



# 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, and the safety and security of vessels, facilities, ports, and waterways.

## **GREETINGS**

From Robert Bruce  
Chief, Coast Guard Hearing Office



## **HEARING OFFICE NEWS**

*Greetings,*

*Spring is finally here, and that means warmer weather and a new boating season in many parts of the United States. With more people out on the water, Coast Guard units will have more opportunities to board boats to check for compliance with U.S. laws. Very likely, that will result in more civil penalty cases forwarded to the Hearing Office for adjudication. We will see many cases where recreational boaters or fishermen are cited for failing to have required safety equipment onboard, for having unserviceable safety equipment, or for failing to have their safety equipment readily available for use. Of course, this doesn’t have to be the case. There are resources that can help recreational boaters and fishermen educate themselves about safety requirements and ensure that they are in compliance before they are boarded. For instance, at <http://www.uscgboating.org/fedreqs/default.html> (copy this web address and paste it into your browser) you can find a guide to federal requirements for recreational boats. I won’t say that this guide includes everything you need to know as a boater, but at eighty-six pages it contains a lot of good information about the requirements that are enforced by the Coast Guard. The Coast Guard also has a web site for fishermen: <https://homeport.uscg.mil/mycg/portal/ep/channelView.do?channelId=-20581&channelPage=%2Fep%2Fchannel%2Fdefault.jsp&pageTypeId=13489>. Among other things, this site has links to various safety flyers that explain federal safety requirements for commercial fishing vessels. It is in your interest to know the rules and operate safely on the water.*



The Coast Guard Hearing Office has a new addition to our staff. She is Lieutenant Commander Michele Bouziane, and she is serving as one of our Hearing Officers, which gives us a total of three Hearing Officers, at this time. This should make it possible for the Hearing Office to process civil penalty cases more quickly as they are sent here. Not that speed is as important as fairness, or achieving compliance with the law and deterring further violations. By all indications, LCDR Bouziane is happy with her new assignment, and the rest of the Hearing Office staff is happy to have her join us.

\* \* \* \* \*



Articles in this issue:

**Coast Guard Civil Penalty Hearings Explained...p.2**

**Civil Penalty Timelines...p. 3**

**Final Decision Options...p.4**

**Who’s in command? The “Paper Captain” and the elements of 46 U.S.C § 12131 violations...p.6**

## COAST GUARD CIVIL PENALTY HEARINGS EXPLAINED



*CDR Mark Hammond*

So you've just received a Preliminary Assessment Letter (PAL) from a Coast Guard Hearing Officer notifying you of a civil penalty action against you for an alleged violation of federal law. The PAL: 1) provides notice of the alleged violation(s) and the preliminary penalty amount assessed; and 2) describes available options that must be exercised within 30 days. One such option is to request a hearing in the matter. In accordance with due process rights, you ("the party"), are afforded an opportunity to be heard. This article briefly outlines the Coast Guard's civil penalty hearing process (including the procedure for requesting a hearing) and provides some insight as to what a party who requests a hearing can expect.

The regulations governing the conduct of Coast Guard civil penalty hearings are found at Title 33 Code of Federal Regulations (CFR), Part 1.07-55. Hearings are informal, non-judicial administrative proceedings. Hearings are held to provide the charged party an opportunity to present evidence in defense, extenuation, and mitigation pertaining to the alleged violations in their case. That is, a party is given the opportunity to present evidence to show that either the violation(s) did not occur (defense); the violation(s) did occur but here's why (extenuation); or that the violation(s) occurred but here's why the final civil penalty amount should be less than what was preliminarily assessed (mitigation).

A party's request for a hearing must be submitted in writing. The party must specify the issues s/he wishes to raise in dispute at the hearing as required

by 33 CFR 1.07-25. These are statements identifying the facts and circumstances surrounding the alleged violation which the party wishes to dispute or explain, or for which s/he wishes to provide mitigating evidence. When a Hearing Officer receives a party's request for a hearing and no issues in dispute are specified, typically the hearing officer will write back to the party and allow additional time to present such issues before scheduling a hearing. Once the issues are received by the Hearing Officer, hearings are promptly scheduled. If a party does not specify the issues in dispute, the applicable regulations will generally preclude consideration of those issues, which may result in a party forfeiting his/her right to have a hearing at which his/her issues can be considered. Specified issues in dispute may be amended at any time up to 10 days before the scheduled date of the hearing.

