



COMDTINST 16200.5B  
23 September 2013

COMMANDANT INSTRUCTION 16200.5B

Subj: COAST GUARD HEARING OFFICER PROCEDURES

Ref: (a) 33 CFR Subpart 1.07, Enforcement; Civil and Criminal Penalty Proceedings

1. PURPOSE. This Instruction provides guidance for Civil Penalty Hearing Officers in carrying out their responsibilities in adjudicating law enforcement cases referred for civil penalty action.
2. ACTION. Coast Guard Hearing Officers adjudicate maritime law enforcement cases and may assess civil penalties. Any Coast Guard unit may submit law enforcement cases for civil penalty action. This Instruction implements Reference (a) and provides amplifying guidance and policy governing day-to-day Hearing Office operations. Hearing Officers and other Hearing Office staff personnel shall comply with Reference (a) and this Instruction in performing their civil penalty case processing duties. The Judge Advocate General shall ensure compliance with the provisions of this Instruction. Internet release is authorized.
3. DIRECTIVES AFFECTED. Civil Penalty Hearing Officer Procedures, COMDTINST M16200.5A is cancelled.
4. DISCLAIMER. This document is intended to provide operational requirements for Coast Guard personnel and is not intended to nor does it impose legally-binding requirements on any party outside the Coast Guard. In the event of any conflict between the language of this document and Reference (a), Reference (a) is controlling. This Instruction is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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NON-STANDARD DISTRIBUTION:

5. THE HEARING OFFICE ORGANIZATION AND MISSION. The Coast Guard Hearing Office is a staff element of the Office of the Judge Advocate General (TJAG). It is supervised by a civilian office chief.

- a. The mission of the Hearing Office is to adjudicate civil penalty cases. The civil penalty process is remedial in nature. Its goals are to gain compliance with statutes and regulations that the Coast Guard enforces and to deter future violations. A fair and informal administrative process promotes maritime safety, security and environmental protection. Charged parties are afforded the basic due process rights of notice and the opportunity to comment. Charged parties are afforded appeal rights.
- b. The staff of the Hearing Office is comprised of an office chief, hearing officers and administrative support staff. The office chief is responsible for administration of the civil penalty process, provides technical guidance to hearing officers, and may hear cases. Hearing officers adjudicate, fairly and impartially, civil penalty cases referred to them for decision. The administrative support staff supports the hearing officers but does not adjudicate cases.

6. BACKGROUND.

- a. In the early 1970s, the Coast Guard civil penalty assessment process varied on a district-by-district basis. In many instances a district program division chief or branch chief decided civil penalty cases. In others, the field commander was the responsible decision maker. This direct involvement in the penalty process by the same agency personnel responsible for detecting, investigating, and reporting apparent violations was problematic, particularly if there was any indication of command influence in case decisions. This same period was marked by increasing Congressional use of civil penalty authority to enforce federal laws.
- b. In 1978, the Coast Guard issued new procedural rules at 33 CFR Subpart 1.07, which established an informal agency process for deciding civil penalty cases that did not require more formal procedures, such as the formality associated with hearings before an Administrative Law Judge. The rules ensured administrative due process while keeping the procedures simple for all concerned. The rules provided for designation of "Hearing Officers" who are removed from any other role in Coast Guard regulatory or enforcement activities and are solely responsible for the decisions in civil penalty cases. Congress continued to recognize the benefit of informal adjudicative proceedings in passage of the Oil Pollution Act of 1990, which expressly exempted the adjudication of class I civil penalties from the provisions of the Administrative Procedure Act. However, informality does not diminish the necessity for basic due process and fairness. Reference (a) prescribes the process due in the Coast Guard civil penalty cases to which it applies and it requires that such cases be fairly adjudicated by an impartial Hearing Officer.
- c. In 1999, the consolidation of the Hearing Officers into a centralized Hearing Office was begun. This consolidation furthered the goal of ensuring fairness to mariners by providing for increased consistency among Hearing Officers in the approach to adjudication of civil penalty cases.

## 7. RELATIONSHIPS.

- a. Headquarters Program Managers. The Coast Guard Hearing Office interacts with various Coast Guard Headquarters Program Managers regarding policies that affect the adjudication of violation cases. Program managers responsible for regulatory law enforcement, databases such as the Marine Information for Safety and Law Enforcement (MISLE) database, and the accounting and collection of civil penalties, can provide valuable input concerning the civil penalty process and the process benefits from collaboration on policy decisions affecting the administration of the process. Hearing Officers do not discuss specific civil penalty cases with Headquarters Program Managers. Hearing Officers may always consider the full range of penalty amount, from a warning to the maximum authorized penalty amount. Hearing Officers are not bound by any penalty recommendation or agency guidance on penalty amounts.
- b. Processing Officials. A processing official is a Coast Guard member or employee responsible for the processing of law enforcement cases for civil penalty action. The processing official may be at any unit organizational level. This official compiles the case package that identifies the party to be charged, identifies the violations to be charged and relevant jurisdictional and factual elements, assembles evidence in support of the violations including evidence in aggravation or mitigation, and makes recommendations as to disposition if desired. Processing officials may only communicate with Hearing Officers about a civil penalty case in writing and on the record; any other communication with a processing official, when necessary, is accomplished by the chief of the Coast Guard Hearing Office or the administrative staff. Civil penalty cases returned for deficiencies are accompanied by written correspondence prepared by a Hearing Officer identifying the deficiencies.
- c. Field Personnel. Hearing Officers are prohibited from communicating, off-the-record, with field personnel involved in a boarding, examination, inspection, or investigation or any other matter concerning a violation that is or may become the subject of a civil penalty case. The chief of the Coast Guard Hearing Office or the administrative staff are responsible for handling any inquiries from the field or making contact with field personnel regarding the adjudication process in general or matters related to any specific violation or case.
- d. External Persons. All communication with media, the public, Congress members or their staff, and other third parties, concerning the activities of the Hearing Office, shall be made solely by the chief of the Coast Guard Hearing Office, the administrative staff or the Judge Advocate General.
- e. Prohibited Disclosures. No person may divulge, in writing or orally, the deliberations and thought processes behind a Hearing Officer's written decision in a civil penalty case except when approved by the chief of the Coast Guard Hearing Office. This prohibition is necessary to protect the integrity of the civil penalty process and the ability of Hearing Officers to exercise their discretion and judgment without the sense, either apparent or actual, of undue criticism, intimidation, harassment, or threat.

8. THE HEARING OFFICER.

- a. With respect to the civil penalty cases assigned to them, Hearing Officers are delegated the authority to determine if a violation has occurred, and if so, to determine if a penalty is warranted, and if so, to issue a warning or assess a monetary penalty. If a monetary penalty is warranted, they exercise their discretion to determine the appropriate preliminary and final assessed amounts. In accordance with Reference (a), they have authority to conduct hearings, weigh evidence, and mitigate penalties. They have authority to dismiss violations or violation cases at any stage of the process when warranted by applicable standards of due process and fundamental fairness. To the extent the law so provides, they may administer oaths and issue subpoenas.
- b. Hearing Officers assess civil penalties, when violations of statute or regulation have been proved, for the purpose of achieving compliance and deterring future violations. Before deciding if a violation has occurred, the Hearing Officer must first find that the Coast Guard has jurisdiction over the person, place and subject matter of the alleged violation. Secondly, the Hearing Officer must find evidence showing non-compliance with the requirements of a regulatory or statutory provision. The standard of proof for a finding that a violation did occur is a “preponderance of evidence.”
- c. The essential function of every Hearing Officer is fact finding. This function cannot be delegated. The Hearing Officer may not assume that because a report of violation has been submitted, there must have been a violation. Any program recommendations, even those consistent with Commandant written policies (e.g., COMDTINSTs), are not binding on Hearing Officers. Hearing Officers’ determinations in civil penalty cases are dependent on evidence presented by the Coast Guard in support of the alleged violation, evidence presented by the charged party in defense, mitigation and extenuation, and matters of official notice. Hearing Officers exercise independent judgment in the weight they give to evidence, in the assessment of the credibility of witnesses, as to whether a civil penalty should be assessed if a violation is found to have occurred, and the amount of any civil penalty assessed. The Hearing Officers’ discretion is free from influence by program managers, chain of command, and the usual deference afforded those senior in rank or position.
- d. Uniformity and consistency in the application of laws, regulations, policies, procedures and time standards, in the method of fact finding, the approach to formulating penalty amounts, as well as in the administrative processing and handling of cases, avoid the appearance or actuality of disparate treatment of those charged with violations. The chief of the Hearing Office facilitates uniformity and consistency through education of and guidance to Hearing Officers, but will not direct the disposition of any case or the imposition of any penalty. Prior decisions by Hearing Officers in civil penalty cases are not precedential and do not limit a Hearing Officer’s decisions in subsequent cases. Consistency in approach to formulating penalty assessments does not mean that Hearing Officers utilize predetermined penalty amounts for certain violations or predetermined degrees of seriousness for particular violations. It means that similarly situated parties should receive similar treatment, considering the totality of the circumstances found to have been proved, applicable statutory and regulatory factors, the goals of achieving compliance and deterrence rather than imposing a punishment, and an overall sense of fairness based on all

the evidence presented. Hearing Officers must impartially exercise discretion in the areas identified above in a way that affords due process and fairness, and preserves the overall integrity of the civil penalty process.

