U.S. Department of Homeland Security
United States Coast Guard

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16780
November 14, 2008

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2550380
[REDACTED]
[REDACTED]
Warning

Dear Mr. Busbee:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2550380, which includes your appeal as operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a warning and a $1,000.00 penalty for the following violations:

LAW/REGULATION	NATURE OF VIOLATION	ASSESSED PENALTY
33 CFR 173.21(a)(1)	Use of a vessel without a valid Certificate of Number or temporary certificate on board.	Warning
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	$1,000.00

The violations are alleged to have been observed on September 6, 2005, when a boarding of the recreational vessel [REDACTED] was conducted by personnel from the Lee County Sherriff's Office and the United States Coast Guard. The boarding was conducted after law enforcement officers allegedly observed the vessel operating at an elevated speed in the reduced speed zone under the Sanibel 'A' span causeway on San Carlos Bay, near Ft. Myers Beach, Florida.

On appeal, although you do not raise any specific issues, you presumably deny that the violations occurred. In so doing, you imply that you have further evidence to submit with regard to the violations and also indicate that you are "seeking legal counsel." Because you have not raised any specific issues on appeal, I have carefully reviewed the record to determine whether there is substantial evidence to support the Hearing Officer's conclusion that the violations occurred. Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address the violations at issue, 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, 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 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).

In addition, I note that a careful review of your appeal indicates that you may believe that you are entitled to submit further evidence in support of your assertion that the violations did not occur while the matter is on appeal. Your assertions in this regard—specifically that you have "additional information" to present—fails to acknowledge an understanding of the applicable procedural rules. While the rules allow parties to submit evidence in argument while a case is pending before the Hearing Officer, they do not allow for the submission of evidence while a case is on appeal. *See* 33 CFR 1.07-25, 33 CFR 1.07-55(b), and 33 CFR 1.07-70 (stating "The only issues which will be considered on appeal are those issues specified in the appeal which were properly raised before the Hearing Officer..."). Irrespective of that fact, however, I have carefully reviewed the record and find that, prior to the assessment of the civil penalties at issue here, the Hearing Officer followed all regulatory procedures and ensured that you were fully apprised of and had the opportunity to exercise your rights in this matter. Indeed, the record shows that you were given the appropriate notice of the initiation of the Coast Guard's civil penalty action, advised of your right to request a hearing, provide any written evidence and argument in lieu of a hearing, or pay the amount specified in the notice as being appropriate. The record further shows that, rather than requesting an in-person hearing in the matter, you submitted written evidence that you believed was relevant to the issues at hand. Perhaps more importantly, the record shows that the Hearing Officer carefully considered the evidence and correspondence that you submitted to him before issuing his May 23, 2007, final decision in the matter. In accordance with 33 CFR 1.07-65(b), you also were advised of your right to appeal the Hearing Officer's decision, which the record shows you have done. Under 33 CFR 1.07, there are no provisions for a hearing on appeal. Furthermore, since the penalty in issue is administrative in nature, and not criminal, you have no right to a formal court proceeding with respect to the violation. Nevertheless, in response to your appeal, I have carefully reviewed the entire record to ensure there is substantial evidence to support the Hearing Officer's final decision.

The record shows that in correspondence with the Hearing Officer, you indicated that although you "realize that the evidentiary procedures for the United States Coast Guard differ from those of the State of Florida" and contend that, as a result of that fact, you "firmly believe...[that you were]…charged by the United States Coast Guard and not the preliminary investigating officer, Lee County Sheriff's Deputy Kendall Wisely." Your assertions in this regard evidence a lack of understanding of the circumstances surrounding the boarding.

As you may be aware, the waters of the San Carlos Bay are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against you

for your operation of a vessel on those waters, without regard to any action by the State of Florida. Indeed, neither the applicable statute, nor any known theory regarding the enforcement authority of the Federal and state governments, precludes the Coast Guard from assessing a civil penalty in this case, regardless of the actions of the Florida law enforcement personnel involved with the boarding. *See, One Lot Emerald Cut Stones and One Ring v. United States,* 409 U.S. 232, 93 S.Ct. 489 (1972). Irrespective of that fact, however, it is worth noting that a common result of this concurrent jurisdiction is the use of joint maritime law enforcement patrols. In such patrols, personnel from state and local law enforcement offices team with Coast Guard personnel to perform maritime law enforcement operations on the navigable waters of the United States. The record shows that the boarding at issue here resulted from one such joint law enforcement patrol.