Hearings are currently held in person at the Hearing Office in Arlington, Virginia, or via video teleconference (VTC) for parties not wishing to travel to Arlington. VTC hearings are typically conducted at the Coast Guard District Office closest to where the party resides.

At a typical hearing, only the party, his/her representative (if applicable), any witnesses whose testimony s/he wishes to offer, and the Hearing Officer are present. Parties are often surprised learn that boarding team members or representatives of the charging unit are not present for cross-examination. Coast Guard civil penalty hearings are not subject to the stricter procedural requirements of an Administrative Procedures Act (APA) hearing on the record. There is no right to cross-examine witnesses. But the Party may request that the Hearing Officer assist in obtaining the personal appearance of a witness that the party cannot obtain on his or her own. The process for requesting such assistance is prescribed in 33 CFR 1.07-50.

At the hearing the party may offer any facts, statements, explanations, sworn or unsworn testimony, or other exculpatory items which bear on the material issues or which may be relevant to the size of an appropriate penalty. Upon hearing all of the evidence the party has presented on the specified issues, the hearing is closed and the Hearing Officer issues a final determination in writing. If the party desires to submit additional information, evidence, or other

[Civil Penalty Hearings continued on next page]

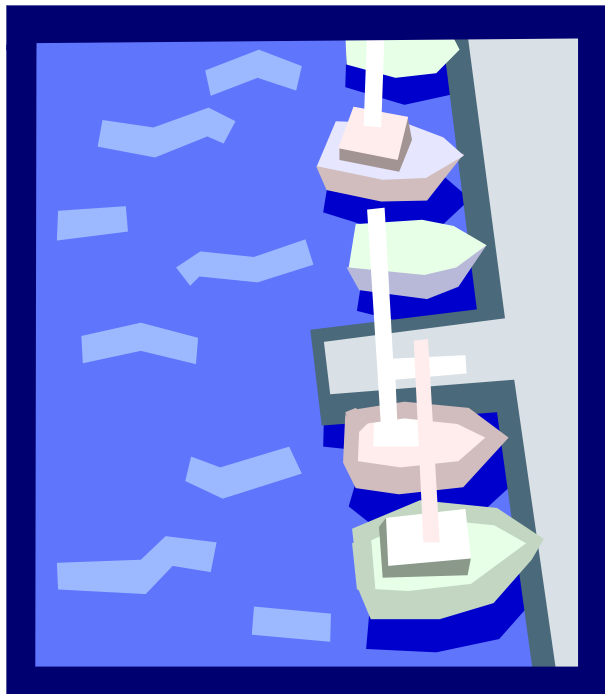
[Civil Penalty Hearings continued from previous page]

submission in writing after the hearing, s/he will normally have 10 days after the hearing to do so.

A verbatim transcript of the hearing is not routinely made. If a party wishes to have a transcript of the hearing, s/he must arrange and pay for a recorder and any copies of the transcript, including copies that must be furnished to the Coast Guard in case of an appeal.

It is important to note that there is no “extra credit” for attending a hearing. The Hearing Officer’s duty is to consider the Coast Guard’s evidence as provided in the case file, and evidence in defense, mitigation and extenuation provided by the party, whether presented at a hearing, or presented in writing in lieu of a hearing. Often parties will request a hearing only to repeat what had already been provided to the Hearing Officer in written submissions. It is a better use of the hearing process for the party to provide additional issues or evidence for the Hearing Officer to consider beyond what has already been presented and included in the case file.

\* \* \* \* \*



**CIVIL PENALTY TIMELINES**

*LCDR Michele Bouziane*

Observance of the timelines set forth in 33 C.F.R. Part 1, Subpart 1.07, ensures not only efficient Coast Guard civil penalty processing, but also procedural due process for the party concerned. Timelines are in maroon type below.