- e. Hearing Officers must be mindful of the national goals articulated by Congress through enactment of statutes authorizing civil penalties. Achievement of these goals requires a consistent national administration of civil penalty provisions in a legally sound manner. Hearing Officers' actions must reflect the Congressional purpose to ensure that our nation's resources are preserved, that the public remains mindful of its duties and responsibilities, and that our nation enjoys safe, environmentally sound, maritime transportation. Some penalty provisions prescribe specific factors which must be considered in assessing a civil penalty under that provision. In addition to the factors previously discussed, Hearing Officers must consider achievement of the statutory purpose intended by the law that was violated. In carrying out this critical decision-making function, Hearing Officers perform an important and essential role with respect to the furtherance of national goals.
- f. Hearing Officers shall follow, and are bound by, authoritative agency policy positions, which include Coast Guard interpretations of statutes and regulations, policy, and agency actions. In cases where an authoritative Coast Guard legal or policy position may be dispositive of a relevant issue, but is unavailable to the Hearing Officer, the Hearing Officer will request through the chief of the Hearing Office an authoritative Coast Guard policy position from the Office of Maritime and International Law (CG-0941). The chief of the Hearing Office may request on behalf of Hearing Officers clarification of authoritative agency interpretations of statutes or regulations, and information regarding relevant agency actions or policies as they apply to the case. The Judge Advocate General will resolve any disagreement over any interpretation of law or policy. If a Hearing Officer intends to rely on a Coast Guard policy position and the civil penalty case file did not previously provide fair notice of the policy position to the charged party, the Hearing Officer will provide notice to the charged party and allow the charged party to present any objections to the policy position.
- g. Hearing Officers must be fair and impartial in the adjudication of alleged violations and the assessment of civil penalties. Hearing Officers may not have any personal interest in the outcome of a civil penalty case or previous association with the subject matter of a civil penalty case before them for adjudication.
- h. To protect the impartiality of Hearing Officers' adjudications, certain measures will not be tracked for purposes of evaluation of Hearing Officers' performance. These include, but may not be limited to, the dollar amounts of civil penalties assessed, the number of cases in which a civil penalty was or was not assessed, and the number of cases in which the Coast Guard's position was upheld or not upheld by the Hearing Officer.
- i. Hearing Officers explain their findings in written decision letters. They do not discuss with parties, members of the public, Coast Guard field or program management personnel, the exercise of their independent judgment or discretion generally or in specific cases. Since Hearing Officers must be fair and impartial in reaching their civil penalty case decisions, they must remain free from the appearance and actuality of improper influence. To that end, they do

not invite or contribute to discussions concerning those areas in which they are duty bound to exercise independent judgment and discretion. Hearing Officers do not engage in off-the-record communications regarding cases or any alleged violations with Coast Guard field or program management personnel, or parties. All Hearing Officer communications regarding the specifics of a case or alleged violations are conducted in writing and are maintained in the civil penalty case file. Beyond that, the deliberations and thought processes of the Hearing Officer will not be disclosed without the approval of the chief of the Hearing Office. This does not preclude the chief of the Hearing Office or the Hearing Office staff from providing information to the Coast Guard or the public that will promote fair and prompt adjudication but which is not connected with any particular case.

- j. Hearing Officers are expected to deal with charged parties respectfully, straightforwardly and honestly. Hearing Officers are impartial and maintain independence from the chain of command, program managers and any Coast Guard personnel with an interest in the outcome of the case when performing their duties concerning the adjudication of civil penalty cases. Hearing Officers shall not engage in any investigation of a case before them, or officially associate themselves with the investigations or investigators developing evidence for civil penalty cases. Entering an electronic database to retrieve evidentiary information not included in the civil penalty case file constitutes investigation and is prohibited. This prohibition is necessary because the Hearing Officer, as an impartial adjudicator, may consider only the evidence included in the civil penalty case file and matters of which they take official notice on the record.
- k. Coast Guard processing officials are responsible for compiling evidence and putting together civil penalty case files referred for adjudication. Hearing Officers may not suggest what violations should be initiated against parties or what investigatory measures should be undertaken in specific cases. The duty to be impartial includes the duty not to assist the Coast Guard in preparing and presenting a case against a party. Hearing Officers are expected to advise those persons responsible for oversight of the penalty process and compliance with Reference (a) if they believe anyone in the chain of command, a program manager or any Coast Guard member or employee is attempting to interfere with the independence that is necessary to assure fair and impartial performance of the Hearing Officer's duties. Hearing Officers are also expected to advise those persons responsible for oversight when they believe any policies, procedures or other demands, imposed upon them interferes with the independence that is necessary to assure fair and impartial performance of the Hearing Officer's duties.
- l. A Hearing Officer shall recuse him or herself from further participation in a civil penalty case if he or she determines that he or she should be disqualified because of actual bias, prejudice, or personal interest in a matter, or because it would appear to reasonable persons with full knowledge of all the relevant circumstances that the Hearing Officer has a disqualifying bias, prejudice or personal interest in the matter. In accordance with Reference (a), a Hearing Officer shall recuse him or herself from participation in a civil penalty case if he or she has had any substantial, official connection with the case prior to its referral to the Hearing Office, or previously acted either as a direct participant in the investigation of the case or as the supervisor of an investigator of the case while the case was under investigation.

## 9. PROCESSING CIVIL PENALTY CASES.

- a. Coast Guard unit personnel are responsible for identifying and documenting violations. It is their responsibility to assemble the civil penalty case file. Processing officials identify the party to be charged and the violations to be charged, prepare the jurisdictional and factual elements in support of each charged violation, and collect the evidence to be included in the case file to support the violations. Processing officials may recommend to the Hearing Office that a warning or specific monetary penalty amount be assessed for a charged violation. Recommended penalty amounts are not binding on Hearing Officers. Such a recommendation is one factor among others considered by the Hearing Officer during the adjudication of a civil penalty case. Processing officials may include aggravating or mitigating factors in the civil penalty case. A recommendation supported by solid evidence in mitigation or aggravation will be more persuasive than a conclusory statement or opinion that lacks support in the record. The processing official should present the evidence in a fair and straightforward manner, but serves as an advocate with an official interest in the outcome of the case.
- b. Prompt adjudication of alleged violations after the Coast Guard obtains the relevant facts promotes the remedial goals of the civil penalty process and deterrence of future violations. Timely receipt of a civil penalty case file at the Hearing Office is of utmost importance. Timely processing by processing officials allows notice to the charged party before the material information in the case becomes stale or unavailable. Ideally, a civil penalty case file should be forwarded to the Hearing Office immediately upon completion of the examination, inspection, or investigation of a matter. Certain interim steps by the unit or processing official, such as compliance incentives or case reviews, may reasonably result in a minimal delay in the forwarding of a case. Dismissal of cases for lack of timely processing is at the Hearing Officers' discretion on a case-by-case basis. The Hearing Officer will take into account the impact of the lack of timeliness on the entire case, all parties, and the overall civil penalty process.
- c. Enclosure (1) reflects time standards for the various steps in the adjudication process. The time standards are for internal management purposes and do not create any due process rights nor are they a basis for dismissal of any case.
- d. The Hearing Office manages the adjudication of civil penalty case files in the most efficient and effective manner practicable. Once a civil penalty case is transferred to, and received by, the Hearing Office, the Hearing Office is responsible for the civil penalty case. The Hearing Office ensures that basic due process rights are afforded to all parties. Those rights are notice and an opportunity to comment.
- e. Once a civil penalty case is submitted to the Hearing Office for decision, the adjudication process begins with a review to determine whether there is sufficient evidence to find a *prima facie* case. Hearing Officers review civil penalty case files for completeness, legal sufficiency, and any improper or inappropriate content. The assigned Hearing Officer reviews the civil penalty case file in its entirety, weighing all evidence presented but with particular attention to:

- (1) Applicability of cited statutes and regulations to the charged party, place and offense;
  - (2) Evidence that the charged party and its role, e.g., owner, operator, etc., have been correctly identified;
  - (3) Some evidence regarding each element of the alleged violation; and
  - (4) Whether a civil penalty is authorized and appropriate.
- f. A Civil Penalty Case Guide is available on the Hearing Office web site at: [http://www.uscg.mil/Legal/CGHO/CGHO\\_doc/CPCGUIDE.pdf](http://www.uscg.mil/Legal/CGHO/CGHO_doc/CPCGUIDE.pdf). The Case Guide provides a detailed description of a well-prepared and well-assembled civil penalty case file. Civil penalty case files are returned if they are found to be incomplete or not prepared and assembled in a manner sufficient to properly begin the Hearing Office's adjudication process.
- g. After completing the initial review, the assigned Hearing Officer either finds there is a *prima facie* case to proceed or that for one or more reasons the adjudication of the civil penalty case cannot proceed. (See Paragraph 11.f. for an explanation of a *prima facie* case.) This may be due to reasons that warrant returning the case to the processing official for correction of one or more deficiencies in the preparation of the civil penalty case file or in the evidence. Depending on the deficiencies, the Hearing Officer may dismiss one or more alleged violations within the case file or the entire civil penalty case. Corrections should be made promptly, within the period allowed, or an extension should be requested. If the processing official and/or originating unit deems the case to be uncorrectable, the processing official and/or originating unit may close the case upon notification to the Coast Guard Hearing Office, within the time allowed for correction. If a timely correction, closure or request for extension is not received, the Hearing Office will determine an appropriate action for the case.
- h. Dismissal is appropriate in cases where the initial review reveals a deficiency that apparently cannot be rectified by the Coast Guard, or if the lack of evidence is such that it is reasonable to conclude that further investigation would not produce sufficient evidence. All dismissals are without prejudice unless the Hearing Officer expressly notes otherwise. When specific alleged violations are, or an entire civil penalty case is, dismissed without prejudice, a new civil penalty case may be submitted to the Hearing Office if the deficiencies are rectified and/or the necessary evidence is obtained. Charges dismissed with prejudice may not be resubmitted for any reason.
- i. Enclosure (2) reflects the paths that a civil penalty case may take during adjudication by the Hearing Office.
- (1) Once the initial review of a civil penalty case has been completed and the Hearing Officer determines a *prima facie* case exists for one or more of the alleged violations, a preliminary assessment letter is issued to the charged party or representative. This letter is sent regular mail. For additional information concerning the preliminary assessment letter and the

charged party's right to notice of the charge(s) and evidence in the civil penalty case file, see Paragraph 10.

- (2) The charged party has the right to review all evidence being considered by the Hearing Officer regarding the civil penalty case.
- (3) The charged party is given every reasonable opportunity to make comment and argument, and provide evidence to rebut the alleged violations and evidence in the case file.
- (4) Within 30 days of receipt of the preliminary assessment letter and access to the civil penalty case file, the charged party may pay the preliminary assessed amount. The charged party may alternatively provide within the same time period, written comment, argument and evidence to defend against the alleged violation(s) in lieu of a hearing. Evidence in extenuation and mitigation may also be provided for the purpose of seeking a reduction or elimination of the preliminary assessed amounts. Alternatively, the charged party may request a hearing. All responses are included in the civil penalty case file.
- (5) If the charged party fails to respond as described above, the Hearing Officer proceeds to make a final determination and assessment based on the evidence in the civil penalty case file without the benefit of a response from the charged party. Failure of the charged party to respond within 30 days of receipt of the preliminary assessment letter waives the right to a hearing. However, at the discretion of the Hearing Officer, a hearing may be granted if the charged party submits a late request. The final determination and assessment is sent to the charged party in a final assessment letter. The charged party is advised of their appeal rights in this letter.
- (6) If the charged party responds and presents comments, argument, or evidence that require an answer from the unit that originated the violations, the Hearing Officer may request rebuttal comments from the originating unit. Rebuttal comments received from an originating unit must be made available to the charged party for an opportunity to comment. The charged party's response to the originating unit's rebuttal comments, if any, is included in the civil penalty case file.
- (7) If the Hearing Officer receives a response from a non-party to the action, who has not been previously identified by the charged party as someone that may respond or act on behalf of the charged party, the Hearing Officer shall forward the response to the charged party. The charged party will be given an opportunity to advise the Hearing Officer that the response may be accepted as if the charged party submitted it, that the person responding represents the charged party, or that the charged party does not acquiesce to the response being considered in the adjudication of his/her civil penalty case. If the Hearing Officer determines based on the response that the non-party should be substituted for the charged party or a violation case should be created against the non-party, the Hearing Officer may forward the response for consideration by the processing official. A Hearing Officer may not, on his own initiative, change the charged party or initiate a civil penalty case against the third-party or non-party who responded.

- (8) Once the charged party has exercised the opportunity to be heard either through written submissions or at a hearing, the originating unit has had the opportunity to respond to any request for rebuttal comments, and following the charged party's opportunity to respond to any rebuttal comments, the Hearing Officer proceeds to make a final determination as to whether the violations occurred as alleged based on a preponderance of evidence standard of proof. The Hearing Officer may dismiss the case, issue a warning or assess a monetary penalty. In cases where there is more than one violation, the Hearing Officer may impose any one of these options for each particular violation.
  - (9) The Hearing Officer prepares the final determination addressing all violations in a case file not previously dismissed. This written decision is sent to the charged party as a final assessment letter. The written decision must stand on its own and advise the charged party of the basis for finding that a violation occurred, address and resolve each material disputed issue raised by the charged party, provide a summary disposition of issues raised but not found relevant, and in general terms explain the basis for the penalty amount (i.e., past violation history, aggravating factors, etc). The written decision should explicitly address statutory factors required to be considered when making the final determinations, so there is no doubt those factors were properly considered. The charged party is advised of their appeal rights in this final assessment letter.
  - (10) After receipt of the Hearing Officer's decision, the charged party may pay the penalty or file an appeal.
- j. Routinely, parties make requests for extension of time, witnesses, documents, change of schedule or location for hearings, etc. All requests must be duly considered. Hearing Officers will grant or deny all such requests in writing and, unless self-explanatory, denials shall include a brief statement of the grounds for denial.
  - k. Each civil penalty case file that is received by the Hearing Office must stand alone and be adjudicated on its own merits. Processing cases as "companion cases" and adjudicating the cases together violates this principle when evidence included in one case, but not in the other, is relied upon in deciding the case lacking the evidence.
  - l. A single Hearing Officer may concurrently adjudicate companion cases based on a single incident (one basic fact pattern) with the same charged party or with different charged parties. The purpose to be served is threefold:
    - (1) Each case must stand on its own merits. However, processing them concurrently by one Hearing Officer will diminish the chance of widely disparate treatment of the cases.
    - (2) The penalty assessed in each case will be better managed and tailored to meet the goals of compliance and deterrence of future violations.
    - (3) The handling of these cases by one Hearing Officer promotes administrative efficiency and fairness.

- m. Separate cases involving the same party but different incidents are not treated as companion cases when they are being adjudicated concurrently. In this situation, the cases must be decided independently and neither case should affect the outcome of the other case. For purposes of violation history, a finding that a violation occurred is not effective until the civil penalty case is final and only evidence of violation history contained in the case file will be considered in adjudicating a civil penalty case.