Even though it is relatively common for Coast Guard boarding officers to team with state and local law enforcement personnel to conduct maritime law enforcement patrols, different standards of proof exist for the respective agencies when violations of any kind are found during boardings. Indeed, as you indicated in your correspondence, the standard of proof necessary to impose a civil penalty at an administrative proceeding such as this one is less than what is necessary for a finding of guilt at a state or federal criminal proceeding. Because of the more serious consequences associated with a criminal trial, due process requires that an individual can only be convicted by proof beyond a reasonable doubt of every element which constitutes the offense. This has generally been described as proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. This is the highest standard of proof in the American judicial system. However, at administrative proceedings, the burden of proof is not as strict. At Coast Guard administrative proceedings, the Coast Guard must prove its case only by a preponderance of the evidence. Preponderance of the evidence means the trier of fact, here the Hearing Officer, is persuaded that the points to be proved are more probably so than not. Stated another way, the trier of fact must believe that what is sought to be proved is more likely true than not true.

Before I address the violations at issue, I believe that it would be beneficial to address the circumstances surrounding the boarding. The record shows that you and the boarding officers present decidedly different versions of the events surrounding the boarding at issue here. Statements submitted by the Coast Guard boarding officers involved with the boarding indicate that the boarding commenced after your vessel was observed operating at "an elevated speed" in the slow speed zone under the Sanibel 'A' bridge span. Upon observing this, Coast Guard personnel aboard a Lee County Sheriff's Office (hereinafter "LCSO") vessel in the vicinity indicated that they would like to conduct a boarding of the vessel.[1] As a consequence, the LCSO officer operating the patrol vessel energized his blue light and headed toward your vessel as you were heading under the bridge. The Coast Guard case file indicates that the boarding officers

[1] Under 14 USC 89(a), "[t]he Coast Guard may make inquiries, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." In examining the applicability of 14 USC 89, the courts have held that the statute authorizes the Coast Guard to exercise plenary authority to stop and board any American flag vessel on the navigable waters of the United States to conduct safety and documentation inspections, even in the complete absence of suspicion of criminal activity. *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186, 89 L. Ed. 2d 302 (1986).

had to "repeatedly energize the signal horn" to get your vessel to yield to allow the boarding to commence even though you reportedly turned around and were aware that your vessel was being hailed. As the boarding commenced, you allegedly identified yourself as a former LCSO deputy and demanded to know the names of the supervisors of the LCSO officers involved with the boarding and informed the boarding officers that you had supervised many LCSO units yourself. During the administrative portion of the boarding, you were unable to provide the boarding officers with a copy of the vessel's Certificate of Number and, during that time, boarding officers first began to suspect that you had been operating your vessel while under the influence of alcohol. According to the boarding officers, there was a "strong presence of an alcoholic beverage emitting from the vessel" at that time. The Coast Guard case file further indicates that when you were attempting to locate the vessel's Certificate, you were observed having difficulty pronouncing words and showed signs of "poor coordination." Those factors, coupled with the fact that the boarding officers observed an empty cardboard case of "Bud Light" on the deck of the vessel lead the boarding officers to question your sobriety.

