he tested positive for drug use.

Captain Periman knew he didn't use drugs and there must have been an error. This is the story of his three-year crusade to prove his innocence. Aided by New Orleans-based attorney J. Mac Morgan, Captain Periman's fight continued in state court.

This story centers around his trial in St. Louis conducted by U.S. Coast Guard Administrative Law Judge Peter Fitzpatrick, a tired traveler from Norfolk, Virginia, who in early January 1999 wearily faced this mariner from northwest Arkansas who insisted he wasn't guilty and had the temerity to argue the point in court without a lawyer to represent him against a Coast Guard prosecutor. What a crazy thought, what a lot of trouble for nothing ... all for only a license to run a towboat.

Timely Reporting of the Accident

When I first heard details about this case in its earliest stages, I truly believed it had the potential to tarnish the Coast Guard's reputation. Having no desire to do this or to undermine the efforts to control the use of drugs in the marine industry, I wrote a personal note to Vice Admiral James Card, the Coast Guard Vice-Commandant, on Mar. 21, 2000 and stated: "I believe that something here is seriously out of place and needs to be brought to the attention of other mariners." My hope was that this mild cautionary note might alert the Admiral to look beneath the surface. I received a pleasant reply from Admiral Carmichael that apparently ended this futile effort. The train had left the station.

In all likelihood, you have never heard of Captain Greg Periman. Greg is a licensed mariner with twenty-two years of service on the western rivers and the Gulf Intracoastal Waterway and operates linehaul towboats. The chances are slim to none that you would ever learn about this case unless you read this article as the Coast Guard prefers to show the public a white glove rather than its iron fist when it deals with our mariners. The frightening thing is that what happened to Captain Periman could happen to any merchant mariner who earns his or her livelihood with a Coast Guard-issued credential. What the Coast Guard giveth, the Coast Guard can take away – and they are willing to do with a vengeance.

On a foggy night in August 1998, Captain Periman serving as Pilot aboard the towing vessel STEVE T had a minor allision while heading upriver on the Mississippi River at Chester, Illinois. He reported his accident in an accurate and timely manner both to the Coast Guard and to his employer. Although there was only relatively minor damage to the comer of one barge, his employer routinely instructed him to take a drug test when he reached St. Louis. Testing is required after a "serious marine incident" described in 46 CFR §4.03-2 as described in Chapter 3 □25 (above).

Clearly, this did not fit the definition of a "serious marine incident" by any stretch of the imagination. It was not a "random" test because he was the only person tested. Nor was it a "reasonable cause test" because it did not fit the pertinent parts of the definition in 46 CFR §16.250(a)(b). But, if he had "refused to test" the result would have been the same as a "positive" test – lose job, lose license.

When Greg reached St. Louis, he submitted a urine specimen that was subsequently determined by LabOne, certified by the U.S. Department of Health and Human Services, and located in Lenexa, Kansas, to be positive for marijuana.

Captain Periman relates that he could not believe he had tested "positive" because he did not use dangerous drugs. Like hundreds of other mariners in his position, he was given the opportunity to admit to drug use and go through "rehabilitation" and, at its conclusion 12 to 18 months later, apply for the return of his license under the Coast Guard's Administrative Clemency program.

Knowing that the drug charges were false, he chose to appear before Administrative Law Judge Peter Fitzpatrick in St. Louis and "tell it to the judge." Believing that some obvious mistake had been made, Greg chose to represent himself in court to refute the charges. This proved to be a serious mistake – and one that no mariner should ever make.

After the Coast Guard Investigating Officer LTJG Christopher O'Neil from the Coast Guard Marine Safety Office in St. Louis presented evidence from LabOne of the positive test, Greg's license was taken on Jan. 7, 1999 at the trial and was formally revoked by a written Decision and Order served on Mar. 26, 1999.

Although Greg was given ample opportunity (to the point of harassment) to plead guilty to the charges and to agree to "rehabilitation," ***he had no intention of pleading guilty to a crime he never committed***. After all, you are supposed to be presumed innocent until you are proven guilty! On Jan. 7, 1999 he was proven guilty.

Where Does This Railroad End?

In a Decision and Order dated Jan. 22, 2001 (CDOA #2621), the Vice Commandant of the Coast Guard remanded the Periman case on appeal involving alleged drug use back to the same Administrative Law Judge to "withdraw the original decision "..."reopen former proceedings on an expedited basis"..."In the interest of Justice and the integrity of the entire drug testing system." The judge was the Honorable Peter Fitzpatrick.