After receipt of a letter/notice (called a “Preliminary Assessment Letter,” or “PAL”) from a Coast Guard Hearing Officer, indicating that the party is alleged to have committed a violation of statute or regulation, the party, or counsel for the party, has **30 days to take one of the following actions** (33 C.F.R. § 1.07-25):

- Provide written evidence and arguments (for example, that the violation did not occur, or that the civil penalty should be reduced for stated reasons and provide evidence to justify reduction of the penalty); or
- Pay the amount specified in the PAL; or
- Request a hearing in writing specifying the issues in dispute (*see article explaining civil penalty hearings, this issue, p. 2*).

The PAL and accompanying pamphlet, which are intended to help a party understand his/her options, should be thoroughly read upon receipt.

If a party does not respond to the PAL, the Hearing Officer will make a final determination based on the

[Civil Penalty Timelines continued on next page]

[Civil Penalty Timelines continued from previous page]

evidence already before him/her, which usually results in a Final Assessment Letter to the party imposing the penalty amount stated in the PAL.

Note: It's in the party's best interests to respond in a timely fashion to the PAL, especially if the party requires more time to bring his/her vessel into compliance. The Hearing Officer may grant a 20-day extension if the party explains why s/he needs more time.

A party should retain a copy of all receipts for items purchased to bring his/her vessel into compliance, and send a copy of the receipt/s to the Hearing Officer. A mere assertion in a letter that all violations have been corrected, without supporting evidence, is unlikely to be persuasive.

The Hearing Officer will want to have evidence of compliance. For example, a receipt, and/or a picture of new Visual Distress Signals or Personal Flotation Devices, arranged so that the vessel number can also be seen in the picture, will provide support for a statement that the required equipment was purchased to comply with the law.

After 30 days, the party no longer has a right to a hearing, however, the Hearing Officer may still grant a request for a hearing, at the Hearing Officer's discretion.

At any time up to 10 days before the scheduled date of the hearing, a party can submit a change to the issues in dispute. Changes to the issues in dispute requested by the party later than 10 days before the scheduled date of the hearing are subject to the discretion of the Hearing Officer.

An appeal from the decision of the Hearing Officer, and any supporting brief, must be submitted to the Hearing Officer within 30 days from the date of receipt of the decision. Otherwise, the appeal is barred, and the Hearing Officer's decision becomes the Coast Guard's final action in the case (33 C.F.R. § 1.07-70).

The Hearing Officer provides a copy of the appeal and any supporting brief submitted by the party to the District Commander who referred the case. The District Commander then has 30 days to submit any comments to the Hearing Officer (33 C.F.R. § 1.07-75).

The Hearing Officer forwards all materials in the case to the Commandant not later than 30 days after receipt of the appeal, or after the District Commander has had an opportunity to comment.

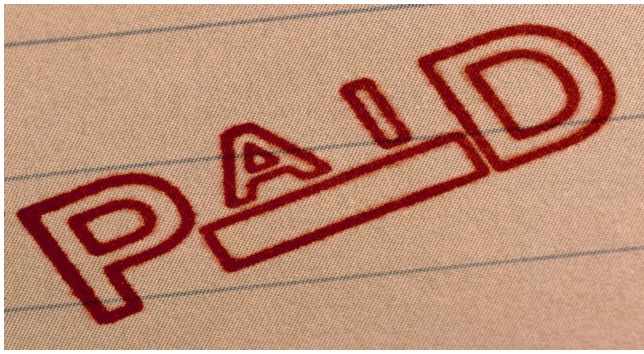
At any time prior to final agency action in a civil penalty case, a party may petition to reopen the hearing on the basis of newly discovered evidence (33 C.F.R. § 1.07-80). Following a denial of a petition to reopen, the party is given 30 days to file an appeal if one has not already been filed, or to amend (change) an appeal which has already been filed.