Throughout the course of the subsequent inquiry, you informed the boarding officers that you had not consumed any alcoholic beverages prior to the boarding but acknowledged that your passengers had been drinking alcohol throughout the day. As all of this was occurring, you reportedly made several cellular phone calls and, at one point, indicated that you were attempting to contact the LCSO watch commander to "help you out of" the situation. Shortly thereafter, the boarding officers asked you if you would submit to afloat field sobriety testing to determine if you were capable of safely operating the vessel. You reportedly told the boarding officers that you would not because you were disabled and unable to do them. On further inquiry, you informed the boarding officers that your right hand and knees were severely injured during a crash that occurred while you were employed by the LCSO. The Coast Guard case file indicates that when the boarding officer informed you that those injuries would not hamper you ability to perform several of the sobriety tests, you continued to refuse to submit to testing. Apparently some time thereafter, the boarding officers had you board the law enforcement vessel and, at that time, informed you that none of your stated injuries precluded you from successfully performing the Horizontal Gaze Nystagmus test (hereinafter "HGN" test). At that point, you informed the boarding officers that you could not do the test because it was "too bright out." When the boarding officers subsequently moved you so that your back was facing the sun, you reportedly informed them that you could not even follow the pen used for the test because you could not "see well." Accordingly to the statements of the boarding officers, you subsequently informed them that you did not "want to lie" to them anymore and admitted that you had had "a couple of drinks" but insisted that you were "good enough" to safely complete your voyage. Upon hearing your admission, the boarding officers asked you one more time whether you would agree to submit to sobriety testing and you continued to say "no." At that time, the boarding officer informed you that based on your refusal to submit to testing and his observation of your activities throughout the course of the boarding, he believed that you had operated your vessel while under the influence of alcohol. At that time, the Coast Guard case file indicates that the boarding officers terminated your voyage and towed your vessel to the Punta Rassa Boat Ramp where both you and your passengers could be safely picked up.

Your version of the events surrounding the boarding is dramatically different. To that end, you contend that as you were traveling toward the bridge, one of your passengers threw an empty six-

pack container of Coors Light onto the floor of your vessel and that you stood on it so that it would not blow overboard. You further contend that as you came closer to the bridge, you properly slowed your speed, however, a large flats boat went by you at a high rate of speed and caused you to have to increase your speed slightly so that you could maintain your vessel in a safe operational manner. You further contend that on your approach and exit from the Sanibel Bridge, you "caused no wake" and further assert that the boarding at issue here did not commence until you were at least 150 yards from the bridge.

You contend that when the boarding officers first approached you, Officer Wisely of the LCSO asked you if you understood why your vessel had been stopped. You contend that you told him that you did not know but thought that the stop might initially have occurred because LCSO Officer Fulton, who had worked for you when you were employed as a law enforcement officer, might have initiated the stop as a joke. You imply that your statements in this regard might have angered Officer Wisely, who responded to your answer by asking you pointed questions about your employment and informing you that he, himself, looked nothing like Officer Fulton. You further assert that when you inquired as to whether the boarding officers knew any of the other people who you worked with, they informed you that "name dropping" would not "get you out of" the situation. You contend that when you informed the officers that you were not "name dropping" and insisted that you were unaware that you were "in trouble," Officer Wisely informed you that he thought you were "a smart ass" and indicated that you were "getting a citation for going too fast." You assert that all of the other officers involved with the boarding got "upset by this," a factor that was only compounded when Officer Wisely told you to "shut up." You further assert that when you advised Officer Wisely that you had not operated your vessel at an unsafe speed and told him that you were "merely trying to make conversation" with the officers during the boarding, he became increasingly abusive with you, continuing to tell you to "shut up." You further assert that when you apologized to Officer Wisely for upsetting him by asking him whether he knew the same people that you did, he informed you that "the good old days are over" and further added that he "didn't care who you knew." You state that, at this time, all of the officers involved with the boarding became "very upset" about your asking who they knew and add that while all of this was occurring you were looking for the vessel's registration, which the boarding officers had requested, but could not find it because you had become so "upset by the way…[that you]…were being treated."

In your statements, you indicate that, at this time, the boarding took an unsavory turn. You assert that the boarding officers began asking you and your passengers questions so rapidly that you could not answer them and insist that when you inquired further as to the reason for your citation and how you could pay it, your further explanation of the incident fell on deaf ears and you were labeled a "smart ass." You contend that when you insisted that you were not being a "smart ass," you were told to "take the citation" or it would "get worse." You further note that when you inquired as to how fast you should have operated in the vicinity of the bridge, Officer Wisely abruptly answered "slower." You state that as the boarding progressed and you continued to inquire as to the "speeding" violation, the officer noticed the empty alcoholic beverage container and informed you that your eyes appeared red and asked you if you had been drinking. You found this statement odd since you were wearing sunglasses at the time and the officer could not possibly have observed your eyes. You further assert that when you informed Officer Wisely that you had not consumed any alcoholic beverages, he told you that you

"smelled like a brewery." You add that when you informed Officer Wisely that one of your passengers had spilled beer on your shirt while it was laying on the vessel's floor, he again accused you of being a "smart ass."