Any case that involves "the integrity of the entire drug testing system" is a very serious matter. I completely support the concept that drug abuse in any mode of transport-rail, highway, air, and marine-can have a dire impact on public safety and must be eliminated-but not by trampling the rights of individual mariners in the process. The myopic pursuit of individuals that may not be drug offenders should be a grave concern of each and every working mariner every time he or she takes a DOT drug test. ***If the Coast Guard can bring false or even questionable charges against one mariner, they can bring them against any mariner***!

When the Coast Guard makes an error so grievous as to destroy a person's life and career, they not only should admit their mistake but also make restitution to the mariner. Mariners who are treated disrespectfully by the system quickly lose their respect for it. The honesty and integrity of drug testing and enforcement always must be beyond reproach since every merchant mariner that stands a watch is subject to random drug testing throughout his employment.

Burden of Proof Placed on the Mariner

Mariners need to know that the burden of proof automatically falls upon you if the Coast Guard can prove it has a "prima facie" case. A "prima facie" case is one that is

sufficient on its face, being supported by at least the required minimum amount of evidence. Such a case usually prevails in the absence of contradictory evidence. Establishing a prima facie case has become a very routine matter with all of the drug-testing rules that are in place today. These rules are spelled out in Title 46 CFR Part 16 and Title 49 CFR Part 40 and must be followed.

With recent changes in the regulations, most drug cases never go to trial. This change took a great burden off the Administrative Law Judges. So, the hearing in early January was pretty much the exception rather than the rule that brought Judge Fitzpatrick to St. Louis in early January 1999.

A mariner who tries to act as his own lawyer has a fool for a client. The trial was an unmitigated disaster for Captain Periman. Unless you understand exactly what you will be facing, it is very difficult to prepare for it. With no money, hiring a lawyer was out of the question. The Coast Guard does not furnish attorneys to indigent mariners. There are no public defenders available in Coast Guard Administrative Law cases. Captain Periman was not a member of a labor union and could not call on them for legal representation or even referral to a competent maritime attorney.

The principal witness, the Vice President of Toxicology of LabOne that processed the urine specimen, Mr. Alan Earl Davis, appeared to have such impeccable credentials that even the Administrative Law Judge was moved to comment upon them during the trial in glowing terms. Mr. Davis claimed in his testimony that he was formerly "the Armed Forces Chief Pathologist" in Washington. He described his laboratory's testing equipment as the "gold standard" for drug testing to the point that each urine specimen tested was virtually untouched by human hands with practically no possibility of a testing error.

Largely as a result of Davis' testimony and that of the Medical Review Officer, Dr. Patel, Captain Periman left the trial without a job, without his credentials, flat broke and without a future. He had not returned to work following the initial drug test while making ineffectual preparations for the trial. By the trial date he had been out of work for over four months. He lost his car, would lose his home, all his savings, and even more important in the river industry, his reputation as a reliable pilot. As a convicted drug user, he could not hold any job in the maritime industry. Nor did he really have a clue as to how he could have failed a drug test.

My first conversation with Greg Periman dealt with widely available literature that explained possible causes of the "false positive" tests that have occurred in a number of drug tests. While not being in tune with the drug culture, I found the literature illuminating in how to beat all sorts of drug tests. Greg rejected it out of hand. He reiterated time and again that he had not used illegal drugs and had, as a licensed officer, even reported crew members who used drugs on the boat to his employer. I answered his questions to the best of my ability as a layman and furnished him with copies of regulations and other material that dealt with the problem he now faced as he determined to appeal his conviction.

Captain Periman Files an Appeal

While a significant number of mariners follow the appeal route, the Coast Guard internet site is littered with innumerable failures. Although the outlook was daunting, Greg filed an appeal on Mar. 8, 2000 and, because he was broke, prepared it using his own resources. In the meantime, the Coast Guard furnished him with instructions on how to obtain "administrative clemency" – which Greg trashed because, as he again insisted-"I don't do drugs."

Around this time, Greg had an inspiration. He knew that the Coast Guard's key witness must have lied about his drug test and his test results – but he didn't know how or why. What sort of a person would ruin the career of a person he never met-and why? What sort of a person, indeed! A liar, a fraud, and a consummate con artist.

