

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

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16200
OCT 02, 2020

[PARTY]
[ADDRESS]

RE: Activity No. 5757522
[PARTY]
[VESSEL]
\$1,500.00

Dear [PARTY]:

The Coast Guard Hearing Office has forwarded the file in Civil Penalty Activity No. 5757522, which includes your appeal as operator of the recreational [VESSEL]. The appeal is from the action of the Hearing Officer in assessing a \$1,500.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR § 25.30-20(a)(1)	Required number of Coast Guard approved fire extinguishers not onboard.	WARNING
46 U.S.C. § 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$1,500.00

The alleged violations were observed on July 28, 2018, when Coast Guard personnel observed you operating the vessel near the Sand Dollar Marina, on Bayou Rigaud, Grand Isle, Louisiana. On appeal, you maintain that you were not intoxicated or under the influence at the time of the alleged violation. Your appeal is denied, for the reasons given below.

You do not object to the Hearing Officer's finding that you were operating the vessel on July 28. You did take issue with the Coast Guard boarding officer's description of the clothes worn by the individual at the helm of the vessel, on approach to the marina. However, you do not dispute that you were, in fact, operating the vessel, and this dispute about whether the clothing you wore that day matched the Coast Guard description of your attire is not persuasive that the significant parts of the Coast Guard report might have been inaccurate.

Throughout this administrative proceeding, you have maintained that you were not under the influence of alcohol or intoxicated on July 28, 2018.

As set forth in 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.”

I agree with the Hearing Officer that the results of the field sobriety tests (FSTs) provided reasonable cause for the boarding officer to direct a chemical test. Based upon the fact that you were asked to submit to a chemical test, and that you did not submit to such a test, the Hearing Officer was entitled to presume you were under the influence of alcohol. This presumption is an independent basis for finding a vessel operator to have been under the influence of alcohol (independent, that is, from observations and FST results).

Once this presumption was established, it was up to you to present evidence sufficient to rebut the presumption that you were under the influence of alcohol. You have provided evidence and argument in rebuttal.

You offer alternative explanations for several of the observations cited by the Coast Guard boarding officer, and the Hearing Officer. These explanations do not tend to rebut the presumption established by your refusal of the chemical test. As to the scent of alcohol on your breath, your admission to drinking, and your refusal to submit to a chemical test, you maintain that all of these were the direct result of your consumption of a single bottle of beer on the way back to the dock, a beer you finished drinking “seconds before being boarded.” You state that you did not submit to the chemical test, even after being informed that a refusal would give rise to a legal presumption of intoxication, because of that single beer, “the only beverage [you] had consumed in hours,” which you feared would result in a positive breath test, because it had been so recently consumed. Your assertion that you had not consumed any other alcoholic beverage in hours did not convince the Hearing Officer that you had rebutted the presumption. Otherwise, nothing about your explanation tends to rebut the presumption.¹

You particularly object to the Hearing Officer’s response, in the Final Assessment, to your alternative explanations for some of the observations by the boarding officer. The Hearing Officer wrote, “when you refused to submit to a chemical test, your explanations lost all credibility.”

This statement by the Hearing Officer mischaracterizes the legal effect of the presumption of being under the influence that arises from a refusal to submit to chemical testing. It would be more accurate to say that, while your alternative explanations might (or might not) be sufficient to rebut an allegation of being under the influence based solely on the observations and FST results, your refusal to submit to a chemical test established a new, independent basis for finding that you had operated your vessel under the influence of alcohol, and those alternative explanations for your various behaviors do not rebut that presumption. In other words, the other explanations you offered concerning your observed behavior (as well as performance on the

¹ It is true that consumption of food or beverage shortly before a breath test may result in a contaminated breath sample from residual mouth alcohol, and consequently an inaccurate test result. The risk of contamination dissipates within fifteen minutes.

FSTs) are *irrelevant*, in rebutting the presumption arising from your refusal of the chemical test, not *incredible*, as the Hearing Officer stated.

I find substantial evidence in the record to support the Hearing Officer's conclusion that you were operating the vessel on July 28, 2018, while under the influence of alcohol. 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 \$1,500.00, 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 979123
St. Louis, MO 63197-9000

Interest at the annual rate of 2% accrues from the date of this letter but will be waived if payment is 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