#### 10. DUE PROCESS RIGHTS.

- a. Right to Notice. The charged party has the right to timely notice of civil penalty action against him/herself. This notice advises the charged party that the Coast Guard Hearing Office has received a case file with violations alleged against the charged party and that a review of that case file indicates one or more violations occurred and that the charged party is responsible. The notice provides access to a charge sheet that sets forth a general description of the violations, the maximum penalty that may be imposed for each violation, and the preliminary penalty amount that the Hearing Officer determined to be appropriate for each violation based on the evidence in the case file. This preliminary assessment letter:
  - (1) Provides the charged party free of charge with access to a complete copy of the entire civil penalty case file (charging documents and evidence) that is before the Hearing Officer for consideration and states that the party will be provided with access to copies of any materials subsequently added to the file. This does not include material that would disclose or lead to the disclosure of the identity of a confidential informant. Access to the case file means either delivery of a complete copy by mail or otherwise making the complete case file available, for example making it available on a secure web site. If any physical evidence incapable of being placed in the case file is being considered, the charged party will be afforded an opportunity to examine this evidence. The charged party will be deemed to have access to material submitted by the charged party that is added to the case file.
  - (2) Provides the charged party with an explanation of the options available to address the alleged violations. These options include:
    - (a) The making of full or partial payment of the preliminary assessment amount for each violation; or
    - (b) The right to comment; or,
    - (c) The opportunity to ask for an extension of time for the purpose of exercising the right to comment.
  - (3) Informs the charged party that failure to exercise any of the above options within 30 days after receipt of the notice of civil penalty action (preliminary assessment letter) will result in the preliminary assessment amount for each violation becoming final and the final civil penalty being due and owing.

- b. Right to Comment. The charged party has the right to comment. The charged party may respond to or rebut any material in the civil penalty case file. The right to comment may be exercised in writing or by appearance at a hearing.
  - (1) Submit evidence in lieu of a hearing. Within 30 days after receipt of the preliminary assessment letter, the charged party may submit documentary evidence in lieu of a hearing in defense, to show the violation did not occur as alleged, or in extenuation or mitigation, to explain why the preliminary assessed penalty amount should be reduced.
    - (a) This evidence may include written witness statements, photographs, receipts, diagrams or any other documentary evidence relating to the alleged violations. The charged party may comment on the impact of the penalty amount on him/herself or his/her business.
    - (b) Any documentary evidence submitted in lieu of a hearing is afforded the same consideration and weight as if the evidence was presented to the Hearing Officer at a hearing.
    - (c) A charged party may request additional time to respond. This request must be made within the 30 days after receipt of the preliminary assessment letter.
  - (2) Request a hearing. Hearings are generally held via video-teleconference at a Coast Guard unit location with video-teleconferencing capabilities closest to the location of the charged party, or in person at the Coast Guard Hearing Office in Arlington, Virginia. The hearing request must be submitted within 30 days after the charged party receives notice of the alleged violation or the right to a hearing is forfeited. For additional information on hearing procedures see Paragraph 14.
- c. Representation. After a preliminary assessment letter has been issued, the charged party is afforded the right to be represented by counsel throughout every stage of the Hearing Officer's adjudication of the civil penalty case. Whether by legal counsel or non-legal counsel, representation is at the expense of the charged party. Although rare, Hearing Officers have the discretion, upon a finding that good cause exists (e.g., conflict of interest) to reject non-legal counsel from representation of a charged party. Such a determination shall be in writing and provided to the charged party. The charged party shall be given the opportunity to comment. Charged party comments shall be included in the case file.

## 11. EVIDENCE.

- a. Standard of Proof. The standard of proof in a civil penalty case adjudicated by a Coast Guard Hearing Officer is a *preponderance of evidence*. The standard of proof is met when the weight of the evidence supporting the violation outweighs the weight of contrary evidence, or the evidence as a whole shows that the fact to be proved is more probable than not. In essence, to find the violation "proved" the Hearing Officer makes a determination that the violation more likely than not occurred as alleged.

- b. Rules of Evidence. Formal rules of evidence do not apply to the informal, administrative adjudicatory process of the Coast Guard Hearing Office. No formalities are associated with the submission of documentary evidence or the proffer of evidence at a hearing. The Hearing Officer may, however, refuse to consider evidence found to be irrelevant, unreliable or not credible.
- c. Documentary and Physical Evidence. A civil penalty case file submitted to the Hearing Office for review and adjudication should include the documentary evidence held by the Coast Guard to support a finding that the violation occurred as alleged. Occasionally, physical evidence is relied upon by the Coast Guard or a charged party. Generally, pictures and statements will suffice to show what the physical evidence is intended to prove. Rarely does it become necessary for the Hearing Officer and parties to visit a site to view physical evidence. The charged party may offer any facts, statements, explanations, documents, sworn or unsworn testimony, or other evidence to rebut the alleged violation or to excuse or mitigate any penalty that may be preliminarily assessed.
- d. Documentary evidence is “paper” evidence submitted by either the Coast Guard or the charged party. Documentary evidence from the Coast Guard unit that identified and documented the alleged violation may include a declined Notice of Violation “ticket;” completed boarding report or deficiency report, either in paper form or as a printout from a computer or digital recorder; completed check-off lists; notes of observations; written statements of witnesses, parties, investigators, or inspectors; photographs, chemical analysis results (e.g., laboratory reports); charts/maps; diagrams, plans or drawings, or blueprints; etc. The charged party in a case will often submit documentary materials. The forms of the documentary evidence may vary widely from a simple letter to a comprehensive and sophisticated factual review with lengthy discussion, arguments, and attachments. Often parties will present photocopies of receipts to show the purchase of equipment or photographs to show the noted violations have been corrected.
- e. Physical evidence is that evidence which is not reduced to paper. It is evidence that is not typically capable of being included in the case file folder. For instance, it may be a hose, pipe, valve, or piece of a hull. If physical evidence cannot be photographed in a way that preserves the evidence and presents it to the Hearing Officer in the same way as if it were viewed, or if statements describing the physical evidence are deemed inadequate, it may become necessary to view the physical evidence. Parties may travel and view such evidence at their own expense and at the availability of the holder of such evidence.
- f. When preparing a case for the Hearing Office, the Coast Guard processing official ensures that the documentary evidence is sufficient to at least support a finding of a *prima facie* case. A *prima facie* case is found when there is at least the minimum evidence necessary to support a finding that the violation occurred as alleged. The finding of a *prima facie* case allows the Hearing Officer to proceed with civil penalty action, and the evidence is then subject to being disputed and rebutted by the charged party. Coast Guard processing officials are encouraged to provide all material evidence, instead of just the bare minimum needed to establish a *prima facie* case.

- g. Oral Evidence. Oral evidence is presented at a hearing. Typically, the charged party and/or his/her representative or witnesses will offer oral sworn or unsworn testimony and argument. This oral testimony and argument is offered to demonstrate that the violation did not occur, or that the circumstances surrounding the violation excuse or mitigate the violation. This testimony can be accompanied by additional documentary evidence or by reference to evidence already in the case file.
- h. Authenticity, Reliability and Credibility. Documentary evidence must have the indicia of being authentic; that is, the document must appear to be true and genuine. In the case of statements, the statement is presumed to be genuine if it is signed and dated. In the case of photographs, a label reflecting the name of the person who took the picture, when and where it was taken, and what the photograph depicts may provide sufficient indicia of authenticity. If the authenticity of any documentary evidence is in question, the Hearing Officer may require the submitter to provide sufficient indicia of authenticity. The Hearing Officer has independent discretion to evaluate the reliability and credibility of each item of evidence offered and to give it the weight the Hearing Officer deems appropriate. Evidence found to be less reliable or credible, to some degree, has a probative value that is reduced or nullified. When the reliability or credibility of evidence is raised as an issue, the Hearing Officer should articulate the basis for the determination of reliability or credibility in a summary fashion in the final decision. To the extent evidence is found to be reliable and credible, it may support a finding of fact even where there is evidence that contradicts it.
- i. Conclusions and Opinions. A statement concluding that a violation occurred is not evidence. Similarly, a statement expressing a personal idea, insight, bias or prejudice is not evidence. Evidence consists of statements of observations and/or facts discovered, usually based on personal knowledge. Conclusory statements and non-expert opinions have limited use. The Hearing Officer may seek to know the underlying observations or facts that support a conclusory statement especially when such a conclusory statement is challenged by the charged party. Opinions are generally disregarded, unless it is an expert opinion rendered by a witness that the Hearing Officer has deemed to be an expert.
- j. Findings. A finding that a violation occurred as alleged must be supported by the greater weight of the evidence for each element of the violation. Other factual findings must be similarly supported. For example, if the amount of the penalty for an oil spill is to be based on a very large quantity spilled, there must be evidence that a very large quantity of oil was in fact discharged into navigable waters.
- k. Elements of Violation. Each element of a violation must be proved by the greater weight of the evidence, including:
  - (1) Elements which demonstrate that the statute or regulation at issue applies to the charged party, vessel, or facility, as the case may be; and
  - (2) Specific elements which show a failure to comply with the statute or regulation.