Greg consulted with friends and family, made some telephone calls, and wrote some letters. He discovered by contacting Dr. Jerry D. Spencer, MD, JD, who ***was*** the Chief Pathologist of the U.S. Armed Forces, Medical Examiners Office, that Mr. Alan Earl Davis, the Vice-President of Toxicology at LabOne, had ***never been Chief Pathologist of the Armed Forces as he testified in court***. To hold this position, a person must be both a medical doctor and a specialist in pathology. Further calls revealed based on the court's transcript indicated that Mr. Davis had attended college for less than one semester ***and was neither a medical doctor nor a toxicologist*** nor even a college graduate!

Greg then contacted the U.S. Department of Health and Human Services (DHHS), the government agency that certifies all the laboratories that perform drug tests required by the U.S. Department of Transportation for all transportation modes including tests given to merchant mariners. The result was immediate.

Greg and I both spoke with Dr. Walter Vogl, the person responsible for certifying all SAMSHA drug labs, who indicated that Mr. Davis had obtained his job under false pretenses and that he had just been terminated by the owner of the laboratory when his fraudulent credentials were revealed. Shortly thereafter, Dr. John M. Mitchell of the National Laboratory Certification Program checked out Lab One on May 23, 2000 on behalf of DHHS and found irregularities in procedures that could have adversely affected Greg's urine sample and potentially innumerable other samples as well. Dr. Mitchell also reported that ***Greg's urine specimen had been discarded in violation of regulations***. Since no split sample had been taken as a result of faulty advice provided by Dr. Patel, the Medical Review Officer (MRO), there was no way that Greg could have it retested at another lab. The evidence to clear him had been flushed down the toilet!

As Greg prepared to submit his formal appeal to the Commandant, he made a number of calls to the Coast Guard in St. Louis to inform them of his findings and to request additional documents. This clearly did not please the Investigation Office headed by LT Joe Rock with LTJG Christopher O'Neil who, served as the Eighth District's DAPI. In telephone discussions it became clear that the "conviction" that LTJG O'Neil had won before the Administrative Law Judge might be threatened by these new revelations. However, the next move reportedly made by LT Rock, showed how desperate the Coast Guard was becoming in its attempt to maintain its conviction. It also turned out to be a tactical blunder of the first magnitude.

The Coast Guard Investigative Service Joined the Act to Further Intimidate Capt. Periman

One late Spring afternoon, an agent of the Coast Guard Investigative Service, Charlie Davis (no relation to Alan Earl Davis previously mentioned), appeared on the family farm in northwest Arkansas owned by Greg's parents. When he arrived, Greg and several of his parent's guests were in the living room. The Coast Guard Investigative Service deals exclusively with ***criminal*** matters. The agent's appearance and subsequent open discussion of the case in earshot of all present was a source of great embarrassment and humiliation, and viewed as an attempt at intimidation. From that moment on the need to clear his own name became even more important as his family's reputation in the community was also at stake.

Although Dr. Periman does not have a maritime background, he served in World War II and clearly recognized that the conduct and tactics of a number of Coast Guard officers associated with this case had gone out of bounds and were clearly unbecoming commissioned officers in any branch of the service. Greg subsequently verified in a conversation with James A. Devino, head of the Coast Guard investigative service's New Orleans office, that LT Rock of MSO St. Louis had ordered Agent Davis to visit Captain Periman.

Through subsequent calls Greg determined that the Investigative Service Agent from New Orleans had been requested by LT Rock and dispatched to the Arkansas farm 1,200 miles away because Greg was reported to be a threat to the Coast Guard. Perhaps there was a threat – but it was a perceived threat to embarrass and shorten the careers of a number of Coast Guard officers that turned their dogs loose on the wrong person and would not back off. Nobody would lose their jobs as a result of this mistake, and at last report, LTJG O'Neil had advanced to the rank of Lieutenant Commander.

The matter does not stop here. The case against Captain Periman was hastily assembled when Greg refused to admit "guilt." Important papers were missing from the Coast Guard's files including Copy 2 of the Custody and Control form (CCF). Loss of this form meant that the chain of custody for the specimen was broken. Substitutes for this vital form were smoothly and convincingly offered into evidence by LTJG O'Neil and were accepted without comment by the judge. This was only one of a series of questionable actions taken by a number of Coast Guard officers and civilian employees in their conduct of this case. This is probably the most distressing part of what happened because the Coast Guard circled their wagons and vehemently denied any wrongdoing by any of their personnel. This is a matter that eventually will be settled by comparing the requirements of the Code of Federal Regulations that delimits the actions of both the Coast Guard and the mariner.

