RESPONDING TO CHARGES – (*HEARINGS vs. WRITTEN RESPONSES*)

Written By CDR Mark Hammond

When a violation case is received at the Hearing Office for action, the Hearing Officer assigned to the case makes a preliminary examination of the case file. If, after a preliminary examination of the case file, the Hearing Officer finds that the violation, as alleged, appears to have occurred, the Hearing Officer sends a Preliminary Assessment Letter (PAL) to the party. The PAL provides the charged party with notice of the violation(s) alleged to have occurred, the preliminarily assessed civil penalty for each charge, and a copy of the entire case file assembled by the charging unit. The PAL also explains the party's options in responding to the charges.

According to Title 33 Code of Federal Regulations (CFR), section 1.07-25: "Within 30 days after receipt of a notice of the initiation of the action as described above, the party, or counsel for the party, may request a hearing, provide any written evidence and arguments in lieu of a hearing, or pay the amount specified in the notice as being appropriate."

This regulation gives the charged party three mutually exclusive choices of how to respond to the notice of an alleged violation (although a charged party who requests a hearing is not precluded from submitting written evidence and arguments). The middle option is to submit written evidence and arguments *in lieu of a hearing*. Some charged parties will submit written evidence and arguments, but also ask for a hearing if the Hearing Officer is not going to dismiss the case or meet some other demand regarding the outcome of the case. That kind of response does not conform to any of the three options allowed by 33 CFR § 1.07-25, and it will result in a hearing being scheduled unless the charged party unconditionally waives his/her right to a hearing.

Hearing Officers are not authorized to engage in "plea bargaining" or negotiation of civil penalty cases. Hearing Officers must give the charged party an opportunity to comment by submitting evidence and arguments, and then the Hearing Officer must adjudicate the case based on the evidence submitted by the Coast Guard and the charged party. As a result, Hearing Officers are not in

a position to accept an offer from the charged party to waive his/her right to a hearing in return for a guaranteed outcome of the case, such as a dismissal or a warning. If the charged party does not unconditionally waive his/her right to a hearing, a hearing must be promptly scheduled once all preliminary matters have been completed. If the charged party wants to rely on written evidence and arguments *in lieu of a hearing*, then the right to a hearing must be waived without any preconditions as to how the Hearing Officer will decide the case.

A party may demand a hearing prior to any final assessment of a penalty. It is important to note, however, that hearings are not conducted for the purpose of merely "discussing" matters, venting spleen, or resolving personal issues that a party has with the way the Coast Guard conducts its business. Hearings are intended to provide a meaningful opportunity for the party to present evidence in defense, extenuation, and mitigation relative to the specific charges in the case. Unfortunately, however, and more often than not, the party will present nothing more at the hearing than the same evidence and argument that was initially submitted in writing. Nothing is really gained by having a hearing in those circumstances because the information presented has already been considered by the Hearing Officer.

The Hearing Officer treats written evidence and argument submitted in lieu of a hearing in the same way as though it were presented in-person at a hearing. There is no "extra credit" given for attending a hearing. After considering the weight of all the evidence presented by the party (*whether it was submitted in writing or presented during a hearing*), along with the other evidence in the case file, the Hearing Officer makes a final determination as to whether the alleged violation(s) did or did not occur and, if there is a violation, assesses a civil penalty as appropriate under the circumstances.

Parties are reminded that in order for a hearing to be scheduled, they must provide the issues in dispute that they desire to raise at the hearing. This is required by Title 33 Code of Federal Regulations (CFR), section 1.07-25. Issues in dispute are statements identifying the facts and circumstances surrounding the alleged violations for which they have a dispute, explanation, or mitigating evidence. If a party does not specify the issues to be addressed at the hearing, in writing, the applicable regulations will generally preclude consideration of those issues. In effect, this may result in the party forfeiting his/her right to have a hearing at which his/her issues can be considered.

Upon receipt of a PAL from the Hearing Office, the charged party should carefully read the PAL, the entire case file, and the enclosed informational tri-fold entitled "Your Alternatives in the Coast Guard Civil Penalty Process."

Understanding the process and the different options available will help parties make informed decisions on how best to respond in a timely and meaningful fashion.