

§ 33.30

(e) The ALJ may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

(Authority: 31 U.S.C. 3803(g)(2))

§33.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under §33.3 and, if so, the appropriate amount of the civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Department shall prove a defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing must be open to the public unless otherwise ordered by the ALJ for good cause shown.

(Authority: 31 U.S.C. 3803 (f), (g)(2))

§33.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Department head, upon appeal, evaluate any circumstances that mitigate or aggravate the violation and articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty is imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Department head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements.

34 CFR Subtitle A (7-1-04 Edition)

(2) The time period over which such claims or statements were made.

(3) The degree of the defendant's culpability with respect to the misconduct.

(4) The amount of money or the value of the property, services, or benefit falsely claimed.

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation.

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss.

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs.

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct.

(9) Whether the defendant attempted to conceal the misconduct.

(10) The degree to which the defendant has involved others in the misconduct or in concealing it.

(11) If the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude the misconduct.

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct.

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers.

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions.

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly.

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section may be construed to limit the ALJ or the Department head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

(Authority: 31 U.S.C. 3803(a)(2) (e), (f))

§ 33.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party must have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing must be held at the place and at the time ordered by the ALJ.

(Authority: 31 U.S.C. 3803(g)(4))

§ 33.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing must be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts must be exchanged as provided in § 33.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination must be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the party *pro se* or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

(Authority: 31 U.S.C. 3803(g)(2)(E); 3809)

§ 33.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ is not bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence if appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement are inadmissible