



Coast Guard Hearing Office

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

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*

Happy Spring to all,
For most of us, spring brings increased activity on our waterways and in our ports. The Coast Guard Hearing Office sees an increase in workload as Coast Guard field personnel refer safety, security, pollution and other vessel and facility violations for civil penalty action.

Although our workload increases, our careful consideration of each document and piece of evidence presented in the case file is not diminished. Diligence and attention to detail during every boarding, investigation, or inspection are necessary to the successful adjudication of violations referred for civil penalty action. The information, data, and materials collected during a boarding, investigation, or inspection are relied upon by the Hearing Officer in making the proper assessments during the process.

Everyone involved in the civil penalty process plays an important role to ensure that violations referred for civil penalty action are based upon information, data or materials that are complete, properly prepared, and put together in a case file in an orderly, logical, and legible manner. All documents and evidence are reviewed to determine if there is sufficient evidence to find a violation more likely than not did occur. All aggravating, mitigating, and extenuating factors are considered during the formulation of a penalty. Due process is afforded to every party during the process and all final penalty assessments are centered around the goal of achieving compliance and deterring future violations in the maritime arena.



*These newsletters will be posted on our website
www.uscg.mil/legal/cgho.*

HEARING OFFICE NEWS



The Hearing Office has been busy with a number of violation case files received at year end. Please do not delay mailing any case files with violations that occurred in 2008 to the Coast Guard Hearing Office. We will soon be concentrating all of our efforts on case files with violations that occur in 2009.

We conduct civil penalty hearings by video-teleconference between our location in Arlington, Virginia and the Coast Guard District or Sector with video-teleconference capability nearest to the charged party. So in the future, you may be hearing from our Administrative Support Staff who handles all the coordination and logistics for these hearings.

In January 2009 some of you may have experienced a delay in contacting us or hearing from us. This was due to renovations causing us to relocate temporarily to one big room with limited capability. We lost an office but gained freshly painted walls, new carpet and a new front door!

This summer will see the transfer of our two current Hearing Officers. The two incoming Hearing Officers bring a wealth of field experience. We look forward to them coming aboard.

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HEARING OFFICERS

Danielle Davis



Hearing Officers primarily “hear you” through the written word. Whether it is the Coast Guard unit forwarding a violation case to the Coast Guard Hearing Officer or a party responding to an assessment letter, the Hearing Officer must be able to read and understand or, in other words, “hear” what is being said. If the Hearing Officer cannot “hear” what is being said, the message being conveyed fails. The result is that the case may be dismissed, or the party’s response doesn’t achieve the party’s desired outcome. There are a couple of things that you can do

to prevent the Hearing Officer from failing to “hear” the message being conveyed:

1. Use of Acronyms:

When providing a narrative on the Enforcement Summary or Activity Summary Report please use plain language and eliminate or limit the use of acronyms. The party, who may not have any affiliation with the military, may have difficulty understanding what it is you are trying to say. Although acronyms are prevalent in the military community, many people outside the military find them difficult to decipher. Acronyms are used to shorten words, but using them may get you short-changed. You have to be precise and detailed in your narrative when explaining the details of a specific violation. Both the Hearing Officer and the party must be able to know what you are trying to convey and be able to understand it. Neither the Hearing Officer nor the party should be confused by acronyms (either official or unofficial), so it’s best to limit or eliminate their usage entirely when writing the narrative. If you do use them, ensure that the acronym is fully spelled out and defined before using it.

2. Consistency

Please be consistent when referring to the party throughout the case file. The party’s name should be the same on all relevant evidence. An example of this is if the party’s name is United Railroad Services on the witness statements, the party should not be referred to as United Railroad, Inc. in the Enforcement Summary’s Narrative Overview. The charged party name on the Enforcement Summary must be the same party as identified in the evidence supporting the violations. Similarly, in declined Notice of Violation cases, the party name on the Enforcement Summary should be the same party name as reflected on the Notice of Violation. If they must be different, the case file should include an explanation of why they are different. If the name is not consistent throughout the case file, the file will be returned for correction. In order to determine if a violation has occurred, the Paralegal Specialist and Hearing Officer must be certain that the party being charged is the correct party as supported by the evidence. Always ensure the party names on the Enforcement Summary, Activity Summary Report, Boarding Report CG-4100 and evidence are the same or include an explanation of why they are not the same.