According to your version of the events, at this time, the boarding officers attempted to commence the Field Sobriety Testing Process. In this regard, you contend that after you were informed as to what Field Sobriety Testing involved, you informed the boarding officers that you "did not know if…[you]…could perform any test on the water as…[you are]…totally and permanently disabled." You insist, however, that you told the boarding officers that you would "try" to perform the required tests. You contend that when you informed Officer Wisely of your paralysis and other injuries, and informed him that he could verify your disability by contacting the LCSO, Officer's Wisely's only response was to question whether you were refusing the tests. You add that, at this time, Officer Wisely instructed you to come over to his vessel and indicate that when you questioned whether, under your condition, you could safely transfer between the vessels, Officer Wisely informed you that if you did not, you would be charged with operating under the influence. You further add that when you asked the officer for assistance with the transfer between the vessels, Officer Wisely's only response was to inform you that if you did not take the test, he would "charge you with BUI and take you to jail." Although you reiterated to the officer that you were disabled and felt uncomfortable transferring to the law enforcement vessel, you assert that you were not offered any assistance boarding the other vessel. When you were finally aboard the law enforcement vessel, the officers began administering the Horizontal Gaze Nystagmus test. You contend that when the boarding officers instructed you to remove your sunglasses for the test, you informed them that you were having trouble with your eyes being sensitive to light. In response, the officers wisely asked you whether you "had glaucoma too." At that time, the officer's again asked you if you were refusing the test and, when you informed them that you were not, you focused on the officer's finger as you were told to, even though the officers were errantly having you perform the test while looking directly into the sunlight. You contend that this factor, and your medically acknowledged sensitivity to light, you were unable to properly perform the test. You add that your sensitivity to light led you to be unable to open your eyes as widely as the test required, a factor that was mistakenly taken as a refusal to test by the officers.

At this time, you informed the officers that you would perform any other test that they gave you. Thereafter, the officer's attempted to have you do the "Finger" test. You contend that although you informed the officers that your right side is completely paralyzed, they instructed you to open your right palm, an activity that you are medically unable to perform. Irrespective of that fact, however, you assert that you performed the test to your best ability with your left hand, although the officers refused to instruct you as to the proper performance of the test. You contend that at this time, the boarding officers concluded that you were intoxicated and informed you that you would be given a citation for "BUI." At this point, although you insist that you asked the officers to take you to the jail so that you could be given a breathalyzer test to prove your innocence, and continued to inform the officers that you were not intoxicated, your pleas went unanswered. Making matters worse, when you subsequently asked the boarding officers how you should handle the "citation" from that point forward, you were told, quite certainly that you should not attempt to fight the case because it would be only your word against that of the

boarding officers. Your vessel was subsequently towed to the Punta Rasa Boat and your voyage was terminated.

I will now address the violations at issue, beginning with the alleged violation of 33 CFR 173.21(a)(1). In relevant part, 33 CFR 173.21(a)(1) states that "no person may use a vessel….unless it has on board…[a] valid certificate of number or temporary certificate for that vessel issued by the issuing authority in the State in which the vessel is principally used." The Coast Guard's case file shows that, at the time of the boarding, you were unable to find the vessel's Certificate of Number and show it to the boarding officers who were conducting the boarding. In addition, the record shows that in correspondence with the Hearing Officer, you did not deny that you could not show the boarding officers your Certificate of Number; however, you insist that the Certificate was properly aboard your vessel but that due to the demeanor of the law enforcement officers conducting the boarding, you were nervous and, therefore, unable to find the relevant certificate. The record shows that in his Final Letter of Decision, the Hearing Officer addressed the violation as follows:

> The party has presented a copy of the vessel's registration but was unable to do so at the time of the boarding. I find sufficient evidence to support the allegation that he did not have the certificate of numbers on board; accordingly, I find the violation proved. I will issue a warning in lieu of a monetary penalty for the violation.

Given the fact that you do not deny that you were unable to produce the Certificate of Number at the time of the boarding, I find that the Hearing Officer did not err in finding the violation proved. The record shows that in reducing the assessed penalty to a warning, the Hearing Officer appropriately considered the evidence that you presented in mitigation. As such, I find the violation proved and will not mitigate the warning assessed by the Hearing Officer for the violation.