- l. Prior Violation History. For penalty assessment purposes, Hearing Officers should consider the prior violation history of a charged party if it is included in the case file, and only if final agency action on the prior violation has occurred.
- m. Official Notice. The Hearing Officer may take notice of matters which are subject to a high degree of indisputability and are commonly known, or can be ascertained from readily available sources of known accuracy. Prior to taking such notice, the charged party must be given an opportunity to consent or object. When official notice is taken, it should be noted in the record along with the charged party's response. The Coast Guard need not be afforded an opportunity to consent or object to the taking of official notice.

## 12. DISCOVERY.

- a. Generally. With the notice of civil penalty action from the Hearing Officer, the charged party will receive access to a complete and identical copy of the entire case file that is before the Hearing Officer for consideration. If audio/video media is part of the case file, the charged party will receive access to an identical copy of the audio/video file. The charged party has the right to examine all materials in the case file. The Hearing Office may provide documents in a digital format. An identical copy of any supplemental material added to the case file by the Coast Guard after receipt of the case file by the Coast Guard Hearing Office must also be made available to the charged party. The charged party may request the Hearing Officer to provide assistance in having documents held by the Coast Guard, that are not included in the case file, produced to the charged party for examination.
- b. Request for Documents. If the Hearing Officer determines that the document requested by the charged party to be produced will materially aid the Hearing Officer's decision in the matter, the Hearing Officer should seek to have the document produced by the Coast Guard member or employee holding the document. The charged party's request for the production of a document must be in writing and specifically describe the document being sought, the Coast Guard member or unit that possesses the document if known, the issue or issues to which the document is relevant, and the substance of what the document is expected to reveal. The Hearing Officer will consider whether production of the document will unreasonably delay the adjudication of a case, whether the document sought has substantial, probative value to the adjudication of the case, and whether the document contains information not otherwise available in the case file. Because there are no formalities associated with the Hearing Officer's receipt of evidence, there are often many expedient alternatives available to the charged party for presenting evidence to support his/her position. A general request for information, based on a hunch or speculation that a document or documents may exist, will usually fail to meet the test of materially aiding the Hearing Officer in deciding the matter.
- c. If documents are produced and made a part of the civil penalty case file in response to a request for production, the Hearing Officer will provide the charged party with access to all such documents received from the Coast Guard and notify the charged party, in writing, of the right to review and comment on the documents. The Hearing Officer may request rebuttal comments from the Coast Guard concerning such documents, the charged party's comments about the documents, or both.

- d. Hearing Officers generally do not have subpoena power nor the authority to compel production of documents requested, except in accordance with 33 U.S.C. § 1321(b)(6)(I). If the Hearing Officer seeks production of a document requested by the charged party, but the document is not obtained, the charged party shall be notified in writing with a brief explanation. The Hearing Officer shall proceed on the basis of all available evidence in the case file.
  - e. Freedom of Information Act Requests. A charged party may pursue a Freedom of Information Act request to obtain documents from the Coast Guard believed to be relevant to the case. While a reasonable extension may be appropriate for a charged party to receive a response to his or her request, hearings and final adjudications will not be unreasonably delayed awaiting the results of a Freedom of Information Act request. Nothing in Reference (a) requires an unreasonable delay in the civil penalty process because a Freedom of Information Act request is pending or has failed to produce the information expected.
13. WITNESSES. The charged party may present witness testimony either by sworn or unsworn written statement at any time during the adjudicatory process including at a hearing. The charged party may present sworn or unsworn witness testimony at a hearing. There is no right to confront witnesses in this forum and, therefore, Coast Guard personnel do not typically appear as witnesses at a hearing.
- a. The charged party has great latitude in the witnesses brought to a hearing. However, the Hearing Officer can limit the number he/she will hear from during a hearing if their testimony is redundant or not relevant to the Hearing Officer's adjudication.
  - b. Hearing Officers may request the appearance of Coast Guard and non-Coast Guard witnesses at a hearing if he/she determines that the appearance may *materially* aid the adjudicatory determinations necessary in a particular case. Such a request may be made on the Hearing Officer's own initiative or at the request of the charged party.
  - c. The charged party's request that the Hearing Officer make witnesses available at a hearing must be in writing and explain why a written statement would be inadequate, the issues to which the testimony would be relevant, and the substance of the testimony. Witness requests may be denied for reasons such as when the witnesses' attendance may unreasonably delay the adjudication of a case, the proffered testimony will not materially aid in the decision-making, the existence or location of the witness cannot be determined, or the witness refuses to be available. The Hearing Officer shall inform the charged party in writing if a witness request is denied and briefly summarize the reasons for the denial.
  - d. Hearing Officers have no inherent authority to subpoena witnesses. Except as authorized by 33 U.S.C. § 1321(b)(6)(I), Hearing Officers have no statutory authority to compel witness attendance even if the Hearing Officer determines that the witness would be of material assistance to the case. However, the absence of subpoena power is not a reason to summarily deny a request for a witness. If the appearance of the witness is not obtained, the Hearing Officer shall proceed on the basis of all other available evidence.

- e. At the Hearing Officer's discretion, telephonic testimony of witnesses may be allowed if it will materially aid in the decision-making without disrupting or delaying the hearing. Hearings may be rescheduled or recessed pending appearance of a witness at the discretion of the Hearing Officer based on the Hearing Officer's determination of the need for the witness's testimony. The discretion to allow telephonic testimony or to delay a hearing pending the appearance of a witness should only be used when the proponent of the witness can show that alternative means of presenting the evidence, such as a written statement, are inadequate.
- f. A Hearing Officer may consider evidence from an expert, including the expert's opinion, if specialized, technical, or scientific knowledge will aid the Hearing Officer to better understand the evidence in a case or assist in the Hearing Officer's determination of a fact in issue, and the expert is qualified based on knowledge, skill, experience, training or education. The Hearing Officer has discretion to allow expert evidence, if the evidence is based upon sufficient information or facts, is the product of credible and reliable methods and principles, and if the expert witness has appropriately applied those methods and principles reliably to the facts in the case.

#### 14. HEARING PROCEDURES.

- a. Request for Hearing. A request for a hearing must be made in writing within 30 days of receipt of the notice that civil penalty action has been initiated. Typically this is the preliminary assessment letter sent to the charged party by a Hearing Officer. If a timely request for a hearing is not received, the right to a hearing is forfeited. Untimely requests for a hearing may be granted at the Hearing Officer's discretion. The hearing request must specify the non-jurisdictional issues in dispute in writing. A Hearing Officer need not consider non-jurisdictional issues in dispute that the charged party has not specified in advance. Issues in dispute are those material facts, evidence or other matters that the charged party desires to dispute or explain. They may also include reasons as to why the penalty should be reduced or eliminated. The Hearing Officer will always consider jurisdictional issues. The Hearing Officer may in his/her discretion consider a non-jurisdictional issue at a hearing even if it has not been previously specified. A charged party may request, at any time up to 10 days before the scheduled date of the hearing, that the issues in dispute be amended. Any such request submitted less than 10 days before a scheduled hearing may be approved at the discretion of the Hearing Officer.
- b. Scheduling. Upon receipt of a request for hearing from the charged party accompanied by the issues in dispute and after all pre-hearing issues are adequately addressed, the Hearing Office will promptly schedule a hearing and a Hearing Officer will be assigned to conduct the hearing. Hearings are generally held via video-teleconferencing at a Coast Guard unit closest to the charged party that is able to provide video-teleconference support. Typically, this is a Coast Guard District Office. If a unit that can accommodate a video-teleconference hearing is identified and located nearer in proximity to the charged party, the hearing may be scheduled at that location at the discretion of the Hearing Officer. Charged parties also have the option of traveling to the Coast Guard Hearing Office in Arlington, Virginia, for an in-person hearing. Such travel is at the expense of the charged party. A charged party may submit a written request to change the location of the hearing. The Hearing Officer has discretion to grant the request if justified. Mere convenience of the charged party is insufficient justification for changing the

hearing location. The Hearing Officer will respond to such a request in writing. If a video-teleconference or in-person hearing is extremely impracticable, a telephonic hearing may be allowed at the Hearing Officer's discretion if requested by the charged party. The chief of the Hearing Office must approve the decision to conduct a telephonic hearing.