Within 30 days after receipt of the Commandant's decision on appeal, or the Hearing Officer's decision in a case in which no appeal has been filed, the party must submit payment of any assessed penalty to the address specified in the assessment notice (33 C.F.R. § 1.07-85).

\* \* \* \* \*



Hearing Office is our Name, Maritime Safety and Security is our Aim



### FINAL DECISION OPTIONS

*CDR Evan Hudspeth*

Generally within 60 days after a preliminary assessment letter (PAL) and case package has been sent to the charged party, the Hearing Officer will consider all of the evidence provided and make a final decision. In a final letter to the charged party, the following information is included regarding the charged party's options:

You may appeal my decision to the Commandant of the Coast Guard. You have 30 days from the date you receive this letter to do so. If you decide to appeal my decision, address your appeal to the Commandant of the Coast Guard but mail it to me. I will then send the appeal forward with the official case file. Title 33, Code of Federal Regulations, Part 1.07-70, expressly limits matters on appeal to those issues that were properly raised before the Hearing Officer and jurisdictional questions. That is, aside from jurisdictional questions, matters on appeal are limited to those issues raised before me *prior* to my final decision in this case. If you find you have newly discovered evidence to be considered following my final decision, you may petition me to reopen your case. The petition to reopen must be in writing and explain why the evidence was not presented for my consideration during the course of the adjudication of your case. I may reopen your case *if* I find that the evidence will have a direct and material bearing on the issues *and* there is a valid explanation as to why the evidence was not and could not have been produced during the adjudication of your case. My decision regarding the petition to reopen will be rendered in writing. If you do not appeal my final decision within 30 days

from receipt of this letter, my decision becomes the Coast Guard's final action on this case (Emphasis added).

So, there are four options for the charged party after the final decision assessing a penalty is issued:

1. Pay the final penalty amount;
2. Appeal the decision based on the evidence already considered and in the case file;
3. Request to reopen the case to consider evidence not previously available and include a good reason why the evidence was not previously available; or
4. Do nothing, in which case the file will be forwarded to collections.

If the charged party wants to submit evidence or information to be considered in mitigation or extenuation, it is in his/her best interests to respond to a PAL in a timely manner, before a final decision is made. If one waits to respond with evidence in defense, extenuation, or mitigation until *after* a final decision has been made, the Hearing Officer may not be persuaded that there is good reason not to consider the evidence untimely, and let the final decision stand.

\* \* \* \* \*



**WHO'S IN COMMAND?**

*The "Paper Captain" and the elements of 46 U.S.C § 12131 violations*

*CDR Mark Hammond*

This article briefly discusses violations of section 12131 of title 46 of the United States Code, often referred to as "paper captain" violations. This law requires that a documented vessel be placed under the command of a U.S. citizen.

The Hearing Officer must find *prima facie* (Latin for "at first sight" or "on first appearance") evidence that a violation occurred in order to proceed with a preliminary assessment and adjudication of a civil penalty case. In other words, the evidence in the case file is, on its face or at first appearance, sufficient to support each element of the charge/charges. As with any case, a clear understanding of the essential elements of the particular statutory or regulatory cite alleged to have been violated will help in determining what constitutes sufficient supporting evidence.

Consider this hypothetical scenario: A documented commercial fishing vessel is boarded at sea by the Coast Guard. During the boarding, the person observed at the helm operating the vessel is identified as a non-U.S. citizen/permanent resident. Another person on board (a U.S. citizen) identifies himself to the Coast Guard boarding team as the vessel's "captain." He also presents a crew list which lists him as the "captain." Looks good on paper, right?

During the course of the boarding, however, the vessel's "captain" displays little knowledge of the operation of the vessel and the location of important documents and required safety equipment on board. Additionally, he appears to rely exclusively on the experienced "deckhand" (the person previously observed at the helm) to answer the boarding team's questions as well as operate the vessel. In contrast to the clueless "captain," the experienced "deckhand" demonstrates a thorough working knowledge of all aspects of the vessel's operation, and other crewmen aboard the vessel tell the boarding team that he "gives all the orders." The boarding team notes that the "deckhand" maintains his personal effects in the captain's quarters while the "captain" shares a berthing space with the rest of the crew. The boarding team concludes that the vessel is actually under the command of the non-U.S. citizen and, consequently, the vessel owner is



charged under 46 U.S.C. § 12131 for failing to comply with the U.S. citizen in command requirement.