I will now address the operating under the influence violation. The record shows that the Hearing Officer addressed the violation, in relevant part, as follows:

> . . .The party has submitted a combined written defense of sixty-nine pages more or less. Again as I noted much if not most simply is not relevant. Perhaps the medical material would have been relevant to explain the party's performance on some of the field sobriety tests if he had submitted to any testing. He cannot simply refuse all testing and then attempt to justify the refusal. He should have submitted to the testing and then offered the evidence. It may be that the boarding officer would have allowed him to skip some tests because of his alleged disabilities but he simply refused to test. His multiple surgeries on his jaw might well explain his slurred speech but the slurred speech would not have prevented him from reciting the alphabet and properly identifying all 26 letters in order. The slurred speech would not have prevented him from counting numbers in a sequential order. In short, I find no justification for his refusal to submit to any testing. Furthermore, I find that the Boarding Officer had probable cause based on all the facts of this case to request the testing and the BAC. Those facts

> included but were not limited to transiting a no-wake zone at a high rate of speed, a strong smell of alcohol, empty beer container, conflicting answers about the consumption of alcohol, poor coordination, etc. A reading of 33 CFR 95.040(a) indicates that a refusal to submit to testing creates a presumption of intoxication. I find nothing in the voluminous material to rebut that presumption. I find sufficient evidence to support the charge of boating under the influence; accordingly, I find the violation proved. I will not dismiss the violation or reduce the penalty.

As I have already stated, you and the boarding officers present decidedly different versions of the events surrounding the boarding. Although the statements of the boarding officers indicate that you showed clear signs of intoxication, refused all requested tests (tacitly [by refusing to fully open your eyes], or otherwise), and, in the end, admitted that you had consumed alcoholic beverages, you contend that you were sorely mistreated by the boarding officers, that your disabilities were neither acknowledged nor understood during the boarding, that your request to prove your innocence (by taking a breathalyzer test) was disallowed, and that your flat out denial of the violation was wholly ignored.

In Coast Guard civil penalty cases, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence presented and to resolve any conflicts presented in the evidence. A careful review of the Hearing Officer's Final Letter of Decision shows that although the Hearing Officer considered the evidence that you presented and accepted your assertions regarding your level of disability, he accepted the boarding officer's version of the events with regard to your alleged refusal to submit to sobriety and chemical testing. Indeed, a careful review of the Hearing Officer's decision, as cited above, shows that he found key support to his conclusion that you operated your vessel while under the influence of alcohol based upon the presumption of intoxication created by your refusal to submit to testing.

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 your "refusal to submit to testing" created a presumption of intoxication. 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(a), expressly states that a refusal to submit to ***chemical testing*** creates a presumption of intoxication. 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. Contrary to the Hearing Officer's conclusion, therefore, the presumption of intoxication does not operate from a party's refusal to submit to Field Sobriety Testing, alone. After a careful review of the evidence contained in the record, I do not find that the Hearing Officer erred in concluding that you refused to submit to the Field Sobriety Tests requested by the boarding officer, while differing versions of the events surrounding the boarding were presented, the Hearing Officer was neither arbitrary nor capricious in determining that you refused to submit to the Field Sobriety Tests requested by the boarding officers. That being said, however, I note that the record does not contain substantial evidence to support a conclusion that you refused to submit to chemical testing during the boarding. While I note that "Details of Violation" portion of the Coast Guard's case file indicates that you "refused field sobriety and BAC testing," a careful review of the statements of the law enforcement officers who conducted the boarding does not support a conclusion that you were offered the opportunity to submit to a breathalyzer test during the boarding. While I suspect that your interaction with the boarding officers and the overall tone of the boarding, itself, may have led the boarding officers to conclude that you would have refused any test, including a chemical test, that factor does not justify the boarding officer's failure to offer you a chemical test. Indeed, given your assertions regarding your level of disability, that likely would have been the best course of action for the boarding officers to take under the circumstances of this case. Therefore, because the record does not support a conclusion that you refused to submit to chemical testing during the boarding, the Hearing Officer erred in finding that a presumption of intoxication operated in this case.

