

Section 5.2

Hearing Officer Checklist

Introduction

The Hearing Officer Checklist (for administrative penalty hearings) is an optional tool intended to compliment, not replace, the Hearing Sourcebook. The checklist includes basic concepts a Hearing Officer should consider. Since there are no specific rules with conducting the hearing process, other than those provisions ensuring due process, these concepts are solely recommendations.

Hearing Officer checklist

The Hearing Officer Checklist contains:

1. Request to Perform a Hearing
2. Notice of Proposed Action (NOPA) Review
3. Pre-hearing Conference
4. Hearing
5. Written Decision

Each part is described below.

1. Request to perform a hearing

1. Obtain a written request from the county agricultural commissioner (CAC) to perform a hearing (or review the request).
2. Make an inquiry about a hearing room. The room should be private and large enough to accommodate the anticipated number of participants. The table should be large enough to provide for proper seating configuration. There should be adequate number of electrical power sources in the room.
3. Make an inquiry about a tape recorder. Are tape recorders and blank audio tapes available? Obtain an adequate number of blank audio tapes, using only unrecorded audio tapes. Test both the tape recorder and audio tape together to make sure the tape recorder and tapes function properly.

Make sure you have enough batteries or power sources, and if needed, an extension cord. Class C (formerly *minor*) violations usually last ½ to 2 hours; Class B (formerly *moderate*) violations usually last 1 to 2-1/2 hours. Class A (formerly *serious*) violations usually last 2 to 4 hours. Multiple violations may double usual times.

Continued on next page

Hearing Officer Checklist, Continued

1. Request to perform a hearing
(continued)

4. Request a copy of the Notice of Proposed Action (NOPA).
 5. Request that a copy of all evidence to be introduced be available to the Hearing Officer and to the Respondent at the hearing or pre-hearing conference, if stipulations are sought.
-

2. Notice of Proposed Action (NOPA) review

Upon receipt of the NOPA:

1. Review the NOPA for completeness. The NOPA should include the standard “boilerplate” language, in addition to information that is individual to each NOPA, which includes the section(s) violated, the circumstances of each violation, the fine amount for each violation and the reason for assessing that amount, and the fine guidelines. The review of the NOPA provides the Hearing Officer with the identical information given to the Respondent. This information will allow the Hearing Officer to be better prepared during the hearing and/or pre-hearing conference.
 2. Compare the wording of the section(s) allegedly violated with the actual Food and Agricultural Code (FAC), Business and Professions Code (B&P Code), and/or California Code of Regulations (CCR) sections. Make note of any discrepancies or paraphrasing.
 3. Identify the elements of each violation and make a checklist to assist you in keeping track of the evidence to make a finding for each element. The list of elements of each violation will assist you in keeping the hearing on track and when writing-up your findings. This checklist can be a simple, three-column, multiple-row table with one column for element, one for evidence to support element, and one column for inference(s).
-

Continued on next page

Hearing Officer Checklist, Continued

3. Pre-hearing conference

The pre-hearing conference should include the county's representatives (Advocate and interpreter if necessary) and the Respondent and/or the Respondent's representatives (and interpreter if necessary). Other individuals, such as the CAC, CAC staff, DPR staff, and/or someone requested by the Respondent may also be considered. In no case should witnesses, or any other parties, be present at the pre-hearing conference.

The pre-hearing conference affords the Hearing Officer the opportunity to:

1. Explain the process of the hearing.
2. Assist in clarifying violation types and fine guidelines. Even when the NOPA contained a description of violation types and fine guidelines, additional explanations are often necessary.
3. Assist in reaching stipulations. Stipulations are agreements or concessions between the two parties. In some instances, most or all potential exhibits are stipulated. To a lesser degree, the alleged violation is stipulated.
4. Ask the Respondent what the issues are. In most cases, the Respondent will indicate that he/she would like the Hearing Officer to decide on the matter of the violation and fine amount. In some cases, the Respondent will stipulate to the violation and is solely concerned with the issue of the fine amount.

Continued on next page

Hearing Officer Checklist, Continued

4. Hearing

The Hearing Officer should provide the Respondent with a meaningful opportunity to be heard, focus solely on the issue(s) at hand, and clearly have in mind what evidence must be presented to sustain the action.

The Hearing Officer should:

1. Make sure the tape recorder is functioning.
2. Identify the hearing, date and time.
3. Enter (read) any stipulations agreed to during the pre-hearing conference, into the record.
4. Ask the Respondent if he/she stipulated to each of the stipulations.
5. Ask all participants providing evidence to take an oath.
6. Ask that all participants identify themselves.
7. Ask that both parties acknowledge any stipulations for the record.
8. Allow each party the opportunity to call and examine witnesses, cross-examine witnesses, introduce exhibits, and to rebut the evidence.
9. Exercise control of the hearing process. Although there are no specific rules conducting the hearing process, a typical hearing includes: opening statements by the Advocate and Respondent, Advocate case presentation, Respondent cross-examination, Respondent presentation, Advocate cross-examination, and closing comments by Advocate and Respondent.

Multiple alleged violations may be presented one at a time following the above scenario, or may be merged if specific evidence supports more than one violation. The Hearing Officer can better focus on the issue when each alleged violation is independently presented.

10. Exercise control over the participants in respect to demeanor. Participants may become emotional. Respondents and Advocates alike may become defensive, intimidated, and/or frustrated. Maintain the hearing on a professional, not personal level. It is easier in a civil, rather than hostile, environment to stay focused on the issue.

Continued on next page

Hearing Officer Checklist, Continued

4. Hearing (continued)

11. Dissect each violation into elements and have the element checklist in front of you. Each element must be satisfied with at least one piece of evidence admissible in a court of law. Admissible evidence may include direct evidence (witness testimony), circumstantial evidence (presentation of one or more facts connected), personal knowledge (expert witness), and exceptions to the hearsay rule (certain public employee or business reports). As evidence is presented, indicate its appropriateness to the element checklist (sometimes, this is called “making an inference”).

Although it is not the Hearing Officer’s responsibility to present the case for the county, nor present the Respondent’s case, it may be necessary to ask clarifying questions to reach a just and fair decision.

Continued on next page

Hearing Officer Checklist, Continued

5. Written decision

Making the decision is the sole responsibility of the Hearing Officer. The decision must be based upon only evidence in the record. Official notices of statutes, regulations, or official publications should be very specific and carefully scrutinized. In most cases, all excerpts of documents should be submitted into evidence as to avoid using personal knowledge to fill in the gaps. The decision should be clearly understandable and provide all the information for third party review. In essence, the written decision should be a "stand alone" document. All decisions generally include three separate sections: Issues, Findings of Fact, and Decision or Determination of Issues.

The Issues section usually parrots the language found in the NOPA unless the Respondent stipulated to specific violations or fine levels. Once again, provide enough information for third party review.

The Findings of Fact section should contain only facts that are supported by evidence. **Each element must be satisfied with at least one piece of evidence admissible in a court of law.** The decision section should draw conclusions that are stated in the Findings of Fact.

In writing the decision, the Hearing Officer should:

1. Separate each violation. Decisions are easier to understand when each violation is separated.
 2. Use a checklist of elements. During the hearing process, many statements and exhibits are offered, but are not essential or relevant. Only those facts necessary to satisfy each element are essential. If each element is not satisfied with at least one piece of evidence admissible in a court of law, the issue must be decided for the Respondent. It is the county's obligation to admit evidence to establish each element.
 3. Review the completed decision. Is each fact supported by evidence? Is each decision supported within the Findings of Fact? If so, the decision is probably fair and just.
-