



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

Here we are, starting another summer season and a lot of people are out on the water. That includes Coast Guard and state law enforcement officials doing their best to ensure that waterways are safe and clean, and that applicable laws are being observed. In advance of the July 4th weekend, I’ve seen several news articles about state officials coordinating with the Coast Guard to conduct Operation Dry Water. These operations appear to be intended to increase awareness of recreational boating safety requirements and practices, with a particular emphasis on deterring boating under the influence of alcohol or dangerous drugs. Hopefully, in the long term, these operations will lead to a better educated boating public, and to fewer boating accidents, injuries and deaths. That is what the Hearing Office is about also, although we do not just decide recreational boating safety cases.

In this Newsletter I’ve included an article about the separation of the Hearing Officer’s function from other functions performed by the Coast Guard as a law enforcement and regulatory agency. The article is intended to explain why the functions are separate, and some of the practical results of the separation of functions on our part of the civil penalty process. It may help our readers understand the reasons behind policies that seem to make Hearing Officers less accessible than they could be. For many people, both those who are in the Coast Guard and those who are not, it isn’t always easy to understand why the Hearing Office does things the way it does. The purpose of this Newsletter is always to help folks become more knowledgeable about our process and to make their participation in the process more effective.



The Hearing Office is welcoming aboard a new member of our administrative staff. He is Yeoman Second Class Drew Steele, and he arrived from the Coast Guard Training Center, Yorktown, Virginia, where he performed personnel duties. We will be training YN2 Steele to process civil penalty cases in support of our Hearing Officers and to provide information to the many people we hear from every day. He seems like a fast learner and eager to get up to speed.

Anyone with civil penalty cases involving alleged violations in 2010 ought to get those submitted to the Hearing Office as soon as possible.

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FINDING THE HAPPY MEDIUM

CDR Evan Hudspeth

According to 33 CFR §1.07-55(d), “In receiving evidence, the Hearing Officer is not bound by strict rules of evidence. In evaluating the evidence presented, the Hearing Officer must give due consideration to the reliability and relevance of each item of evidence.”

When determining what evidence to provide for the Hearing Officer’s consideration in a case, it’s important to focus on the elements of each violation. Without careful thought, it is quite possible to provide either too much, or not enough, evidence and information. It is fine to tell the whole story, and surrounding circumstances may be weighed as mitigating or aggravating factors; including irrelevant information, however, can be unnecessarily burdensome and distracting for the Hearing Officer. The goal, for both the charging unit and the charged party, should be to find the happy medium.

More is not always better

Occasionally, alleged charges will stem from an incident that included an extensive investigation, and/or response operations by the Coast Guard. When the **charging unit** is compiling a case package for submission to the Hearing Office, it is more confusing than helpful to include everything available. Instead, consider the



elements of the alleged violation, and what evidence is available that clearly shows that these elements have

been met. Similarly, it would be more beneficial to the charged party if there were a clear focus on the elements of each violation and any mitigating or extenuating circumstances.

A **charged party** responding to the allegations may be tempted to address all the finer details of the case file, pointing out minor discrepancies, and passionately offering personal opinions or conclusions about the case. To the Hearing Officer, whose job it is to make a decision based on the facts, such responses are

usually less helpful than is evidence containing factual detail to support the finding the party seeks to prove.



The charged party may want to: a) determine what evidence is available or obtainable that either clearly contradicts the Coast Guard’s evidence relating to the elements of the violation; or b) clearly present facts that are extenuating or mitigating, such as timely achievement of compliance.

A little is probably not enough

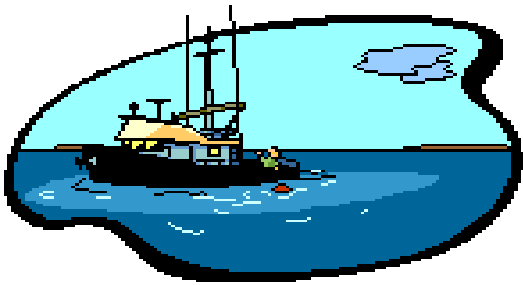
Lack of evidence may render an argument or case less than convincing, or not very credible. It becomes difficult to make a decision if not enough evidence, or not enough of an explanation about how the evidence is relevant, has been provided. To the persons involved in a boarding or other incident, it may be obvious how evidence of a certain fact relates to the proof of an alleged violation. You should try to put yourself in the

position of the Hearing Officer, who must understand what happened



only from the evidence and explanations provided. Although we may consider ourselves to be knowledgeable and experienced in the matters before us, Hearing Officers are not mind readers. A brief explanation should not only provide the Hearing Officer with a clearer understanding as to why the evidence provided is relevant, but also why, if at all, it should be considered in defense, extenuation, mitigation, or aggravation.

Not too little, and not too much, but just right... Hopefully with some forethought and common sense, both the charging unit and the charged party will be able to find the happy medium of evidence to provide in a case.



