



SEPARATION OF AGENCY FUNCTIONS

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Like many federal agencies, the Coast Guard combines a number of functions within a unitary organization, ultimately under the direction of the Coast Guard Commandant. Those functions include: policy and rulemaking, investigations, inspections, prosecuting law enforcement cases (including civil penalty cases), and adjudicatory functions. The combination of these functions in the Coast Guard allows the agency to efficiently and effectively perform the missions assigned to it by Congress.

For example, recreational boating safety program managers at Coast Guard Headquarters develop and interpret regulations and policies to carry out the Coast Guard's mission to regulate boating safety. These program managers provide guidance to Coast Guard boarding officers at stations all around the nation about how to conduct the boarding of recreational vessels and enforce the boating safety laws. The program managers also provide guidance to boarding officers and the intermediate officials with authority to decide how to prosecute law enforcement cases. The combination of the recreational boating safety rulemaking, inspection, investigation and prosecutorial functions within the Coast Guard allows for a robust federal program to ensure that reasonable boating safety standards are established and enforced.

Separation of the Adjudicatory Function.

Courts have long recognized that there is nothing unconstitutional about the combination of such functions within a federal agency, and so it is up to the legislative and executive branches of government to determine how an agency will perform its various functions. That said, there are still fair concerns about the combination of some

functions within agencies. Particularly with regard to the adjudicatory function, it is generally accepted that individuals who must decide if a law enforcement case has been proved should not also serve as prosecutors of law enforcement cases, or have other duties that would give them an interest in the outcome of the cases they decide. Additionally, it is accepted that persons involved with the inspection or investigation that leads to a prosecution case, should not be allowed to communicate off-the-record with the individual who will decide if the law enforcement case has been proved. These safeguards promote the agency requirement that its adjudicators be fair and impartial. That requirement of fairness, in turn, protects the integrity and legitimacy of the adjudicatory process.

With regard to the Coast Guard's civil penalty process, the agency has, by policy, directed that the Hearing Officers who perform the adjudicatory function be separated from those in the agency who perform inspection, investigation and law enforcement functions. According to Title 33 Code of Federal Regulations § 1.07-15: "(a) The Hearing Officer has no other responsibility, direct or supervisory, for the investigation of cases referred for the assessment of civil penalties.*.* (b) The Hearing Officer decides each case on the basis of the evidence before him, and must have no prior connection with the case. The Hearing Officer is solely responsible for the decision in each case referred to him. In addition to prohibiting Hearing Officers from investigating the cases they adjudicate, this regulation is interpreted to prohibit the Hearing Officers from engaging in any off-the-record communications with anyone who has an interest in the outcome of the case.

Results of the Separation of the Hearing Officer Function.

Persons who have been charged in a civil penalty case will regularly call on the telephone and ask to speak to the Hearing Officer on their case. To be fair and even-handed, however, a Hearing Officer cannot engage in that kind of off-the-record communication any more than s/he can take a call from the boarding officer in a case to talk about how the case should be decided. Persons who have been charged in a civil penalty case will also occasionally suggest that the case file is not complete and that the Hearing Officer should provide additional

documents that may or may not exist. Because Hearing Officers do not investigate the cases they adjudicate, nor do they engage in off-the-record communications, they must decide the cases based on the case files provided to them, along with any evidence submitted by the charged party. A party who has been charged in a civil penalty case can request the assistance of the Hearing Officer in obtaining documents from the Coast Guard, however, and the Hearing Officer may provide such assistance if the charged party demonstrates that the requested documents may have a material effect on the Hearing Officer's decision.

In some cases, Hearing Officers will want the Coast Guard inspectors or investigators involved in a case to respond to evidence submitted by the charged party. In those cases, the Hearing Officer will send a request to the charging unit for rebuttal comments in writing. If rebuttal comments are received, those are provided to the charged party. By prohibiting off-the-record communications, and inserting all written submissions and communications into the case file, the Hearing Officer can maintain an accurate record of the evidence s/he can properly consider, and be certain that the charged party has been provided all of the same information.

Hearing Officers are fact-finders; not policy makers.

There is one other important aspect of the separation of agency adjudication functions. As discussed earlier, the Coast Guard has Headquarters program offices that formulate regulations and policies for the Coast Guard. These program offices are supervised by very senior Coast Guard officials. It is clear that the authority to issue rules and policy for the Coast Guard rests with those program offices. The Coast Guard does not rely on Hearing Officers to make rules and policy for the agency through their decisions in civil penalty cases. So, although a Hearing Officer has complete independence in fact-finding, s/he must follow the authoritative Coast Guard interpretations of its regulations and policies. This deference to authoritative agency determinations is similar to the deference that courts give to agency determinations when they are challenged under the Administrative Procedure Act (APA). Such challenges generally fail unless the challenger can show that the agency determination is unlawful or fails to meet APA standards of

reasonableness. If an authoritative Coast Guard interpretation of regulation or policy is relevant to a civil penalty case decision, then the Hearing Officer must follow the Coast Guard interpretation unless the charged party can demonstrate that the agency position is unlawful or otherwise fails to meet APA standards of reasonableness.

As an example, in a recent case the charged party challenged the jurisdiction of the Coast Guard over the waterway where his vessel operates. In accordance with Title 33 Code of Federal Regulations section 2.40(a), the Coast Guard may make navigability determinations for certain waters, and it had made a determination that the waterway at issue in this case was navigable waters of the United States. The navigability determination was based on Coast Guard and sister agency decisions going back at least to 1957. In that case, because there was an authoritative Coast Guard determination on jurisdiction, the Hearing Officer used the determination to find there was jurisdiction. The charged party failed to show that the jurisdictional determination was unlawful or did not meet APA standards for reasonableness.

The Coast Guard policy of separating the civil penalty adjudication function from other agency functions is a very important safeguard for the civil penalty process. The Hearing Officers are very aware of this policy and the reasons for it. They are scrupulous about maintaining the separation of functions