



16200

March 30, 2017

[REDACTED NAME OF ATTORNEY]

[REDACTED LAW OFFICE]

[REDACTED ADDRESS]

RE: Case No. 4166924
[REDACTED OPERATOR]
\$750.00

Dear [REDACTED NAME OF ATTORNEY]:

The Coast Guard Hearing Office has forwarded the file in Civil Penalty Case No. 4166924, which includes your appeal on behalf of [REDACTED OPERATOR], operator of the recreational vessel [REDACTED VESSEL]. 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 while under the influence of alcohol or a dangerous drug.	\$750.00

The violations were observed on September 4, 2011, when Coast Guard boarding officers boarded the [REDACTED VESSEL] while it was underway on the ICW in Texas, approximately 50 yards from Coast Guard Station Port O'Connor.

On appeal, you deny the violation and contend that the record lacks substantial evidence to show either that the Coast Guard observed [REDACTED OPERATOR] operating the vessel or that [REDACTED OPERATOR] was, in fact, operating the vessel. You also contend that record lacked substantial evidence to support a conclusion that [REDACTED OPERATOR] was under the influence of alcohol or a dangerous drug because initial afloat Field Sobriety Tests ("FSTs") were conducted "mostly satisfactorily" while the vessel was "rocking on the water" and because [REDACTED OPERATOR] successfully passed subsequent ashore FSTs, administered only fifteen minutes later. Your appeal is denied for the reasons discussed below.

The record shows that the Hearing Officer issued a Preliminary Assessment Letter in [REDACTED OPERATOR]'s case on January 7, 2012. That letter informed [REDACTED OPERATOR] that he would have thirty days within which to pay the preliminarily assessed penalty, request a hearing in the matter, or provide written evidence and argument in lieu of a

hearing. [REDACTED OPERATOR] failed to respond. As a consequence, the Hearing Officer issued a Final Decision, assessing a \$750.00 penalty, on March 14, 2012.

The Hearing Officer concluded that [REDACTED OPERATOR] was operating the vessel while under the influence of alcohol on the relevant date. Although you contend that the record does not contain substantial evidence to support a conclusion that [REDACTED OPERATOR] was operating the vessel, the record does support that conclusion. First, the Coast Guard Boarding Report of the incident, Form CG-4100, identifies [REDACTED OPERATOR] as operator of the recreational vessel [REDACTED VESSEL] and contains notations indicating that the vessel was observed while underway on the ICW. In addition, the Coast Guard's Narrative Summary of the incident, signed by the boarding officer, states that [REDACTED OPERATOR] was identified as the operator of the vessel. Thus, the record contains substantial evidence to support the conclusion that [REDACTED OPERATOR] operated the vessel.

According to 33 CFR 95.030, "Acceptable 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." In addition, 33 CFR 95.040(a) provides, "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."

The FST report, contained in the record, indicates that during afloat FSTs, [REDACTED OPERATOR] performed with discrepancies on the "Alphabet Test," the "Finger Count" test, the "Palm Pat" test, and the "Finger to Nose" test. [REDACTED OPERATOR] also showed distinct nystagmus at maximum deviation and onset of nystagmus prior to 45 degrees in both eyes on the "Horizontal Gaze Nystagmus" test. [REDACTED OPERATOR] did subsequently pass ashore FSTs administered by State officers.

[REDACTED OPERATOR] was asked to take a chemical test following the administration of the FSTs and he refused.

[REDACTED OPERATOR]'s performance on the afloat tests, along with alcohol-specific information contained in the record, tends to establish that he was under the influence of alcohol, as provided by 33 CFR 95.030(a), quoted above.

The same information also provided reasonable cause for the boarding officer to direct a chemical test. The presumption that arose when your client refused the chemical test was sufficient to find that your client was under the influence of alcohol. The boarding officer's observations tend in the same direction. Although the ashore FSTs constitute some evidence in rebuttal of the presumption, the Hearing Officer did not err in finding, on the basis of the whole record, that your client was under the influence of alcohol.

I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that your client is the responsible party. The

penalty is within the amount authorized. The decision of the Hearing Officer was neither arbitrary nor capricious and is affirmed.

In accordance with the regulations governing civil penalty proceedings, 33 CFR subpart 1.07, this decision constitutes final agency action.

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. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 531112
Atlanta, GA 30353-1112

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% 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,

L. I. McCLELLAND
Civil Penalty Appellate Authority
By direction of the Commandant

Copy: Coast Guard Hearing Office
Coast Guard Finance Center