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KNOT

The Hearing Office receives many enforcement activities (cases) that cannot be adjudicated. This is because one or more deficiencies relating to one or more violations

are identified upon receipt. More often than not, these deficiencies can be avoided with a little knowledge and attention to detail. In each newsletter publication we will include a **KNOT** corner. No, not the kind you tie but rather a **K**nowledge **N**ote **O**r **T**ip. Be sure to watch for this corner. You may see the same subject addressed more than once...it will be because our first KNOT on the subject failed!



**“CAPACITY IN WHICH CHARGED”
BLOCK ON THE ENFORCEMENT SUMMARY**

Remember that not everyone on a vessel can be charged with a violation. Certain violations can only be charged to certain persons. That requires knowledge of the “applicability” language in the statute or regulation. You must know if the law or regulation applies to the person you intend to charge with the violation. For instance, only the “operator” of a vessel can be charged with boating under the influence. Other laws or regulations may apply to everyone such as the regulation prohibiting the draining of oil into the bilges of a vessel. It states “no one” may do the prohibited act. Still other laws or regulations may apply to two or three persons such as operator, master or person-in-charge.

The question to ask is what is the “capacity of party” (COP) being charged and does the law or regulation violated apply to that “capacity.” You can think about “capacity” as the role of the person such as operator or owner. A regulation may apply only to the vessel master meaning that the vessel owner cannot be charged with its violation. Similarly, a regulation may only apply to a facility owner meaning that the facility operator cannot be charged with violation of that regulation.

If you identify a violation of a regulation, you must identify what capacity can be held responsible under the regulation. Ensure you correctly identify the party and the COP (owner, operator, master, person-in-charge, etc) in the boarding report, investigation or inspection report. Processing officials must be diligent to ensure that the Enforcement Summary reflects that the charged party’s “capacity” is one that can be held responsible under the cited law or regulation.

The KNOT is know your COP.

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COMPLIANCE

Alicia Scott and YN3 Christopher Brown

The civil penalty process at the Coast Guard Hearing

Office is remedial in nature, or in other words, the process is meant to “remedy” parties’ noncompliance with laws and regulations. The goals of our process are compliance and deterrence.

Since compliance is a goal, it is necessary that when a party provides proof of compliance after receiving a warning or violation that the compliance is immediately documented. Often a party, upon learning that he or she is not in compliance with a law or regulation, will remedy the noncompliance immediately. The party generally wants to tell the Coast Guard that he or she has remedied the noncompliance and proceeds to a local Coast Guard unit to do that. The party may show new visual distress signals or vessel numbers newly affixed to his or her vessel to a USCG member and receive a “well done.” But the USCG member must do much more. That USCG member should enter the compliance into the boarding activity in MISLE or if unable to do so, notify the unit that conducted the boarding so that the unit can enter the compliance in MISLE. Also, if the violation has been forwarded to a processing official for civil penalty action, the processing official should be notified. The processing official can then take appropriate action at his or her level, or if the violation has already been referred to the Coast Guard Hearing Office, the processing official should then notify the Coast Guard Hearing Office of the compliance.

If the party has shown compliance *before* the violation has been sent to the Coast Guard Hearing Office and *no* further civil penalty action is desired, then there is no reason to refer that violation to the Coast Guard Hearing Office. Often, after a party has shown compliance, the unit or processing official refers the violation to the Coast Guard Hearing Office with a recommended penalty amount of \$0. This conveys to the Coast Guard Hearing Office that no civil penalty action is desirable and causes us to wonder why the violation was referred to us. If a unit or processing official desires that the Coast Guard Hearing Office consider a “Warning” in such a case, then the recommended penalty amount should reflect “Warning.” In such a case, it would be helpful to include an explanation as to why a warning is being recommended after the party has shown proof of compliance.



STANDARDS AND PROCESSES

The Coast Guard Hearing Office is a unit that handles a lot of paper neatly packaged in hundreds of violation case files. It is also a unit that must accord fairness to both Coast Guard field personnel that work to enforce

maritime laws and regulations, and to the members of the maritime public subject to civil penalty action. One critical and very important pillar to providing this fairness is timeliness. Often, that means establishing time standards for processing steps so that any given violation case file continues to move through the process efficiently and without unnecessary stagnation.

