



# Coast Guard Hearing Office

*“Hearing Office is our Name,  
Maritime Safety and Security is our Aim”*

We adjudicate civil penalty cases in support of the Commandant's maritime safety and security strategy to compel compliance with federal laws and regulations, and deter violations in the maritime domain. By balancing national interests, fairness, and the fundamental right to due process, we promote protection of the environment, vessel safety, and security at facilities, ports and waterways.

## GREETINGS

From CAPT R. Trabocchi, USCG  
Commanding Officer, Coast Guard Hearing Office

*Hello again,*

*It has been a busy summer for all and especially for the boarding teams who seem to be identifying a tremendous number of “boating under the influence” violations.*

*With so much work for Coast Guard field personnel to do and the transfer in / out of new personnel, we are finding that the case files sent to us are lacking in ways that prevent us from processing them. This edition will highlight some of the deficiencies we are seeing and the impact they have on the activities forwarded to us for adjudication.*

*For reference, these newsletters will be posted on our website.*

[www.uscg.mil/legal/cgho](http://www.uscg.mil/legal/cgho)

## HEARING OFFICE NEWS

To date, we have received approximately 1,850 enforcement activities with violation dates in 2007 and 2008. Due to deficiencies, some of these will be dismissed. See what that means on page 5.



The Hearing Office is happy to announce that it has added a new member to our Administrative Support Staff. Alicia Scott comes to us from the Department of Justice. We applaud our two yeomen, YN3 Victor Anderson and YN3 Christopher Brown on their extraordinary efforts during the last several months that the personnel vacancy existed.

The Hearing office said farewell to newly “pinned” CAPT Mark Rizzo and welcomes CDR David Strong aboard. CDR Strong transfers in from the DOG.

## THE FIELD SOBRIETY TESTS AND DOCUMENTATION

*CDR D. Strong*



We addressed the following in our previous Newsletter. However, we see a need to address this subject again. Boating Under the Influence (BUI) is a serious threat to safety on our waterways. One of the critical pieces of information from any suspected BUI violation is the Field Sobriety Battery Test (FST) worksheet. As Hearing Officers we rely on this document to provide the necessary reflection of a mariner's performance and the boarding officer's observations. Recently we have been seeing an alarming number of discrepancies with FST worksheets that potentially could lead to a case file's dismissal or cause it to be returned for correction.

First and foremost, the copies need to be legible and complete. A bad photo copy does not get better with age. We have had numerous occasions where critical observation information was cut off, the signature block was cut off or the quality of the copy was so poor that we were unable to read the information. In addition some cases arrive with the front or back page missing.

Another disturbing trend is missing information from the worksheet. Remember all items are on the FST worksheet for a purpose. Initial observations are key factors in determining reasonable cause to complete the FSTs and the chemical test. Secondly, when completing the chemical test portion, the entire signature block must be filled out. The information must include machine serial number, calibration date, BWI qualification date for the boarding officer and the witness signature along with the actual BAC reading. In the case of a refusal, a witness signature is still necessary.

Attention to these critical details prior to submitting the case for adjudication` will assist us in the timely and successful processing of cases and ensure mariners' are provided accurate documentation upon which to exercise their opportunity to comment.



### **FATAL FLAW: THE MISSING LOU**

*CDR P. Bartz*

The Letter of Undertaking (LOU) is a crucial document in the case file. It can mean the difference between an enforcement activity proceeding to a preliminary review by a Hearing Officer or being dismissed outright.

The LOU is a legal agreement requested by the Coast Guard to secure payment of a civil penalty should one be assessed against a foreign entity. Typically, when the foreign entity is a foreign commercial vessel, a Captain of the Port (COTP) order will initiate the requirement for the LOU. This occurs when the COTP is made aware of an alleged violation by the vessel, the statutory authority to impose a civil penalty exists, and the vessel is desirous of leaving the port. Securing the LOU allows the vessel to depart and conduct business elsewhere while the civil penalty process proceeds. Should a civil penalty be imposed, the civil penalty is collected "against" the LOU. The party's issuance of an LOU does not "admit" that a violation occurred. The LOU provides for payment in the event a violation is "proved" and a civil penalty is imposed.

