

§ 1.07-40

the Hearing Officer in writing and state the reasons justifying nondisclosure. Failure to make a timely request may result in a document being considered as nonconfidential and subject to release.

(c) Confidential material is not considered by the Hearing Officer in reaching a decision unless:

(1) It has been furnished by a party, or

(2) It has been furnished pursuant to a subpoena.

§ 1.07-40 Counsel.

A party has the right to be represented at all stages of the proceeding by counsel. After receiving notification that a party is represented by counsel, the Hearing Officer directs all further communications to that counsel.

§ 1.07-45 Location of hearings and change of venue.

(a) The hearing is normally held at the office of the Hearing Officer.

(b) The Hearing Officer may transfer a case to another Hearing Officer on request or on the Hearing Officer's own motion.

(c) A request for change of location of a hearing or transfer to another Hearing Officer must be in writing and state the reasons why the requested action is necessary or desirable. Action on the request is at the discretion of the Hearing Officer.

[CGD 87-008a, 52 FR 17554, May 11, 1987]

§ 1.07-50 Witnesses.

A party may present the testimony of any witness either through a personal appearance or through a written statement. The party may request the assistance of the Hearing Officer in obtaining the personal appearance of a witness. The request must be in writing and state the reasons why a written statement would be inadequate, the issue or issues to which the testimony would be relevant, and the substance of the expected testimony. If the Hearing Officer determines that the personal appearance of the witness may materially aid in the decision on the case, the Hearing Officer seeks to obtain the witness' appearance. Because many statutes prescribing civil penalties do not provide subpoena power, there may be

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cases where a witness cannot be required to attend. In such a case, the Hearing Officer may move the hearing to the witness' location, accept a written statement, or accept a stipulation in lieu of testimony. If none of these procedures is practical, the Hearing Officer shall proceed on the basis of the evidence before him.

§ 1.07-55 Hearing procedures.

(a) The Hearing Officer must conduct a fair and impartial proceeding in which the party is given a full opportunity to be heard. At the outset of the hearing, the Hearing Officer insures that the party is aware of the nature of the proceeding and of the alleged violation, and of the provisions of the law or regulation allegedly violated.

(b) The material in the case file pertinent to the issues to be determined by the Hearing Officer is presented. The party has the right to examine, and to respond to or rebut, this material. The party may offer any facts, statements, explanations, documents, sworn or unsworn testimony, or other exculpatory items which bear on appropriate issues, or which may be relevant to the size of an appropriate penalty. The Hearing Officer may require the authentication of any written exhibit or statement.

(c) At the close of the party's presentation of evidence, the Hearing Officer may allow the introduction of rebuttal evidence. The Hearing Officer may allow the party to respond to any such evidence submitted.

(d) In receiving evidence, the Hearing Officer is not bound by strict rules of evidence. In evaluating the evidence presented, the Hearing Officer must give due consideration to the reliability and relevance of each item of evidence.

(e) The Hearing Officer may take notice of matters which are subject to a high degree of indisputability and are commonly known in the community or are ascertainable from readily available sources of known accuracy. Prior to taking notice of a matter, the Hearing Officer gives the party an opportunity to show why notice should not be taken. In any case in which notice is taken, the Hearing Officer places a written statement of the matters as to

which notice was taken in the record, with the basis for such notice, including a statement that the party consented to notice being taken or a summary of the party's objections.

(f) After the evidence in the case has been presented, the party may present argument on the issues in the case. The party may also request an opportunity to submit a written statement for consideration by the Hearing Officer and for further review. The Hearing Officer shall allow a reasonable time for submission of the statement and shall specify the date by which it must be received. If the statement is not received within the time prescribed, or within the limits of any extension of time granted by the Hearing Officer, the Hearing Officer renders his decision in the case.

§ 1.07-60 Records.

(a) A verbatim transcript will not normally be prepared. The Hearing Officer prepares notes on the material and points raised by the party, in sufficient detail to permit a full and fair review and resolution of the case, should it be appealed.

(b) A party may, at its own expense, cause a verbatim transcript to be made. If a verbatim transcript is made, the party shall submit two copies to the Hearing Officer not later than the time of filing and administrative appeal. The Hearing Officer includes them in the record.

§ 1.07-65 Hearing Officer's decisions.

(a) The Hearing Officer issues a written decision. Any decision to assess a penalty is based upon substantial evidence in the record. If the Hearing Officer finds that there is not substantial evidence in the record establishing the alleged violation or some other violation of which the party had full and fair notice, the Hearing Officer shall dismiss the case and remand it to the District Commander. A dismissal is without prejudice to the District Commander's right to refile the case and have it reheard if additional evidence is obtained. A dismissal following a rehearing is final and with prejudice.

(b) If the Hearing Officer assesses a penalty, the Hearing Officer's decision contains a statement advising the

party of the right to an administrative appeal. The party is advised that failure to submit an appeal within the prescribed time will bar its consideration and that failure to appeal on the basis of a particular issue will constitute a waiver of that issue in any subsequent proceeding.

[CGD 78-82, 43 FR 54186, Nov. 20, 1978, as amended by CGD 85-001A, 51 FR 19329, May 29, 1986]

§ 1.07-70 Right to appeal.

(a) Any appeal from the decision of the Hearing Officer must be submitted by a party within 30 days from the date of receipt of the decision. The appeal and any supporting brief must be submitted to the Hearing Officer. The only issues which will be considered on appeal are those issues specified in the appeal which were properly raised before the Hearing Officer and jurisdictional questions.

(b) The failure to file an appeal within the prescribed time limit results in the action of the Hearing Officer becoming the final agency action in the case.

§ 1.07-75 Action on appeals.

(a) Upon receipt, the Hearing Officer provides a copy of the appeal and any supporting brief to the District Commander who referred the case. Any comments which the District Commander desires to submit must be received by the Hearing Officer within 30 days. The Hearing Officer includes the District Commander's comments, or not later than 30 days after receipt of the appeal if no comments are submitted by the District Commander, the Hearing Officer forwards all materials in the case to the Commandant.

(b) The Commandant issues a written decision in each case and furnishes copies to the party, the District Commander, and the Hearing Officer. The Commandant may affirm, reverse, or modify the decision, or remand the case for new or additional proceedings. In the absence of a remand, the decision of the Commandant on appeal shall be final. In addition to the actions which may be taken by the Commandant on appeal, the Commandant may also remit, mitigate or suspend the assessment in whole or in part.