- c. If the charged party requests to utilize a commercial video-teleconferencing vendor, the Hearing Officer may approve the same provided that the commercial vendor's equipment and network is compatible with the Hearing Office's equipment. Use of a commercial video-teleconferencing vendor at the request of the charged party is at the charged party's expense.
- d. Generally, once a hearing is scheduled it will not be rescheduled. Failure of the charged party to appear, absent good cause, will result in forfeiture of the right to a hearing. Hearing Officers have the discretion to reschedule the hearing based on the charged party's showing of good cause.
- e. When the hearing is scheduled at a Coast Guard unit, a Coast Guard escort, typically, a junior enlisted member, will be assigned to escort the charged party, his/her representative and any witnesses to the hearing. The escort remains during the hearing and will escort the charged party and others from the hearing at its conclusion. The duties of the escort do not include duties typical of a security detail. The escort is simply to guide the charged party and others to and from the hearing, provide an identity check from photographic identification if so requested by the Hearing Officer and respond to any administrative or clerical task such as retrieving or sending a fax during the hearing at the Hearing Officer's request.
- f. The Coast Guard Hearing Office affords a hearing as part of an informal, but official, agency administrative process in accordance with Reference (a). Hearings must be conducted with the appropriate decorum, adjudicative temperament, and order necessary for the fair and efficient determination of serious matters. The Hearing Officer's approach to a hearing must be one that gives deference to the charged party's right to comment with regard to the factual or legal issues in dispute that have been specified and any jurisdictional issues. The Hearing Officer must remain impartial and unbiased. The burden of proving that a violation occurred by a preponderance of the evidence is always on the Coast Guard. The decision to allege a violation and forward a case for civil penalty action has no evidentiary weight by itself; the bare allegation does nothing to show that a violation has occurred.
- g. The Hearing Officer must be willing to listen to the charged party's evidence and argument, and weigh the same before making a determination regarding an alleged violation. The Hearing Officer must not give the impression that he/she has abdicated his/her responsibility to be independent, or that he/she may be influenced by anything other than evidence properly presented at the hearing or documented in the case file. Program penalty amount recommendations including those in various Commandant Instructions or policy letters (such as COMDINST 16200.3 series) are not binding, but a Hearing Officer should give deference to authoritative agency interpretations of law or relevant agency actions in accordance with Paragraph 7.a. of this Instruction. Charged parties will be treated with respect and dignity and afforded all courtesy regardless of the alleged violation or reported behavior. Hearing Officers will be treated with respect, dignity and all courtesy deserving of their position and rank.

- h. At the beginning of the hearing, the Hearing Officer will obtain the charged party's written acknowledgement of his/her rights at the hearing. This is accomplished by a written document provided to the charged party. The Hearing Officer will also advise the charged party of his/her rights and review basic procedural matters concerning the hearing with the charged party at the outset of the hearing. The record of this advisement of rights shall be inserted in the civil penalty case file. Although Hearing Officers should conduct hearings with the latitude and flexibility appropriate to this informal process, he/she should maintain firm control and ensure that the hearing proceeds in an efficient and logical manner. Use of a script is required so that all procedural requirements are met and hearings are conducted in a fairly uniform manner. Hearing Officers may take notes during the hearing.
- i. During the hearing, persons in attendance are introduced, evidence and testimony are received, an opportunity for argument is afforded, and rebuttal evidence may be heard. A copy of the complete case file should be available for the charged party's review and reference during a hearing if necessary. Charged parties will be afforded the opportunity to present evidence in defense, extenuation and mitigation. Hearing Officers may question the charged party or witnesses to seek clarification of any matter that will materially aid in his/her decision. Hearing Officers do not make or announce determinations relative to the violations or penalty amounts at the hearing. Prior to the conclusion of the hearing, any outstanding post-hearing procedural matters should be addressed. The Hearing Officer will take any evidence and testimony presented at the hearing together with any evidence provided post-hearing under deliberation. After full review and due consideration of all of the Coast Guard's evidence and all evidence and testimony presented by the charged party, a final determination and assessment will be made by the Hearing Officer.
- j. Typically only the Hearing Officer, the party and persons present for the purpose of providing evidence or testimony will be in attendance at a hearing. Attendance by Coast Guard personnel not providing evidence or testimony may tend to chill the charged party's opportunity to comment and therefore such attendance is discouraged. Hearings are afforded as an opportunity for the charged party to comment on the alleged violations and any evidence in the case file. Hearing Officers have the authority to terminate the proceedings at anytime due to inappropriate conduct of any party, representative, or witness or for displays of disrespect, such as obvious dishonesty, deceit or untruthfulness.
- k. A verbatim transcript of a hearing is not normally prepared. The charged party may make arrangements for a verbatim transcript at his/her own expense, including all related expenses. Electronic recording of the proceedings is not allowed, except by a certified court reporter in conjunction with the preparation of a verbatim transcript or by the Hearing Officer. If the Hearing Officer makes and electronic recording of the hearing, a copy of the recording will be made available to the charged party. The charged party must advise the Hearing Officer 10 days before the hearing of the intent to have a court reporter record the hearing. Failure to do so will result in forfeiture of the opportunity to record the hearing and make a verbatim transcript. If the charged party has the hearing recorded and subsequently appeals the Hearing Officer's decision, the charged party must submit 2 copies of the verbatim transcript of the hearing to the Hearing

Officer no later than the time of filing the appeal. The Hearing Officer will include a copy of the verbatim transcript with the record when forwarding the appeal.

- l. The Hearing Officer may receive documentary evidence during a hearing from the charged party. There are no formalities associated with, or required for, the presentation of documentary evidence at a hearing. Any documentary evidence received will be properly labeled and made part of the civil penalty case file. If there are questions about authenticity, the Hearing Officer shall attempt to resolve such questions at the hearing or if unable to do so, post-hearing. If not able to resolve these questions, the Hearing Officer will address them and make appropriate comment in the final determination.
- m. Charged parties are encouraged to provide photographs and statements concerning physical evidence rather than bringing physical evidence to the hearing. If the material probative value of the physical evidence cannot be effectively presented by way of photographs or statements, the Hearing Officer may admit and consider the physical evidence. Photographs of the physical evidence may be substituted for the record, and the Hearing Officer's decision should address relevant observations and findings with respect to the physical evidence.
- n. The charged party may present witnesses at a hearing. The travel arrangements and all expenses are the responsibility of the charged party, except that a witness who is a member or employee of the Coast Guard, that the charged party has asked the Hearing Officer to arrange for, may be provided at Coast Guard expense. Testimony by witnesses is typically unsworn at a hearing although the Hearing Officer may allow sworn testimony. Witnesses are subject to the requirements concerning appropriate decorum discussed in Paragraph 14.f. Witnesses may be questioned by the charged party and his/her representative or the Hearing Officer. Witness testimony must be relevant to the issues in dispute or to the elimination or reduction of the preliminary assessed penalty. Charged parties may submit a signed statement from the witness in lieu of the appearance of the witness. Such a statement is given the same weight as if the witness appeared and gave oral testimony. Telephonic hearings and testimony by telephone may be allowed in accordance with Paragraphs 13 and 14.b. of this Instruction.
- o. The charged party has the right to be represented by counsel at his/her expense at all stages of the civil penalty process including the hearing.
- p. Following the hearing, the charged party is afforded additional time to submit any further documentary evidence such as written statements, invoices, receipts, diagrams, etc., for consideration prior to a final determination and assessment by the Hearing Officer. The Hearing Officer will specify a date certain for receipt of post-hearing evidence from the charged party. Typically, a period of 10 calendar days is afforded. The charged party may request to have this additional time waived if there is no intention to submit post-hearing evidence. Such evidence is added to the case file and considered by the Hearing Officer when making the final decision. If the evidence requires further comment from the Coast Guard, the Hearing Officer will request rebuttal comments. Any rebuttal comments from the Coast Guard shall be in writing. The charged party will receive a copy of the rebuttal comments and an opportunity to comment in writing on them to the Hearing Officer. All comments will be considered prior to the Hearing Officer's final decision.