The LOU is a powerful document. Without this document, international trade would be adversely impacted. It guarantees payment of a civil penalty despite where the vessel or its owner may be located at the time the civil penalty is assessed. If there is no LOU the chance of collecting a civil penalty against the foreign entity is very difficult. Therefore, before a Hearing Officer will begin review of alleged violations against a foreign commercial entity, the Hearing Officer will look to see if the *original* LOU is in the file. If it is missing, the enforcement activity will be dismissed. The original is necessary. The original reflects the original signature and "seal." A copy cannot be substituted. Therefore, in accordance with the Marine Safety Manual and Coast Guard Hearing Office

requirements, always insert the *original* LOU in the case file before mailing it to the Hearing Office.

### **KNOT**

#### **Knowledge Note Or Tip**

*Felita Jackson*



1. The Hearing Office receives many enforcement activities that began as Notice of Violation (NOV) "ticket" cases. We receive many NOV cases that have been changed to enforcement activities without evidence showing that the charged party declined the NOV. The Hearing Office will not adjudicate an enforcement activity without either the NOV form (both sides) reflecting that the box on the reverse side of the NOV has been marked "declined" OR a letter from the party or its counsel stating that the NOV is declined OR a signed statement from a Coast Guard member stating that the party verbally notified the unit that the party chose to decline the NOV.

2. The Hearing Office receives many enforcement activities that begin with a party failing to comply with a Captain of the Port (COTP) order. When a violation is alleged based on failure to comply with a COTP order, the Hearing Office must determine if the COTP order was properly issued and received. The copy of the COTP order in the case file must reflect the signature of a Coast Guard officer authorized to issue COTP orders at the particular unit. The case file must also include evidence that the COTP order was presented to, and received by, the party. This might be accomplished by including in the case file a copy of the COTP order with the party's signature and date on the bottom of the COTP order, a statement by the person who delivered it to the party, or, if mailed, a copy of the returned registered receipt with the party's signature and date.



### **DOCUMENTATION IS EVERYTHING**

*Danielle Davis and Vernon Slape*

The preliminary review of an enforcement activity begins with checking to see if certain "requirements" have been met. Most often, this takes no more than a few minutes. But if one or more of the "requirements" have not been met, the result may be that the enforcement activity is

dismissed outright. Here's a laundry list of some of the "requirements" we look for during our initial review. These are not new, but we are finding a need to re-emphasize them.

1. A complete copy of the entire case file is needed for the party. Don't forget to copy the back of documents that are 2-sided.
2. In addition to the Enforcement Summary, the Activity Summary Report (if one exists) must be included in the enforcement activity / case file. The party's copy must also include both documents.
3. Remember, whatever is submitted to the Hearing Officer must be sent to the party. Sending a full-size chart for the Hearing Officer means another full-size chart **MUST** be provided for the party.
4. Processing Officials should not add comments to the Narrative Summary of the Enforcement Summary. This block is meant for information relative to the violations. Remember, the Enforcement Summary is about the alleged violations, aggravating and mitigating factors, and prior violation history. It is not a place for administrative comments, processing official's musings about the violations, case tracking information, etc. There are appropriate places in MISLE for such "comments."
5. Submitting an enforcement activity without a narrative in the Activity Summary Report or Enforcement Summary summarizing the boarding or inspection could hinder adjudication. It is akin to submitting a listing of violations with **NO** supporting description of the boarding or inspection. This is especially true when a CG-4100 or PDA printout is not included in the enforcement activity.
6. Violations can be alleged but it means nothing without evidence. Don't forget the details in the evidence: number of items required, number of items missing; if unserviceable, how is the item unserviceable; if a Rules of the Road violation, specify inland or COLREGs waters, and so on.

### **BREAKIN' OUR STRIDE**

*Alicia Scott, YN3 V. Anderson and YN3 C. Brown*

When entering the party's information into MISLE, (example: name and address) do so by entering the information in all CAPITAL letters and placing the first and last name in the proper order. By doing these simple tasks at the time of MISLE entry, the Hearing Office can prepare party correspondence



without being slowed down to "fix" the MISLE data entries previously made by the field. Also, checking for correct grammar, spelling and punctuation at the time of data entry will help us in our efforts to meet the timeliness demands of the field and the boating public. On any given day "the demands" could mean that 100 or more letters and case files must be readied for mailing. Maintaining that "fast-pace" stride is all important!

