

Hearing Officer seeks to obtain the witness' appearance. Because many statutes prescribing civil penalties do not provide subpoena power, there may be 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.

[CGD 78-82, 43 FR 54186, Nov. 20, 1978, as amended by USCG-2002-12471, 67 FR 41331, June 18, 2002]

§ 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 avail-

able 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 an administrative appeal. The Hearing Officer includes them in the record.

[CGD 78-82, 43 FR 54186, Nov. 20, 1978, as amended by USCG-2002-12471, 67 FR 41331, June 18, 2002]

§ 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

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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

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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. Upon the taking of remission, mitigation, or suspension action, the Commandant will inform the party of the action and any conditions placed on the action.

[CGD 78-82, 43 FR 54186, Nov. 20, 1978, as amended by CGD 87-008a, 52 FR 17555, May 11, 1987]

§ 1.07-80 Reopening of hearings.

(a) At any time prior to final agency action in a civil penalty case, a party may petition to reopen the hearing on the basis of newly discovered evidence.

(b) Petitions to reopen must be in writing describing the newly found evidence and must state why the evidence would probably produce a different result favorable to the petitioner, whether the evidence was known to the petitioner at the time of the hearing and, if not, why the newly found evidence could not have been discovered in the exercise of due diligence. The party must submit the petition to the Hearing Officer.

(c) The District Commander may file comments in opposition to the petition. If comments are filed, a copy is provided the party.

(d) A petition to reopen is considered by the Hearing Officer unless an appeal has been filed, in which case the petition is considered by the Commandant.

(e) The decision on the petition is decided on the basis of the record, the petition, and the comments in opposition, if any. The petition is granted only when newly found evidence is described which has a direct and material bearing on the issues and when a valid explanation is provided as to why the evidence was not and could not have been, in the exercise of due diligence, produced at the hearing. The decision is rendered in writing.

(f) Following a denial of a petition to reopen, the party is given 30 days to file an appeal if one has not already