



# Coast Guard Hearing Office

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

Hearing Office Mission: Adjudicate civil penalty cases. The civil penalty process is remedial in nature. Its goals are to gain compliance with statutes and regulations the Coast Guard enforces and to deter future violations. A fair and informal administrative process promotes maritime safety, security and environmental protection.

## **GREETINGS**

From Robert Bruce  
Chief, Coast Guard Hearing Office



## **HEARING OFFICE NEWS**

*The Coast Guard's civil penalty process essentially took its current form in 1979 when the regulations in 33 C.F.R. Subpart 1.07 became effective. At that time Hearing Officers were assigned to each Coast Guard district to adjudicate the cases arising within the district's boundaries. In the late 1980's, the Coast Guard began consolidating the Hearing Officers into fewer locations, under the supervision of the Area Commanders, who were above the district commanders in the chain of command. This consolidation eventually led to the creation of a single Hearing Office in Arlington, Virginia, to adjudicate all Coast Guard civil penalty cases. The consolidation was complete by about 2001, and supervision of the Hearing Officer process was assigned to the Coast Guard's Judge Advocate General, the service's senior lawyer. The result of these changes, among other things, has been a physical and organizational separation of the Hearing Officer function from Coast Guard program managers and field units, to go along with the separation of functions directed by 33 C.F.R. § 1.07-15.*

*These changes over the years have benefited the appearance of impartiality and fairness in the civil penalty process, and improved its efficiency. These Newsletters were begun in 2008 to make the Hearing Office process more transparent to charged parties and to Coast Guard program managers and field units. Another goal is to improve the civil penalty process by addressing errors and encouraging best practices.*

*I hope you will find the information in this Newsletter useful, and that you will also review the prior editions at: [http://www.uscg.mil/Legal/CGHO/CGHO\\_News.asp](http://www.uscg.mil/Legal/CGHO/CGHO_News.asp).*

This month, one of our Hearing Officers, Commander Mark E. Hammond, retired after more than 35 years of service in the Coast Guard. Commander Hammond served as a Hearing Officer for almost four years and was involved in the disposition of 2,200 civil penalty cases. He was very knowledgeable about marine safety and vessel inspections, manning and other safety requirements. We will greatly miss Commander Hammond's experience and expertise, not to mention his sense of humor. A new Hearing Officer should be arriving to fill the vacancy in July.



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**Immigration Status of Unlicensed Seamen on Fishing Vessels**

*Mr. Robert Bruce*

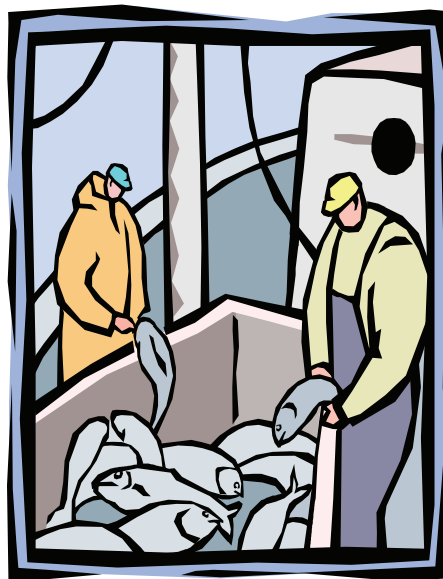
Recently, the Hearing Office has seen several civil penalty case files alleging a violation of 46 U.S.C. § 8103(i) in which the Narrative Overview of the Activity identified one or more unlicensed seamen as a “Mexican citizen” or a “Mexican national,” without further describing the immigration status of the seamen. Often there will be information in the case file that provides more information about the immigration status of the seamen, but it would be helpful to the Hearing Officer, and to the charged party, if the Narrative Overview of the Activity included the alleged immigration status of the seamen that violates 46 U.S.C. § 8103(i).

There are few, if any, stateless persons, so almost any unlicensed seaman you come across will be a citizen or national of some country. Foreign citizens/nationals in the United States may be here illegally either because they entered illegally or because they entered legally and then overstayed, for example, the duration of their visa. If an unlicensed seaman is in the United States illegally, there is a violation of 46 U.S.C. § 8103(i). This is because the provision prohibits such a person from being employed as an unlicensed seaman on a fishing vessel. In such a case, it would be helpful to state in the Narrative Overview of the Activity that the unlicensed seaman is a foreign citizen or national who is in the United States illegally. Naturally, there must be evidence in the civil penalty case file to support the allegation to meet the Coast Guard’s burden of proof.

If the foreign citizens or nationals have some type of lawful immigration status in the United States, the Narrative Overview of the Activity should include the immigration status of those persons. There is no limit on the number of permanent resident aliens that 46 U.S.C. § 8103(i) allows to be employed as unlicensed seamen. Foreign citizens and nationals who are temporarily admitted to the United States and lawfully allowed to be employed are limited to no more than 25% of the unlicensed seamen onboard.


