the Hearing Officer was correct to conclude that you failed to rebut the presumption of intoxication created by your refusal, the Hearing Officer’s determination that you operated your vessel while under the influence of alcohol would not be in error. On this issue, I note that in her Final Letter of Decision, the Hearing Officer expressly found that there was “nothing opposing” the presumption of intoxication created by your refusal to submit to the chemical test in the record and, more importantly, that “[a]ll recorded observations corroborate the presumption.” After a thorough review of the record, I do not find that the Hearing Officer erred in so concluding.

Your third appeal argument centers on the amount of the penalty assessed by the Hearing Officer for the violation. You contend that the \$800.00 penalty assessed by the Hearing Officer is arbitrary and capricious when viewed in light not only of the “admittedly ‘weak’” case presented by the government,” but also in light of the fact that the Coast Guard unit responsible for initiating the instant civil penalty case recommended a penalty of only \$250.00 for the violation. For the reasons discussed below, I find your assertions with regard to the penalty amount to be wholly unpersuasive.

First and foremost, I note that I have already determined that the record contains substantial evidence to support a conclusion that you were operating a vessel while under the influence of alcohol. As such, the assessment of a penalty is appropriate. While I agree with you that the initiating unit recommended a penalty of \$250.00 for the violation, I note—contrary to your assertion—that the Hearing Officer is, in no way, bound by the penalty amount recommended by the initiating unit. Indeed, the record shows that, upon her initial review of the case file and after finding substantial evidence to support a conclusion that the Coast Guard had established a *prima facie* case of operating under the influence against you, the Hearing Officer assessed an initial penalty of \$1,000.00 in the case. After considering the evidence that you submitted in response to the Hearing Officer’s Preliminary Assessment Letter, the record shows that the Hearing Officer mitigated the initially assessed penalty to \$800.00 based on the fact that you were required to pay \$162.00 to resolve a state negligent operation charge that resulted from the incidents giving rise to the instant civil penalty case. After a thorough review of the record, I do not find that the Hearing Officer was either arbitrary or capricious in assessing an \$800.00 monetary penalty in this case. Indeed, I note that the penalty assessed by the Hearing Officer is less than one-fifth the maximum penalty permitted by the statute authorizing the Coast Guard’s “Operating Under the Influence” regulations. *See* 46 USC 2302(c). As such, I am not persuaded by your third appeal argument.

March 31, 2008

Your final argument on appeal is that the Hearing Officer disregarded and gave no weight to probative evidence that was uncontested. Your assertion, in this regard, can best be identified as a reassertion of the other appeal arguments that you raise, that reasserts—albeit slightly differently—you contention that the Hearing Officer erred in finding the violation proved given her conclusion that the government’s case was “weak.” You conclude that the evidence in the record “clearly supports a finding that...[you]...were not operating a vessel under the influence” and insist that the Hearing Officer’s determination that the violation was proved “ignores the bulk of the record” now before me. Given my determination that the record contains substantial evidence—under 33 CFR 95.030—to support the Hearing Officer’s conclusion that the violation occurred, your final argument on appeal is not persuasive.

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. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Moreover, I find the \$800.00 penalty assessed by the Hearing Officer to be appropriate in light of the circumstances surrounding the violation.

Payment of **\$800.00** 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