To this end, the Coast Guard Hearing Office requires that files returned to the program manager for correction be returned to the Coast Guard Hearing Office within 20 days. Requests made to a unit for rebuttal comments to a party’s response or appeal comments to a party’s appeal letter require a response to the Coast Guard Hearing Office within 30 days. “Within” means physically received by the Coast Guard Hearing Office no later than the number of days specified.



Additionally, units have 4 days to respond to a request to transfer control of an enforcement activity in MISLE to the Coast Guard Hearing Office. Units have 15 days to respond to a request for a new mailing address for a party because the address in MISLE resulted in a failed delivery.

The time standards above may be shortened or lengthened by the Coast Guard Hearing Office for reasons not obvious to the reader but necessary for the appropriate handling of the violation case file. Extensions to any of the above time standards may be requested.

A word about rebuttal and appeal comments. The Hearing Officer will cause a request for rebuttal or appeal comments to be sent directly to the Executive Officer of the unit that initiated the violation for civil penalty action. The unit’s response is required to be in Coast Guard memorandum format (vice email) and forwarded to the Coast Guard Hearing Office. In all but dismissed cases, a copy of the response is provided to the party so it is important that the response answer any points raised by the party or the Hearing Officer, and that it be professional in tone and content.

Units and processing officials are reminded that the Coast Guard Hearing Office may determine that a violation case file was not processed timely by a unit or processing official and the lack of timeliness has affected the ability to fairly adjudicate the case. While there are acceptable reasons for delaying the timely referral of a violation for civil penalty action, those reasons are few once the boarding, inspection or investigation is complete. Units and processing officials are encouraged to monitor enforcement actions and if wanting

to refer violations for civil penalty action, that the violation case files are prepared and forwarded without delay.

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FACTUAL ELEMENTS AND DUE PROCESS

Lane Mc Clelland

We've all heard the term "due process," but what does it really mean? Literally, it means "the process that is due." The phrase comes from the Bill of Rights of the U.S. Constitution. The Fifth Amendment is well known to give a criminal suspect the right to remain silent, but it also says that no person may be deprived of life, liberty, or property, without due process of law. In other words, a person can't be executed or imprisoned or fined without a trial of some sort. When a civil penalty is assessed, we are depriving a person of property (money), so we must first follow the process that is due. The specifics of the process are found in 33 CFR 1.07. Those specific requirements are intended to ensure that the party receives notice of what they are accused of and the evidence against them, and the opportunity to respond to that accusation and evidence.



To ensure that the party has notice of what they are accused of, a very important part of the case file is Factual Elements. This is where the specific allegation against the party is to be stated. In a case where a person is charged with one or more simple violations (e.g. equipment requirements, boating under the influence), Factual Elements are simply stated and everyone knows what the party is accused of. However, when more complex or multipart regulations are violated, or a course of conduct constitutes the violation, Factual Elements require more thought.

A common example where this comes into play is 33 CFR 156.120, Requirements for Transfer pertaining to transfers of oil and other regulated bulk liquids. Section 156.120 has thirty-one subsections from a to ee, some of which are further subdivided. The citation in MISLE is simply 33 CFR 156.120. The Factual Elements must clearly describe what was violated in that regulation, ideally the specific subsection or subsections alleged to have been violated.

There are many other sections in the Pollution Prevention Regulations, MTSA Regulations, Safety Management Regulations, to name just a few categories, that state more than one requirement. When a regulation containing more than one requirement is cited, it is essential that the Factual Elements make clear specifically what was done wrong and which part of the regulation

was not followed.

Another example where Factual Elements require special attention arises when a violation occurs in the course of a lengthy scenario. Consider the situation of a cruise terminal where a group of passengers arrived late for the sailing of a cruise ship. The passengers' baggage was screened through x-ray machines in the terminal, but the passengers were never screened ashore. They were escorted aboard the vessel, where they were screened by wand. The Factual Elements should give the regulation violated, 33 CFR 105.290, and a succinct statement of what was done wrong. Simply telling the whole story under Factual Elements does not serve the purpose of providing notice of what, specifically, the party is accused of. Simply state what they violated and how they violated it. Any lengthy narrative that may be necessary to convey the relevant circumstances of the violation may be placed in the narrative overview of the activity.