According to 46 U.S.C. § 12131(a), "a documented vessel may be placed under the command only of a citizen of the United States" (*exceptions to this requirement are documented vessels with only a recreational endorsement, and unmanned barges operating outside of the territorial waters of the United States*). Obviously, in order for a violation to occur under this cite, the vessel involved must be a documented vessel and the person in command of the vessel must not be a U.S. citizen. Evidence of vessel documentation and crew citizenship status is fairly straightforward.

In the typical "paper captain" case described in the scenario above, however, presenting persuasive evidence of who was in command of the vessel can sometimes present a bit of a challenge.

We often see cases where vessel owners, in an apparent attempt to circumvent the requirements of 46 U.S.C. § 12131, establish different positions on board their vessels in writing such as a "fish captain," or they'll have a "master" and a "captain" on board, each with separate and distinct duties.

For example, in some cases the U.S. citizen "master" will be designated in writing as having overall responsibility for the general care of vessel and cargo, but the non-U.S. citizen "captain" or "fish captain" will be the designated person having responsibility for the operation and safe navigation of the vessel, and the

[Continued on next page]

["Paper Captain" continued from previous page]

care/conduct of the crew. The documentation laws contained in 46 U.S.C. Chapter 121 and 46 C.F.R. Part 67 generally require that U.S. documented vessels must be owned and under the control of U.S. citizens. Among other things, control refers to the right to direct the operation of the vessel. Actual control as a matter of fact is more important than a person's title. Accordingly, the law refers to the person in command of the vessel and not to the "master" or "captain." If command of a vessel is split between two or more persons, and one of the persons in command is not a U.S. citizen, then the vessel is not "under the command only" of a U.S. citizen.

Whether the evidence is submitted by the Coast Guard in support of a violation, or by a charged party to show that there was no violation, what will be most persuasive to a Hearing Officer is detailed documentation of crew responsibilities, knowledge and experience, as well as witness statements from other crewmembers regarding who controls the operation of the vessel. That kind of evidence is likely to carry more weight than a bare assertion that a U.S. citizen was the "master" or "captain."

\* \* \* \* \*



**DECKPLATE RIVETS**

For alleged violations under 46 USC § 8103 it is a good practice to ensure that the correct citation for the violation is reflected on the Enforcement Summary (ES). The evidence must directly support the citation on the ES. With respect to violations under 46 USC § 8103, citing the entire section can be ambiguous and confusing. The case package should cite the specific subsection alleged to have been violated, such as 46 USC 8103(i). Cases submitted to the Hearing Office without the correct cite will typically be returned to the program manager. (See Volume 3 of our Newsletter, the "Special Edition," for useful information in preparing § 8103 violations for referral to the CGHO.)

Always check for applicability when selecting an appropriate cite for an alleged violation. Improper cites will result in the return of the case to the program manager and the halting of the adjudication process. The following are some common errors encountered by the CGHO: (1) using a cite pertaining to a recreational vessel when the subject vessel in the case is a commercial fishing vessel; (2) citing for a missing Certificate of Number or temporary certificate on board when the vessel is a documented vessel; (3) citing for missing safety equipment that is not required due to vessel length, gross tonnage, or route of service; (4) using the "applicability" or "definitions" cite as the charging cite; (5) using a cite directed at a vessel operator when the party is charged as the vessel owner.

Sometimes important information is missing from the violation narrative. Here are some examples:

46 CFR § 25.30-20: Does the vessel have a fixed fire extinguishing system in the machinery space?

46 CFR § 28.145: The vessel routinely travels within how many miles of the coastline?

And remember that the Inland Navigation Rules are now contained in title 33 (Navigation and Navigable Waters), Part 83, of the Code of Federal Regulations, and should be cited accordingly.