Considering that 46 U.S.C. § 8103(i) is very specific about the status of the persons who may be employed as unlicensed seamen on a fishing vessel, it is a good practice to be very clear about the status of every unlicensed seaman onboard, if a violation of that provision is being alleged. Alleging that an unlicensed seaman is a foreign citizen or national is not, by itself, enough information for a Hearing Officer to find that a violation has occurred.


The Hearing Officer will consider any reliable evidence in the case file that shows the person’s status. Additionally, a clear statement in the Narrative Overview of the Enforcement Summary of the status of each unlicensed seaman will make it much easier for the Hearing Officer, and the charged party, to understand why the Coast Guard is alleging that there was a violation of 46 U.S.C. § 8301(i).




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**DECKPLATE RIVETS**

 Copies of all documents in the case file are provided to the charged party; careful attention should be given, therefore, to what is included in the file, and what is not. Personally identifiable information (PII) of persons other than the charged party should NOT be included in the case file if not directly relevant to the alleged violation. An individual’s name, position, and relationship to the incident may be necessary to establish context and credibility of the evidence. Addresses, phone numbers, SSNs, and DOBs, however, are PII and are not necessary to support the alleged violation. All unnecessary PII should therefore be removed from the case file, or otherwise redacted. If redacting the PII, the redacting method used must be effective, so that there is no possibility that the PII can be read.

 In Boating Under the Influence (BUI) cases, evidence establishing that the charged party was an operator is always important. Sometimes an intoxicated operator, once aware of a Coast Guard vessel nearby, will try to avoid responsibility by switching places at the helm with a sober passenger. Such maneuvers are not always successful in fooling the Boarding Officer. Anytime there is more than one person onboard, the Hearing Officer will review the civil penalty case file for evidence that explains how the vessel operator was identified. It is important for Boarding Team Members to record, for example, a description of the person at the helm and what s/he was wearing. Admissions by the charged party that s/he was, in fact, operating the vessel can be strong evidence. A bare conclusory statement that the charged party was operating the vessel does not help the Hearing Officer understand how the operator was identified.

 Parties in civil penalty proceedings are entitled to fair notice of the regulation/s they are alleged to have violated, and the circumstances that

allegedly show that the violation/s occurred. (See the reprinted article in this issue, “Factual Elements and Due Process.”) It is therefore important that the cites for the violations in the Enforcement Summary be specific enough to alert the party as to the nature of the alleged violations. If, for example, the vessel that is the subject of the violation is a commercial fishing vessel over 65 feet in length and does not have the requisite number of fire extinguishers, then 46 CFR § 28.160(b) would accurately reflect the violation. Subsection (b) of § 28.160 states: “Each vessel 65 feet (19.8 meters) or more in length must be equipped with the minimum number, location, and type of portable fire extinguishers specified in table 28.160.” Contrast subsection (b) with the more general subsection (a) of that regulation: “Each vessel must meet the requirements of part 25, subpart 25.30 of this chapter.” Subpart 25.30, “Fire Extinguishing Equipment,” contains six different regulations. To the extent possible, it is a good practice to use the cite that most clearly describes the requirement the charged party may have violated.

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**FACTUAL ELEMENTS AND DUE PROCESS**

*Lane Mc Clelland\**

*(Reprinted, with minor edits, from Volume IV Newsletter April 2009)*

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 multi-part 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 per-

taining 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.

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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 a 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 ... (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 unserviceable. 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

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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.

*\*Lane McClelland, retired O-6 and a former Hearing Officer, is now the Coast Guard Civil Penalty Appellate Authority.*

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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.

Here are some Coast Guard Hearing Office metrics (as of March 31, 2013) that provide a “how goes it” glimpse into our work:

Number of case files received by the Hearing Office with violation dates in 2009: 1444

Number of case files received by the Hearing Office with violation dates in 2010: 1498

Number of case files received by the Hearing Office with violation dates in 2011: 1625

Number of case files received by the Hearing Office with violation dates in 2012: 1399

Number of case files received by the Hearing Office with violation dates in 2013: 45

Number of case files received by the Hearing Office in 2013 regardless of violation date: 432

Number of preliminary assessments issued in 2013: 453

Number of final assessments (FLAP, FLAN, FLW, and FLD) issued in 2013: 277

Number of violation case files returned to the program manager for deficiencies in 2013: 38

Number of hearings held in 2013: 2

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

**JUST FOR FUN**

By Ms. Alicia Scott and YN2 Drew Steele  
Drawing by Ms. Alicia Scott

**WHAT IN THE WORD?**



Our fisherman needs items for his boat!  
Can you find the items he needs, using  
the letters below, to spell the items?  
You can only use the letter once.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_

**I S E T A D**

**F L N N S**

**L A I**

**S O J L E G**

**E C I U T I K**

**A S G L R**

**H**