VESSEL BOARDINGS AND COAST GUARD AUTHORITY

CDR Mark Hammond

We've all watched enough episodes of "COPS" or "Law and Order" to be familiar with the concept that an agent of law enforcement needs "probable cause" to arrest a person for the commission of a crime. Agents of law enforcement need a "reasonable suspicion" that a crime has been or will be committed to stop/detain a person for questioning. So, does the Coast Guard need either a reasonable suspicion or probable cause to believe that a law or regulation has been violated to stop your boat and board your vessel? The answer is, "No."

The Hearing Office often receives responses from charged parties demanding that their cases be dismissed because the Coast Guard "lacked probable cause" to stop and board their vessel. Moreover, they argue that any violation discovered during the boarding cannot be processed because the boarding was improper and in violation of their rights under the Fourth Amendment of the Constitution, which prohibits unlawful searches and seizures.

The Fourth Amendment to the United States Constitution guards against unreasonable searches and seizures and requires warrants to be judicially sanctioned and supported by probable cause. The courts have long held however, that it is not unreasonable for the Coast Guard to exercise plenary authority under Title 14



United States Code (USC) section 89 to stop and board vessels on the navigable waters of the United States to conduct safety and documentation inspec-

tions, even in the absence of a reasonable suspicion that some criminal activity is occurring.

The Coast Guard exercises its broad authority to conduct vessel boardings for the purpose of enforcing U.S. laws and regulations to promote marine safety, security and environmental protection. This authority extends to any vessel over which the United States has jurisdiction. This essentially means U.S. vessels anywhere outside the territorial waters of another country, and foreign vessels in U.S. waters. Title 14 USC § 89 states in part:

"(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance..."

For civil penalty cases forwarded to the Hearing Office, the Hearing Officer reviews each case to determine if there is sufficient evidence in the case file to make a preliminary determination that a violation has occurred and proceed with adjudication. This



includes ensuring the Coast Guard has jurisdiction over the matter and the elements of the alleged violation are met based on the evidence. There may be cases where a party could reasonably argue that a denial of fundamental fairness, or actions that shock the conscience, undermine the credibility of the officials involved in a case and the reliability of the evidence those officials have offered. Arguments that the Coast Guard "did not have probable cause to conduct the boarding," however, most often just show an unfamiliarity with the relevant law, as discussed above, and have no bearing on the determination of whether a violation of law or regulation was committed.

SEPARATION OF AGENCY FUNCTIONS

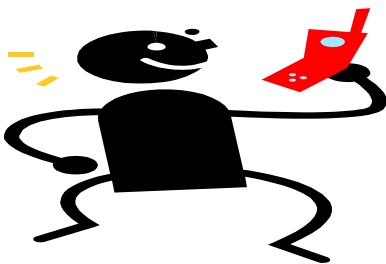
Mr. Robert Bruce

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



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

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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.

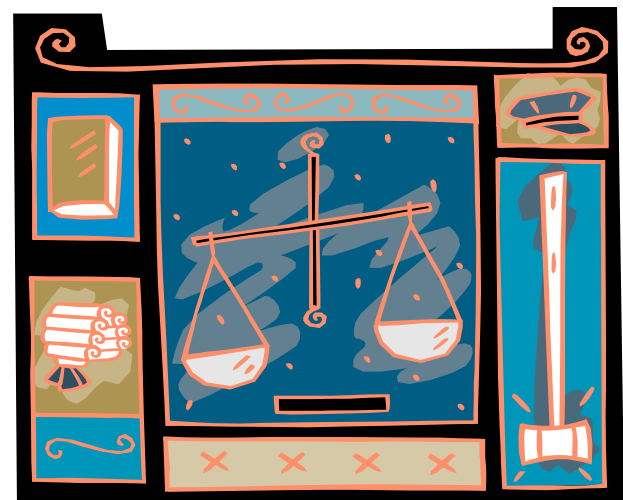
Hearing Officers are fact-finders; not policy makers.

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 determina-

tion 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.



JUST FOR FUN

BLACK CATS, SWALLOWS AND LUCK

Alicia Scott and YN2 Pamela Conlee

If a black cat crosses your path, it is known to bring bad luck, right? Well, if you are sailor, a black cat can symbolize good luck if the cat comes to you. If, however, the cat comes to the sailor and then walks away, don't go out fishing that day—you will just have plain bad luck. It was also known that if you had a cat on board your boat and: the cat sneezed, rain was on the way; if the cat was cleaning its fur against the grain, a hailstorm was a-comin'; and if the cat was frisky, you could expect some wind.

Sailors' superstitions have been around for many years and have been passed down through generations of sailing fathers to sons who take on the same profession. Have you ever heard the term, "Whistling up a storm"? Well, this comes from a traditional



sailor superstition. To whistle in the wheelhouse, or anywhere on board your vessel, could bring a gale. For all you redheads out there, don't be offended if a sailor

does not allow you to board his ship; it is known that redheads bring bad luck to a ship unless the sailor speaks to the redhead before the redhead can speak to the sailor. To the ladies out there, I have bad news. Women were known to be bad luck aboard a ship because they would distract the crew.