Similarly, it is insufficient for Factual Elements to simply say, "See enclosed statements." It is also insufficient to say, under a citation of 33 CFR 96.230 (Failure to establish and implement Safety Management System), "The validity and/or implementation of the vessel's SMS is in question based on numerous deficiencies issued during a routine Port State Control Boarding of the vessel." Factual Elements should make clear what is alleged to have been wrong that is a violation of the cited regulation, i.e. what conditions were found that showed the Safety Management System was not really implemented.

While the typical recreational boat violation does not present much of challenge in formulating Factual Elements, the task should not be done mindlessly. Most of the citations used for recreational boat violations are in MISLE with text listing the generic elements of the offense. When Factual Elements are added for a specific case, they should not simply repeat the generic text.

For example, under Factual Elements for 33 USC § 2033 (b) (Inland Navigation Rule 33(b)), "Failure to have some means of making an efficient sound signal for vessel less than 12 meters in length," the following text automatically appears:

- ACT: 1. Must be a vessel LESS THAN 12 METERS in length
2. not carrying a sound producing device.

For the above, when preparing a case involving a 22-ft. vessel, that text should not be repeated. Instead, the following is appropriate:

Vessel is 22 ft.
No SPD aboard.

Similarly, under Factual Elements for 33 CFR 175.15(a), “No person may use a recreational vessel unless at least one Type I, II, or III PFD is on board for each person,” the following text automatically appears:

ACT: 1. A recreational vessel.
2. Vessel is used without one PFD (may be Type I, II, or III) for EACH person onboard. EXCEPTION: vessel is one of the following: a foreign boat temporarily using U.S. waters; a military or public boat of the U.S.; a boat owned by a State and used principally for governmental purposes; a lifeboat; a seaplane on the water.

For the above, when preparing a case involving 4 POB and no PFDs, rather than repeating the above generic language, text such as the following should be filled in:

- 1. Recreational vessel, 4 POB.
- 2. No PFDs aboard.

In the same manner, equipment failures should be described in detail in the Factual Elements. For instance, don't say “Fire extinguisher was inoperable.” Rather, describe how the fire extinguisher was inoperable. Don't say, “Visual distress signals expired.” Rather, state the number of the visual distress signals and expiration month/year stamped on the visual distress signals. Always describe how the personal flotation device was un-serviceable. For instance, state the length of the tear in the fabric or describe how much of the buoyancy material was deteriorated or missing. Describe how the vessel's numbers were improperly displayed rather than simply stating “Improper display of vessel numbers.”

For those enforcing MTSA regulations, the Factual Elements should describe the actual offense under the cited regulation. As in all cases, the Factual Elements must be supported by evidence of each element of the offense. For example, 33 CFR 104.220, “Company or vessel personnel with security duties,” specifies a number of subjects of which these personnel must have knowledge. Many of the subjects are vessel-specific or company-specific, such as “(g) Knowledge of emergency procedures and contingency plans,” and “(k) Relevant provisions of the Vessel Security Plan (VSP).” Violations of these types of knowledge requirements are typically discovered during an inspection when facility or vessel personnel are asked questions and they fail to give the right answers. In such cases, the Factual Elements must state or describe the specific security plan provision(s) not known by the personnel and how the personnel

showed they did not know the provision(s). The evidence should include either a copy of the provision, a restatement of the provision, or copy of the relevant VSP page (s), sufficiently identified. 33 CFR 105.210 works the same way for facilities. Other sections of the MTSA regulations work this way too—where the violation relates to a security plan provision, you must specify the VSP or FSP provision, and provide evidence of it.

To sum up: Factual Elements should be a succinct statement of what the party has done wrong, so as to focus both the Hearing Officer and the party on the specific regulation allegedly violated and what the party did that violated it.

From the Factual Elements, the Hearing Officer should know what the field was thinking that caused them to believe a violation occurred, and the party should know what it is they allegedly did not do or did wrongly so they can appropriately respond in defense, mitigation or extenuation.