- q. The need for more than one hearing in a civil penalty case is rare and not generally granted. A Hearing Officer may allow an additional hearing if the additional hearing is deemed necessary after consideration of all the relevant factors. Substantial weight is given to whether the additional hearing will materially aid the Hearing Officer's decision-making and if the evidence or testimony to be presented would be inadequate in any form (i.e., written statements, photographs) other than presentation at a hearing.

## 15. CORRESPONDENCE.

- a. All communications related to the merits of a civil penalty case between the Coast Guard Hearing Office, Hearing Officers, charged parties, charged party representatives, and the Coast Guard must be in writing and will be made a part of the civil penalty case file. The text of an email addressed to anyone at the Hearing Office is not an acceptable method of communication because the authenticity of emails cannot be reliably determined. The text of such an email will not be treated as evidence or included in the civil penalty case file. However, properly authenticated emails relating to the facts of a case may be submitted, in writing, as evidence. Coast Guard personnel may also use email to forward evidence or rebuttal documents, as email attachments, to the Hearing Office administrative staff and, if appropriate, such evidence or documents may be added to the case file with notice provided to the charged party.
- b. Hearing Officers should ensure that letters and replies to party responses are concise, direct, and rely solely on evidence in the civil penalty case file, and applicable statutory and regulatory provisions. Hearing Officers' letters should generally be free from gratuitous commentary, opinions, hypothetical examples, and criticism of any persons or parties. A Hearing Officers' reply should stay within the scope of the party's response and the evidence in the case file. They should reflect professionalism, integrity, and fairness to the charged party. Hearing Officers must take care not to take official notice of a matter in their written replies without first providing the charged party an opportunity to consent or object to the taking of official notice.
- c. See Paragraph 9.g. of this Instruction concerning the initial Hearing Officer review process and communications related to the correction or resubmission of deficient cases.
- d. The Hearing Officer may request that the Coast Guard provide rebuttal comments to a charged party's response. Most often, the request for rebuttal comments will go to the unit that originated the civil penalty case. Such comments are typically requested when the charged party raises issues that the case file does not adequately address. Upon the Hearing Officer's receipt of rebuttal comments from the Coast Guard, the charged party shall be provided a copy and afforded an opportunity to comment. If the Coast Guard does not respond, the Hearing Officer will proceed with the adjudication of the civil penalty case without the benefit of rebuttal comments.
- e. Rebuttal comments received *after* the Hearing Officer has issued a final letter of dismissal that dismisses all of the alleged violations in a case file are not required to be sent to the charged party. Rebuttal comments received after a final letter of assessment but before the Hearing Officer's decision becomes final agency action or before an appellate decision is rendered, must

be sent to the charged party for purposes of appeal or to afford the charged party the opportunity to request reconsideration.

- f. When the charged party responds to the allegations in a civil penalty case file, the Hearing Officer may find that the response is such that rendering a final determination at that time would be premature, and that an interim reply from the Hearing Officer may be helpful in reaching a sound decision. Examples of when a Hearing Officer reply may be appropriate include, but are not limited to, instances when the charged party: attempts to raise an issue without providing enough information for the Hearing Officer to decide if the issue has merit; fails to provide evidence to support assertions made in the charged party's response; raises issues that should be addressed prior to a hearing to facilitate a meaningful hearing; indicates a misunderstanding of the process or law that is applicable to the alleged violations; or should be given an extension of time to submit further comment or proof of compliance. Hearing Officers should avoid making dispositive findings on the ultimate issues of whether a violation occurred or not in an interim reply or in any other type of correspondence that is not a final determination letter.
- g. The Hearing Officer's final determination letter should explicitly address all relevant issues presented by the charged party. If a relevant issue was previously and fully addressed in interim correspondence, the Hearing Officer may, instead of repeating the discussion of the issue in the final determination, reference the issue and date of the letter that contained the discussion of that issue. When the charged party's arguments are clearly inappropriate, incorrect, or without merit, there is no need to provide an in depth discussion; however, the party should be briefly informed as to why the particular argument warranted little or no consideration. The Hearing Officer should take care, though, not to casually dismiss an issue or argument that warrants greater attention. The final determination letter should explain the basis for finding that the Coast Guard met its burden of proof, if the Hearing Officer finds that a violation occurred. Hearing Officers shall state their findings clearly along with a summary of the evidence and/or law that supports their findings. If a hearing was held during the adjudication of a civil penalty case, the final determination letter should also reflect a summary of the evidence and argument presented at the hearing.
- h. The final determination letter should explain what evidence was considered, and what violations were found to have occurred. It should generally include a brief discussion of the basis for any penalty assessed, including a warning, and explicitly acknowledge consideration of factors required by law to be considered. The final determination letter should fairly explain the Hearing Officer's decision, but need not reveal all the deliberative thought processes or judgments of the Hearing Officer. It is important for the Hearing Officer not only to summarize what evidence was considered but if any evidence was not considered, the basis for its non-consideration. If the charged party indicates at any time during the process that an incorrect statute or regulation was cited, and the Hearing Officer determines that, although the citation was incorrect, the charged party had adequate notice of the substance of a well-founded violation of another statute or regulation, the Hearing Officer may find that the violation occurred as alleged and assess a penalty. All decisions to dismiss a charge are without prejudice unless the Hearing Officer expressly notes otherwise. Charges dismissed with prejudice may not be resubmitted for any reason. If a charge is dismissed following a rehearing, the charge may not be resubmitted.

- i. It is essential for Hearing Officers to ensure that *all* final determinations are based only on evidence in the administrative record. Facts that are generally known or accepted, but which are not supported by evidence in the record, may not be considered unless official notice is properly taken.

16. PETITIONS TO REOPEN. A petition to reopen may be submitted at any time after the Hearing Officer's final determination but prior to the determination becoming final agency action. During that period, a charged party who desires to raise new issues and/or present new evidence may submit a petition to reopen for the Hearing Officer's consideration.

- a. Following a Hearing Officer's final determination but prior to the expiration of the time to appeal, a charged party may find that it has relevant issues or evidence that were not previously available or that were available but were not presented to the Hearing Officer. In such a case the charged party may petition the Hearing Officer to reopen the case and consider the new issues and/or new evidence. The petition to reopen must be in writing and explain why the issues or new evidence were not presented for the Hearing Officer's consideration during the course of the initial adjudication of the case. The Hearing Officer may grant the petition to reopen upon finding that the new issues and/or new evidence will have a material bearing on the final determination. The Hearing Officer may also consider whether the explanation for the delay in submitting the new issues and/or new evidence has some merit.
- b. A petition to reopen may be denied either because no matter that will have a material bearing on the final determination has been raised or because there is not an adequate explanation for the delay in submitting the new matters. The Hearing Officer's decision on the petition will be in writing and state the basis upon which the petition to reopen was granted or denied. The charged party may appeal the denial of a petition to reopen to the appellate authority within 30 days of receipt. If the petition to reopen is granted, the Hearing Officer will decide the reopened case.
- c. Following the proper submission of an appeal, a charged party may discover relevant new issues and/or evidence that were not previously available. In that case, the charged party may petition the appeal authority to reopen the case to consider the new issues and/or evidence. A petition to reopen following submission of an appeal must describe the new issues and/or new evidence, state why it is likely to produce a more favorable result to the petitioner, and whether it was known to the petitioner prior to the submission of the appeal. It must also state why the new issues and/or new evidence could not be produced or discovered through reasonable diligence prior to the submission of the appeal. Those statements should be supported by evidence. If the case has not yet been forwarded to the appellate authority, the Hearing Officer will grant or deny the petition to reopen as discussed above in Paragraph 16.a., before forwarding the case to the appellate authority.
- d. The appellate authority will decide a petition to reopen received when a case is before the appellate authority or appealed from a denial by the Hearing Officer. The appellate authority's decision to grant the petition to reopen will result in a remand to the Hearing Officer. The appellate authority's decision to deny the petition to reopen will result in the pending appeal, if any, being decided immediately.