All this talk about bad luck! "What about good luck?," you may say. Swallows at sea have always been a comforting sight for a sailor. Swallows are land-based birds; seeing them at sea meant: "Land is near and your prospects are clear." Tattoos and piercings kept evil spirits away and a sailor wore gold hoop earrings for good luck. If you were to throw some coins into the sea to Neptune, the sea god, it was presumed that you would have a safe voyage.


There are many other superstitions, but if you just remember to throw some coins to Neptune, listen to your cat, and keep an eye out for swallows, you're sure to have a good trip!


The authors acknowledge: http://caribbean-pirates.com/nautical_superstitions.php as a source of information for the article.

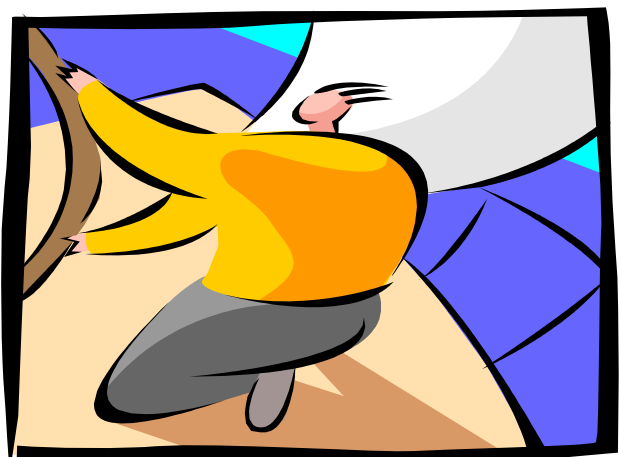
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DECKPLATE RIVETS

 Vessels of 5 net tons or more, engaging in fisheries on the navigable waters of the United States or in the Exclusive Economic Zone, or engaging in the coastwise trade (unless meeting the exceptions set forth in 46 C.F.R. § 67.9(c)) are required to be documented per 46 C.F.R. § 67.7. In cases featuring documented vessels where the Certificate of Documentation (C.O.D.) is at issue, it's a good practice to get a copy of the C.O.D. from either the party or the National Vessel Documentation Center and include it in the file before sending the case to the Hearing Office.

 Some regulations are definitional or explanatory. These regulations contain information, but they do not specifically direct anyone to do anything. No one can violate a regulation that contains only information, such as definitions or explanations. One of those regulations that only contains information is 33 CFR § 173.27, "Numbers: Display; size; color." Subsection (a) of 173.27, however, does reference the regulation that directs boaters not to operate without proper numbers. Cite the regulation that directs the boater not to operate without proper numbers.



KNOT



(Knowledge Note or Tip)

Minimum Civil Penalties for Failure to Heave-To and for Hazardous Materials Transportation Violations

Within the table of civil penalty amounts in 33 CFR Part 27, there are at least two penalty amounts that are identified as minimum civil penalties. One is the \$1,000.00 minimum civil penalty for failure to heave-to, in violation of 19 USC § 1581(d), and another is the \$300.00 minimum civil penalty for violating requirements for transportation of hazardous materials, authorized by 49 USC § 5123(a)(1). When considering whether or not to charge someone with failing to heave-to, it is important to keep in mind that, if the violation is proved, the Hearing Officer is required to assess the minimum penalty, at least. If the violation is proved, the Hearing Officer cannot assess a warning or any penalty less than a civil penalty of \$1,000.00. Accordingly, when a Coast Guard unit forwards a case including a charge of failing to heave-to, in violation of 19 USC § 1581(d), the unit should not recommend a warning or a civil penalty less than \$1,000.00. The same is true for violations of the hazardous materials transportation regulations, although the minimum \$300.00 civil penalty for those violations is less likely to raise concerns about whether the penalty fits the violation. Making a recommendation that is inconsistent with the minimum civil penalty is clearly not effective, because the Hearing Officer must follow the law, and it gives the appearance that the unit making the recommendation is not fully aware of the consequences of the charge it is asserting. The decision to seek a civil penalty should always take account of material factors involved in the case, including any minimum civil penalty.



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 (as of June 29, 2011) 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: 946

Number of case files received by the Coast Guard Hearing Office with violation dates in 2009: 1442

Number of case files received by the Coast Guard Hearing Office with violation dates in 2010: 1463

Number of case files received by the Coast Guard Hearing Office with violation dates in 2011: 245

Number of case files received by the Coast Guard Hearing Office in 2011 regardless of violation date: 716

Number of preliminary assessments issued in 2011: 688

Number of final assessments issued in 2011: 405

Number of violation case files returned to the program manager for deficiencies in 2011: 117

Number of hearings held in 2010: 3