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JUST FOR FUN
YN3 Victor Anderson



Many of us in the Coast Guard have heard the term “Bravo Zulu” before. Whether it was at recruit basic training, the Coast Guard Academy, during rescue operations, or just simply after spending all day chasing rust and wiping down a salty bulkhead, everyone can recall those famous words by the BM1 in charge, “Bravo Zulu” for “Well Done”. We all (hopefully!) have heard the term several times throughout our careers.

Some may think and wonder, who, when and where, was this term first introduced to the maritime community. Unlike many catchy phrases today that come from MTV or some sort of music video, some say the term “Bravo Zulu” was used by the Royal Navy long ago. Legend has it that “Bravo Zulu” was once used as a flag signal to “issue an extra tot of rum to the crew.” Now, that would be a Morale Day! Sadly, the legend is not real because the term did not exist that long ago. It was first introduced as a naval signal in 1949 from the Allied Signal Book. Before the “B Z” was known as “Bravo Zulu”, it was known as “Baker Zebra.” It was not until the birth of the International Civil Aviation Organization when the aviators developed a radio alphabet for international aviation use. It was then that “Baker Zebra” became known as “Bravo Zulu”. So if there is one thing that we can say that aviators and sailors have in common it would be “Bravo Zulu.”

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DECKPLATE RIVETS

☪ We have a clarification to make regarding our past articles on entering party names and addresses into MISLE. When entering the party name and address into the party details tab of MISLE, we request that this information is entered in all upper case letters. We also request that the first and last name be entered in the proper order. Letters generated by MISLE automatically pull the party name and address from the party details tab. If the party name and address is not done correctly, the letter has a good chance of not being delivered by the post office. When using the party name and address in documentation in MISLE, it is appropriate to use upper and lower case letters.



☪ Don't forget the all important e-signature!! See our Newsletter, Vol II, September 2008, page 3.

☪ Beware of the PII (personally identifiable information), SSI (sensitive security information), FOUO (for official use only) information, and LES (law enforcement sensitive) information that finds its way into a violation case file. Remember that inclusion of such information is often not "evidence" necessary to support an alleged violation. If it is not necessary, it may be omitted from the case file. But if you do include such information in a violation case file, know the policies concerning the public release of the information and comply with them to ensure that the civil penalty process may proceed without delay. Failure to comply will cause the violation case file to be returned for corrective action.

Why? Because the charged party gets a copy of the violation case file and that means all information contained within the file will be released to the party. If you include information that requires authorization from the originator or other authority before public release, the violation case file must contain evidence that the information has received proper authorization for release. You should consult program managers, message traffic, and applicable manuals for instruction on handling these types of information:

SSI is related to maritime security activities such as security plans, maritime security directives and certain NVICs. It also includes information obtained or developed in the conduct of transportation security activities.

PII is information about an individual that can be used to distinguish or trace an individual's identity such as social security number, name, date and place of birth, biometric record data and so on.

FOUO is unclassified information of a sensitive nature and which the unauthorized disclosure could adversely affect a person's welfare or privacy, conduct of a federal program, or operations essential to the national interest. Generally release of this material requires authorization from the originator.

LES includes materials that reveal law enforcement investigative methods or policies/procedures, reveal official law enforcement or regulatory functions, or reveal sensitive Coast Guard operations.

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WHAT'S IN A NUMBER?

A number is nothing in and of itself. A number is a creation used in counting and measuring. Numbers can convey "magnitude" or "degree." Numbers are relative and can be expressed as a ratio or percentage. Sometimes numbers are used simply as convenience for certain functions such as telephone numbers, lock combinations, etc. Today we hear much about business measures or business metrics. Often these "metrics" are used to measure the success or failure of a desired outcome.

The Coast Guard Hearing Office has some business metrics for you to consider. We hope to periodically provide a glimpse into our business through these metrics:

Number of case files received by the Coast Guard Hearing Office with violation dates in 2007: 1,442

Number of case files received by the Coast Guard Hearing Office with violation dates in 2008: 808

Number of case files received by the Coast Guard Hearing Office Jan 2009—Mar 2009 regardless of violation date: 250

Number of preliminary assessments issued Jan 2009—Mar 2009: 409

Number of final assessments issued Jan 2009—Mar 2009: 343

Number of violation case files returned to the program manager for deficiencies Jan 2009—Mar 2009: 53

Number of hearings held Jan 2009—Mar 2009: 10

