



16780
July 22, 2009

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2747751
[REDACTED]
[REDACTED]
\$750.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2747751, which includes your appeal as operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$750.00 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.	\$750.00

The violation is alleged to have occurred on August 12, 2006, after Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was being operated on Muskegon Lake, near Muskegon, Michigan.

The record shows that, in accordance with the procedural rules governing the Coast Guard's civil penalty process, at 33 CFR 1.07 *et seq.*, the Hearing Officer issued a preliminary decision in your case via a letter dated February 21, 2008. Although the Hearing Officer informed of your right to examine the record and to either request a hearing or provide written evidence in lieu of a hearing, you failed to respond to the Hearing Officer's initial notification letter. As a result, and after allowing the case to remain open for an extended period of time, the Hearing Officer issued a final decision in the matter on May 27, 2008. The record shows that you responded to the Hearing Officer's final letter of decision via a letter dated June 27, 2008. In that letter, you informed the Hearing Officer that you failed to respond to the initial notification letter because you "had major medical issues" at the time the case was initiated. However, because your "medical condition" was resolved, you informed the Hearing Officer that you were "able to take care of this matter." In your letter, you further stated that you were "appealing" the Hearing Officer's decision because you "believe[d]" that you were "innocent of this charge considering

the facts of this case” and further stated that you believed that “once the Appeal Division has seen all the facts in this issue, they will see that...[you are]...innocent.” Given your assertions regarding your inability to respond to the Hearing Officer’s initial correspondence, the Hearing Officer treated your letter as a request to re-open the matter and did so via a letter dated August 4, 2008. In that letter, the Hearing Officer expressly informed you not only that he was re-opening the case but also that you would be afforded an additional thirty days within which to “provide any evidence” that you had to support your assertion that you were innocent of the alleged violation and that “the issues and the facts of the case” proved so.

The record shows that you did not respond to the Hearing Officer’s letter and that, in so doing, you provided no evidence or argument to support your assertion that you were innocent of the charged violation. Given the fact that you did not provide any evidence to support your assertions regarding the violation, the Hearing Officer issued a second final decision in the matter, finding the violation proved based upon the evidence contained in the case file, via a letter dated October 28, 2008. The Hearing Officer’s letter specifically informed you that your earlier—and only—correspondence of June 27, 2008, would be considered your appeal in the matter.

I note, as did the Hearing Officer, that you do not raise any specific issues on appeal. Instead, you simply argue that you are “innocent” of the alleged violation based on the facts of the case. Because you do not raise any specific appeal issues, I have reviewed the case file to determine whether there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred. Having done so, your appeal is denied for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the violation. The record shows that Coast Guard personnel conducting a boating safety patrol first observed the [REDACTED] at approximately 9:27 p.m. on August 12, 2006. According to the statements of the Coast Guard boarding team members, it was readily apparent that the vessel’s operator was having difficulty navigating the vessel; it was weaving back and forth and was being operated very close to the south in break wall of the Muskegon Channel. During the boarding, you were identified as the operator of the vessel. On commencing a safety inspection of the vessel, the boarding officers observed numerous open beer containers and a bottle of liquor in the port gunwale. Moreover, the boarding officers reported observing a strong odor of an alcoholic beverage on your breath and noted that you stumbled around the vessel’s deck, slurred your speech and had difficulty answering questions asked by the Coast Guard boarding team.

Because you were determined to be the operator of the vessel and showed signs of being under the influence of alcohol during the safety boarding, the boarding officers asked you to come aboard their vessel to take a chemical test. After the boarding officers explained to you the consequences of refusing either the chemical test or any field sobriety tests offered, you agreed to take a breathalyzer test. The record shows that a breathalyzer test was subsequently administered to you at approximately 9:47 p.m. The results of that test showed that you had a Blood Alcohol Concentration (BAC) of .155%. According to the boarding officers, after you were showed the breathalyzer test result, you informed them that you had had about four beers

and one mixed drink earlier in the evening. As a result of your test result, the boarding officers requested that you perform several afloat Field Sobriety Tests (FSTs). The record shows that you performed poorly on four out of five FSTs administered. After you completed the afloat FSTs, the boarding officers afforded you the opportunity to take a second breathalyzer test. The second test showed that you had a BAC of 0.154%. At that time, the boarding officers determined that you had been operating a vessel under the influence of alcohol. Due to that fact, the boarding officers elected to tow the vessel to Hartshorne Municipal launch ramp, where you would be transferred into the custody of the Muskegon Police Department. According to the boarding officers, although you performed ashore FSTs offered to you by personnel from the Muskegon Police Department, you refused to take a subsequent chemical test requested by the police officers at approximately 10:18 p.m. You were subsequently taken into the custody of the Muskegon Police and were transported to their Department for further processing.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety, security 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 procedural rules have been both 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).

As I have already stated, you have not provided any evidence or information to support your assertion that you were “innocent” of the alleged violation. 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.” 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 do not deny—that during the boarding, you admitted to consuming alcoholic beverages, had a strong odor of alcohol on your breath, stumbled around, had difficulty answering the boarding officers questions, and that you failed four of five FSTs administered to you by the boarding officers. In addition, the results of the two chemical tests administered show that on the evening of the boarding, your BAC was nearly double the legal limit (0.155% and 0.154%). As a consequence, I find that the record contains substantial evidence to support the Hearing Officer’s determination that

you operated a vessel while under the influence of alcohol under the standards set forth at 33 CFR 95.030(a) and 33 CFR 95.030(b).

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 \$750.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute, to be appropriate under 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//

F. J. KENNEY
Captain, U. S. Coast Guard
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