Having determined that a presumption of intoxication was not created, I must now determine whether, irrespective of that fact, the record contains substantial evidence to support a conclusion that you operated a vessel while under the influence of alcohol on the evening of the boarding. As I have already mentioned, 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). Therefore, regardless of whether a presumption of intoxication was created by your refusal to submit to requested Field Sobriety Testing, if the record contains substantial evidence to show that your mannerisms and behavior indicated that you were operating a vessel while under the influence of alcohol, I would not find that the Hearing Officer erred in finding the violation proved.

As the Hearing Officer noted in his Final Letter of Decision, there record shows that there was a strong odor of alcohol present on your vessel during the boarding and an empty beer container was observed in your vicinity. In addition, you showed poor coordination throughout the boarding and, according to the Hearing Officer both offered "conflicting answers" regarding your consumption of alcohol on the evening of the incident and refused to submit to all requested Field Sobriety Testing. As I've already mentioned, you deny consuming alcoholic beverages on the evening of the boarding and contend that your disabilities prevented you from successfully

completing any of the Field Sobriety Tests administered. To support your assertion, in this regard, you have provided medical records which show that you are "100% disabled," have had "numerous surgeries to…[your]…jaw, neck, back, hands and knees" in the years since your disabling accident (while on duty as a police officer) and that you now suffer from TMJ, chronic pain and depression.

A careful review of the record shows that the initial indicia of intoxication that you exhibited during the boarding were: 1) that "a strong presence of alcoholic beverage was smelled emitting from the vessel," 2) that an empty beer case was observed on the vessel's deck, 3) that you were "having some difficulty pronouncing words," and 4) that you exhibited "poor coordination" throughout the boarding. In addition, the record shows that, based on your conclusion that you could not perform the required Field Sobriety Tests due to your disabilities, you refused all testing except the Horizontal Gaze Nystagmus Test (hereinafter "HGN" test). While I cannot condone a refusal to submit to required sobriety testing, given the evidence that you have submitted as to your disabilities, I am inclined to accept your assertion that you refused the tests solely because you felt that you could not perform them correctly. With regard to the HGN test, the record shows that you initially informed the boarding officers that you could not perform the test because you could not see due to the level of brightness outside and that, when the boarding officers subsequently moved you beneath your vessel's bimini cover, you were found to tacitly refuse the test because you continued to squint excessively during its administration. The record shows that while the matter was pending before the Hearing Officer, you submitted medical indication which indicates that you suffer from excessive dryness to your eyes, a factor which may likely have prevented you from successfully completing the HGN test. Viewed in their totality, I do not find that the personal observations of your manner, disposition, speech, muscular movement, general appearance, or behavior provided substantial evidence to support a conclusion that you operated a vessel while under the influence of alcohol under the standard set forth at 33 CFR 95.020(c) and I will dismiss the violation.

Although I am dismissing the charge, I want to comment on what subsequently became the main focus of this case—the boarding. I firmly believe that most of the problems associated with this case could have been avoided had you simply cooperated with LSCO and the Coast Guard on the evening in question. I am surprised that someone with your law enforcement experience would delay a boarding—by "name dropping" and the like—when such endeavors might well likely be viewed, as they were by the boarding officers involved with this case, as obstructive. Moreover, it is surprising that someone with your level of law enforcement experience would fail to acknowledge that it is not for you to dictate the terms and conditions of the boarding. While I realize that the Coast Guard boarding officers involved in this case may have been relatively young, I note that the Coast Guard places significant authority on the shoulders of its junior personnel. Those individuals work long hours and face many dangers as maritime law enforcement 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 you have gained a better understanding of the role of the U.S. Coast Guard in promoting boating safety and will be more cooperative should your vessel be boarded by the Coast Guard in the future.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation of 33 CFR 173.21(a)(1) occurred and that you are the responsible party. For the reasons discussed above, the decision of the Hearing Officer to assess a warning for that violation was neither arbitrary, nor capricious, and is hereby affirmed. However, as is discussed in this decision, I find that the Hearing Officer erred in determining that the violation of 46 USC 2302(c) occurred and, as a result, I have dismissed the violation and $1,000.00 penalty assessed by the Hearing Officer for it.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 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