### **THE ALL-IMPORTANT E-SIGNATURE**

*Danielle Davis*



An Electronic Signature (e-signature) authenticates or validates a statement of events pertaining to a boarding, inspection, or investigation on a document that is electronically produced. The Activity Summary Report (ASR) reflects a boarding. The ASR should always reflect the name of the Team Lead and Subject POC at the top of the report in the designated spaces. When the Team Lead and Subject POC name is the same, then it is this name that should appear on the ASR as an e-signature in the Narrative Summary block of the ASR. If there is a narrative, then place the e-signature after the narrative. If the Team Lead and Subject POC names are different, then either one of these names may appear as the e-signature. If there is no ASR (pollution case) the inspector's or investigator's e-signature or penned signature should appear on any investigative report or summary including the narrative on the face of the Enforcement Summary. All statements by any boarding team members, inspectors, and investigators should be signed—either electronically or penned.

The e-signature signifies that the statements and information are true and accurately recorded as known by the person whose name appears in the e-signature. The accepted e-signature format is: //s//First name, middle initial, last name, rate/rank//

### **YOU SEE IT, BUT DO THEY?**

*CAPT M. Rizzo*



We all know the old saying that "a picture is worth a thousand words." The use of pictures and/or video as evidence in a case can benefit both the Hearing Officer and the Party as the case is adjudicated. In a sense, the Hearing Officer is "taken" to the scene through visual evidence. If properly presented, visual evidence can assist a Hearing Officer

in understanding the facts prior to making a final decision. However, sometimes the improper submission of pictures and / or video causes the opposite result. Rather than enhancing the case review, improperly submitted pictures and / or video hinders the review. The following guidelines are provided should you have a need to submit pictures and / or video as supporting evidence.

Printed pictures are preferred to avoid the obvious difficulties that might be encountered with digital media. Whenever possible, print the pictures and send them instead of digital media. When sending pictures, ensure first that they are relevant to the violation. If so, label them accordingly, including the date and time the picture was taken and the name of the person who took the picture. Every picture should have a description of what it reflects and an exhibit or enclosure number that can be matched to a exhibit or enclosure number on the Enforcement Summary. Remember, two identical copies are necessary—one for the Hearing Office and one for the party. If the pictures are in color, then the party's copy must be in color.

If sending digital media as evidence, there are some special considerations to keep in mind: The Hearing Officer and the party must be able to "view" the CD or DVD. Please do not send VHS tapes. If we can't see it, then the evidence is not in the case file. Use a standard format compatible with most computer media viewers. Always send two copies of the CD or DVD as the party must receive a copy.

Only include pictures or video clips that are "relevant" to the violations alleged. Sending two hours of video generally isn't helpful. Ensure you label each CD or DVD as an exhibit. The enforcement activity should include a full description of what is presented in the CD or DVD, who prepared the CD or DVD, the date it was prepared and its exhibit or enclosure number.



### **MAXIMUM CIVIL PENALTY AMOUNTS**

*Vernon Slape*

All enforcement activities are created in MISLE. The creation of an Enforcement Summary includes a "charge" page for each violation identified. At the top of each "charge" page, the MISLE database will populate the fields "Law or Regulation Cite," "Description," "Statutory Authority," and

"Maximum Penalty." The data in MISLE that populates these fields can be inaccurate due to changes in law or regulation. This is especially true with respect to the Maximum Penalty.

The Maximum Penalty allowed for a violation is dependent upon the statutory authority for that particular violation. For instance, the statutory authority to impose a monetary penalty for violation of the requirement to report a marine casualty under 46 CFR 4.05-1 is 46 USC 6103. A review of this statutory authority indicates that the maximum penalty amount allowed is \$25,000. However, it is important to note that such amounts may be adjusted for inflation.

33 CFR Part 27, Adjustment of Civil Monetary Penalties for Inflation, lists the sections of the United States Code that authorize civil monetary penalties for laws administered by the Coast Guard. In our example, a review of the penalty table reflects that the maximum penalty for violation of 46 CFR 4.05-1 is \$27,500; that is the statutory maximum of \$25,000 adjusted for inflation.