\* \* \* \* \*

**MORE DECKPLATE RIVETS**

For cases involving more than one charge, the Violation details and Factual Elements contained in the Enforcement Summary should be tailored to the specific charge. It is not helpful to the Hearing Officer if all factual elements are repeated (cut and pasted) for every charge, whether they are relevant or not.

For cases involving recreational boats discovered in use with no State registration numbers affixed to the hull, the applicable regulatory cite is Title 33 Code of Federal Regulations (CFR), Part 173.15. 33 CFR 173.15(a) states: "Except as provided in 173.17, no person may use a vessel to which this part applies unless (1) It has a number issued on a certificate of number...(2) The number is displayed as described in 173.27." While 33 CFR 173.27 prescribes the manner in which the required numbers must be displayed on a vessel, it is 173.15 that sets forth the requirement for the numbers to be displayed.

A Hearing Officer may, in computing a final assessment for a violation, consider a party's compliance efforts as a mitigating factor. When submitting a receipt as evidence of efforts to achieve compliance, send a quality copy of the receipt; don't send the original receipt. Mail sent to the Hearing Office is subject to irradiation screening, which usually renders original receipt paper unreadable. An unreadable document is not helpful to the Hearing Officer.

A party's timely compliance, after being notified of a violation, does not guarantee a reduced penalty amount. The Hearing Officer weighs all the evidence in the case file, considers violation history and makes an appropriate final determination based on all relevant circumstances. An aggravated or egregious violation may warrant some penalty, even if the party immediately corrects the deficiency.

\* \* \* \* \*



**KNOT**

**(Knowledge Note Or Tip)** The Coast Guard may issue a "Notice of Violation" (NOV) in many of the same situations that can result in a civil penalty case. The proposed penalty amounts associated with the NOV are determined by policy in the Notice of Violation User's Guide, COMDTINST M5582.1A. The charged party may choose to pay the proposed penalty, or decline the penalty. The back of the NOV document explains that choosing to decline the NOV "...will result in the case file being sent to a Coast Guard Hearing Officer for a determination. After the Hearing Officer makes a preliminary determination, you will be afforded the opportunity to respond to the allegations or request a hearing." It is important to note that the Hearing Officer is not bound by the proposed penalty in the declined NOV or COMDTINST M5582.1A. Once the case file is forwarded to the Coast Guard Hearing Office for adjudication, the proposed penalty amount derived from COMDTINST M5582.1A is only one of many factors the Hearing Officer may consider in determining the appropriate penalty amount, if a violation is proved. The Hearing Officer's assessed penalty amount, therefore, may be greater than, less than, or equal to the NOV proposed penalty amount.



\* \* \* \* \*



**JUST FOR FUN**

*Alicia Scott, YN2 Pamela Conlee, and YN2 Victor Anderson*

1. What Coast Guard ship was the last to be decommissioned that fought at Pearl Harbor on December 07, 1941?
2. In what year was the first Coast Guard helicopter mercy mission flown?
3. What is the location of the first Coast Guard Air Station that opened in 1920?
4. During the American Civil War, what ship fired the first naval shot?
5. What is the mascot for the Coast Guard Academy?

1. Taney; 2. 1944; 3. Morehead City, NC; 4. Harriet Lane; 5. Bear named Objee

ANSWERS



**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.

Here are some Coast Guard Hearing Office metrics that provide a “how goes it” glimpse into our work:

Number of case files received by the Coast Guard Hearing Office with violation dates in 2008: 945

Number of case files received by the Coast Guard Hearing Office with violation dates in 2009: 1440

Number of case files received by the Coast Guard Hearing Office with violation dates in 2010: 1345

Number of case files received by the Coast Guard Hearing Office with violation dates in 2011: 82

Number of case files received by the Coast Guard Hearing Office in 2010 regardless of violation date: 1420

Number of preliminary assessments issued in 2010: 1391

Number of final assessments issued in 2010: 759

Number of violation case files returned to the program manager for deficiencies in 2010: 150

Number of hearings held in 2010: 12

\* \* \* \* \*