17. APPEALS AND REMANDS.

- a. A charged party may appeal the Hearing Officer's final determination. The appeal must be postmarked or placed with an express carrier for delivery to the Coast Guard Hearing Office no later than 30 days from the date the charged party receives the final determination. The appeal shall be addressed to Commandant, United States Coast Guard and mailed to the Coast Guard Hearing Office. If no appeal is submitted within 30 days from the date the final determination is received by the charged party, the Hearing Officer's final determination becomes the final agency action in the case.
- b. If a Hearing Officer finds that a charged party's appeal is untimely, the Hearing Officer will advise the party in writing. The Hearing Officer will nevertheless seek appeal comments from the Coast Guard and forward the appeal package to the appellate authority with an explanation in the appeal memorandum of the reasons for finding that the appeal is untimely. The Hearing Officer has discretion, upon a showing of good cause, to grant an extension of time to file an appeal. The request for extension must be made within the original 30 days allowed to submit an appeal. A Hearing Officer will grant only one 30 day extension of time to appeal, unless the charged party demonstrates that exceptional circumstances warrant an additional extension of time.
- c. Upon receipt of an appeal, the Hearing Officer performs a cursory review of the appeal. Matters on appeal are limited to those issues and evidence that were properly raised before the Hearing Officer and jurisdictional questions. Appeals should not raise new issues or include new evidence. If the charged party fails to comply with certain formalities, for instance if there is not a proper title or address, but the request demonstrates the intent to appeal to the Commandant, the Hearing Officer should process the request as an appeal in accordance with this Instruction. However, if the appeal raises new issues or includes new evidence, the Hearing Officer may find it appropriate to treat the appeal as a Petition to Reopen. If correspondence received during the time allowed for an appeal does not demonstrate an intent to appeal to the Commandant, and addresses other matters, instead, it is not an appeal.
- d. The appeal package will consist of the charged party's appeal, a forwarding memorandum prepared by the Hearing Officer, any appeal comments received from the Coast Guard and the complete case file. The complete case file will contain all Coast Guard documents and evidence submitted, all responses and documentary evidence submitted by the charged party including any evidence submitted at a hearing or subsequent to any hearing, and all correspondence generated for the case by the Hearing Officer or the Hearing Office. The Hearing Officer will give the Coast Guard an opportunity to provide comments in response to a charged party's appeal prior to the appeal being forwarded to the appellate authority. Most often, the request for appeal comment will go to the unit originating the civil penalty case. Upon receipt of appeal comments from the Coast Guard, the Hearing Officer will forward the appeal package to the appellate authority.
- e. A copy of the forwarding memorandum and any appeal comments from the Coast Guard will be provided to the charged party. If the Coast Guard does not respond to the request for appeal comments within the time allowed, the Hearing Officer will forward the appeal package to the

appellate authority without appeal comments from the Coast Guard. The appeal package will be forwarded no later than 10 days following the expiration of the 30 day period allowed for the Coast Guard to provide appeal comments. If the appeal raises new issues and/or includes new evidence not previously raised before the Hearing Officer, and the Hearing Officer decides not to treat the appeal as a Petition to Reopen, the forwarding memorandum will identify the new issue and/or evidence and reference the final determination letter that provided the charged party the opportunity to petition to reopen the case to consider new issues and/or evidence. Otherwise, the Hearing Officer will not comment on the new issues and/or new evidence.

- f. The appellate authority issues a written final decision in each case and furnishes the final decision to the charged party. A copy is provided to the Coast Guard Hearing Office. The appellate authority may affirm, reverse, or modify the Hearing Officer's decision, or remand the case for additional action or proceedings by the Hearing Officer. The appellate authority may also remit, mitigate or suspend the penalty assessment in whole or in part. The appellate authority may substitute its judgment for that of the Hearing Officer in order to reach a final agency action that fully comports with agency policy. A final appeal decision for the Commandant constitutes final agency action. A remand is not a final appeal decision.
- g. If the case is remanded by the appellate authority, the Hearing Officer must go back to the point in the proceedings necessary to address the issues identified by the appellate authority for action on remand. Usually, it is not necessary to go back further, but that may be necessary in some cases and may be done at the Hearing Officer's discretion. The Hearing Officer should review the file in conjunction with the remand letter from the appellate authority to determine what additional matters must be addressed.
- h. If additional evidence is required on remand, a copy of the portion of the file relevant to the remand may be returned to the Coast Guard, generally the originating unit, with the request for additional evidence. If the Coast Guard replies that additional evidence is not available or will not be provided, or offers new arguments but not evidence, the case may be dismissed for insufficient evidence. The charged party will be promptly notified.
- i. If the Coast Guard provides new evidence or overcomes the deficiency in evidence that was identified, the Hearing Officer will notify the charged party in writing that the case has been reopened for further consideration following the Commandant's action on appeal, remanding the case. The notification to the charged party shall:
  - (1) Specify the issues being addressed;
  - (2) Give the charged party the opportunity to re-examine the case file, and provide the charged party with a copy of the remand letter and make available any additional evidence received from the Coast Guard and added to the case file; and
  - (3) Afford the charged party 30 days from the date of receipt this notification to respond to the remand letter and any supplemental evidence that was added to the case file following the Commandant's remand.

- j. Following consideration of all new evidence and arguments received from the Coast Guard and/or charged party, the Hearing Officer will issue a new final determination. This new final determination will address all decisions required by new issues and/or evidence presented on remand. Where appropriate, it will discuss any change in the interpretation or application of law. The Hearing Officer may reference prior correspondence as necessary to avoid repeating discussions of fact and law that remain unchanged.
  - k. The new final determination will grant the party the right to appeal within 30 days from receipt of the new final determination.
18. DISTRIBUTION. No paper distribution will be made of this Instruction. An electronic version will be located on the following Commandant (CG-612 web sites. Internet: <http://www.uscg.mil/directives/>, and CGPortal: <https://cgportal.uscg.mil/delivery/Satellite/CG612>.
19. RECORDS MANAGEMENT CONSIDERATIONS. This Instruction has been thoroughly reviewed during the directives clearance process, and it has been determined there are no further records scheduling requirements, in accordance with Federal Records Act, 44 U.S.C. 3101 et seq., National Archives and Records Administration requirements, and Information and Life Cycle Management Manual, COMDTINST M5212.12 (series). This policy does not create any significant or substantial change to existing records management requirements.
20. ENVIRONMENTAL CONSIDERATIONS. This Instruction and the policies contained within it have been thoroughly reviewed by the originating office and are categorically excluded under USCG categorical exclusion 33 (Table 2-1 COMDTINST 16475.1 (series)) from further environmental analysis. This Instruction has no significant cumulative impacts on the human environment, makes no substantial change to environmental conditions, it is not inconsistent with any Federal, state or local laws, or administrative determinations, relating to the environment, and it does not raise any substantial controversy relating to the environment.
21. FORMS/REPORTS. None.

FREDERICK J. KENNEY /s/  
Rear Admiral, U. S. Coast Guard  
Judge Advocate General

Enclosure (1) Hearing Office Time Standards

Enclosure (2) Flowchart for Case Processing

## HEARING OFFICE TIME STANDARDS

The following time standards guide the processing of various stages of the adjudication of case files. Failure to meet these standards does not provide grounds for dismissal of violations or reduction/elimination of any penalty assessed. Similarly, failure to meet these standards is not grounds for appeal.

Return of violation case files to the processing official for correction of a deficiency: Return to the Coast Guard Hearing Office within 20 days of receipt of the violation case file for correction.

Request for valid address for charged party: Provide valid address within 15 days of receipt of request for valid address.

Request for control to be electronically transferred to the Coast Guard Hearing Office: Transfer control of MISLE activity within 4 days of receipt of request for control.

Request for rebuttal comments or appeal comments from Coast Guard: Submit/deliver comments to the Coast Guard Hearing Office within 30 days; within 10 days of request for comments after a hearing.

Hearing Officer preliminary assessment letter (notice to charged party): Issue within 30 days from the date the violation case file is received at the Coast Guard Hearing Office.

Hearing Officer reply to charged party response to the preliminary assessment letter and all other charged party responses during the adjudicatory process: Issued within 45 days from the date the charged party response is received by the Coast Guard Hearing Office.

Hearing scheduled upon charged party request: As soon as practicable, but no later than three months from date of hearing request unless for good cause.

Request for Appeal: Forwarded to appellate authority within 10 days of receipt at the Coast Guard Hearing Office unless appeal comments from the Coast Guard were requested; if so, then 10 days after receipt of the appeal comments at the Coast Guard Hearing Office. If Request for Appeal is improperly labeled and the content constitutes a Petition to Reopen, it is not forwarded to the appellate authority.

## FLOWCHART FOR CASE PROCESSING