With respect to 33 USC 1321(b) listed in the penalty table, note that some of the entries are followed by the words "Judicial Assessment." The penalty table in this Part reflects civil penalties that may be assessed by the Hearing Office and by those in a judicial role such as Administrative Law Judges. Depending on the forum, the maximum penalties may differ. Penalty amounts associated with the words "Judicial Assessment" are maximum penalty amounts that are not applicable to enforcement activities sent to the Hearing Office. Report errors in the MISLE populated fields (maximum penalty, statutory authority citations, etc) to HQ MISLE representatives. Errors must be corrected manually and for that to occur, the representatives must be made aware of the error.

### **WRITTEN WARNING V. CIVIL PENALTY**

Activity Summary Reports that reflect that a "Written Warning" was issued should generally not be sent to the Hearing Office for civil penalty action. Boarding Officers have the authority per 33 CFR 1.08 to issue written warnings for certain violations. The reverse side of the Boarding Report, CG-4100, expressly states that if a written warning was issued then no civil penalty will be instituted. There is an exception to this general





rule. 33 CFR 1.08-5 describes the exception. If the Activity Summary Report reflects a written warning" was issued and the processing official determines that civil penalty action is warranted, then the narrative should be annotated to reflect that the written warning has been rescinded, a prior written warning or violation issued within the described time period and, civil penalty action is being instituted as a result. Failure to do so may result in dismissal of the violations for which a written warning has been issued.

### **LACK OF RECORDS DOES NOT ALWAYS MEAN FAILURE TO DO THE ACTS REQUIRED**



Inspections often involve the request for records or documentation to reflect that an event occurred. But the lack of documentation does not always mean that the event did not occur. Take for example, the enforcement activity forwarded to the Hearing Office for violation of the requirement to conduct facility security exercises once each calendar year. The violation is "discovered" during a spring 2007 inspection and is based upon the facility's failure to produce, upon Coast Guard request, the records documenting the occurrence of the exercises. The Hearing Office sends a preliminary assessment letter to the party notifying the party of the violation and the amount of civil penalty that appears to be warranted. The party responds to the Hearing Office and forwards a copy of a letter the facility sent to the Coast Guard unit who conducted the inspection, three weeks after the inspection occurred. The letter to the unit included copies of previous annual exercise records and explained that the records were not at the facility at the time of the inspection because they had been destroyed by water during Hurricane Katrina. New copies of the records were obtained from the facility's contractor responsible for conducting the exercises. The Coast Guard unit, assumed to have received the letter and records three weeks after the inspection, should have considered the records as highly relevant evidence and cleared the violation. If the records were insufficient to clear the violation, then the enforcement activity should have included the letter and records along with an explanation as to why the records were insufficient. In this case, the enforcement activity did not include the party's letter or the records.

The lesson to be learned is to consider all evidence available before identifying a violation. When identifying the violation, be careful to focus on what the party did or did not do. The lack of records or documentation may simply mean lost paper and the inability to present it at the time, and nothing more. The party presented the records within three weeks of the inspection. The violation for failure to conduct the exercises was in error. The appropriate violation in this case would have been for failure to make the records available to the Coast Guard upon request.

### **THE DISMISSED ENFORCEMENT ACTIVITY**

An enforcement activity is dismissed when the deficiency identified is not one that is amenable to simple correction. For instance, a case is returned to the program manager with a statement of what is deficient when the deficiency is an obvious error such as the cite for the violation, the second page of the Field Sobriety Tests (FSTs) worksheet is missing and so on. Enforcement activities are dismissed when there is insufficient evidence to establish a *prima facie* case or the deficiency is not one that is believed to be quickly or easily corrected. An example might be the case in which the operator is charged but only the owner can be held responsible under the cited regulation and the enforcement activity shows no evidence that the owner is known.

A dismissal is not a death knell for the enforcement activity but really quite the opposite. A dismissal is without prejudice. This means that the unit may endeavor to correct the reason for the dismissal and resubmit the enforcement activity for Hearing Office adjudication. However there is a caveat. Due process requires timely notice to the mariner of the violation. Units should proceed at deliberate speed to correct the deficiency and resubmit a dismissed enforcement activity so that the necessary due process can be afforded to the mariner.



### ***SPECIAL EDITION COMING***

Watch our website for a Special Edition newsletter. An article by CAPT M. Rizzo and CDR P. Bartz will discuss the 75/25 rule (46 USC 8103) as seen from the decks of the Hearing Office.