Come Into My Parlor Said the Spider to the Fly

Coast Guard Vice-Commandant T. H. Collins subsequently vacated the Administrative Law Judge's decision. This showed one of the first glimmers of fairness in this case. But, even that might have been illusory. Remanding the case back to the same Administrative Law Judge who screwed it up in the first place was hardly reassuring. However, it is a tactic we have seen used a number of times that holds a mariner within the Coast Guard's Administrative Law system and makes further appeal very difficult and costly. Under the circumstances, the Coast Guard would have complete control over the outcome of the trial. They had much more to lose here than they were willing to accept. They denied a mariner a number of his basic civil rights. That matter must be remedied.

The system the Coast Guard created was twisted and abused to arrive at conclusions it could not substantiate. Agents of the government as well as a number of private parties caused or contributed to Captain Periman's substantial economic losses and emotional stress. The driving force behind the investigation by MSO St. Louis can be characterized as: "if it doesn't fit, force it. If you happen to get caught, stonewall it."

Our Warning to All Mariners

If you are caught in the Coast Guard's Administrative Law system for any reason, be prepared to spend big bucks. Lawyers who are experienced in the system, or even those willing to deal with it, are few and far between. Some attorneys with limited experience may offer to learn at your expense! Since the Coast Guard doesn't provide lawyers for indigent mariners, each mariner must bear the cost of his or her own defense.

If an accident or injury is involved, a mariner's personal interests and the interests of his employer may not be the same and the "company lawyer" will not be available. And, as Captain Penman discovered in this case, the Coast Guard has its own agenda, its own priorities, and dispenses its own brand of "justice."

In a 1994 report titled U.S. Coast Guard Marine Casualty Investigation and Reporting: Analysis and Recommendations for Improvement, researchers from the Idaho National Engineering Laboratory under contract to the Coast Guard presented compelling information about the Coast Guard's investigative process that left considerable doubt as to the effectiveness of their investigations conducted at the Marine Safety Office level. The Periman case appeared to mirror many of these findings. In addition, we propose to Congress that there is a very basic question as to whether the Coast Guard should continue to have free rein to trample the rights of civilian merchant mariners. Captain Periman allowed me to be privy to every detail this case, and fortunately, I have had experience in reporting on the Coast Guard bureaucracy before. *[Refer to our Report #R-429-A.]*

Coast Guard Restores Captain Periman's Credentials

Congress granted the U.S. Coast Guard broad powers to issue credentials to commercial mariners. With this authority also comes an ability to damage, destroy, or injure individual licensed or certificated mariners by suspending or revoking their license or document. This power should only be used when a mariner clearly demonstrates misconduct, negligence, incompetence, or violation of a dangerous drug law or addiction to dangerous drugs. The "big five" regulations that apply to virtually all Suspension and revocation hearings are clear, in plain English, and easy to understand. They are:

46 CFR §5.27 Misconduct.

Misconduct is human behavior, which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act, which is forbidden, or a failure to do that, which is required.

46 CFR §5.29 Negligence.
Negligence is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.

46 CFR §5.31 Incompetence.
Incompetence is the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.

46 CFR §5.33 Violation of law or regulation.
Where the proceeding is based exclusively on that part of title 46 U.S.C. section 7703, which provides as a basis for suspension or revocation, a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters, the complaint must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.
[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG-1998–3472, 64 FR 28075, May 24, 1999; USCG-2004–18884, 69 FR 58342, Sept. 30, 2004]

46 CFR §5.35 Conviction for a dangerous drug law violation, use of, or addiction to the use of dangerous drugs.
Where the proceeding is based exclusively on the provisions of title 46, U.S.C. 7704, the complaint will allege *conviction for a dangerous drug law violation* or *use of dangerous drugs* or *addiction to the use of dangerous drugs,* depending upon the circumstances and will allege jurisdiction by stating the elements as required by title 46, U.S.C. 7704, and the approximate time and place of the offense.
[CGD 82–002, 50 FR 32184, Aug. 9, 1985, as amended by USCG-1998–3472, 64 FR 28075, May 24, 1999]

In the case of Captain Gregory L. Penman, that broad authority was abused by a small group of junior officers whose zeal allowed them to dishonor the reputation of a licensed merchant marine officer with an unblemished twenty-two year record of service. Their mistakes were compounded by a bureaucracy that increasingly has turned deaf ears and blind eyes to problems that our working mariners face. As a close-knit quasi-military organization, the Coast Guard compounded a number of their procedural errors. They expect and receive monolithic support from officers throughout the service as well as from a small, cohesive administrative law office with Judges who claim to be "independent" yet are on the Coast Guard payroll. These young officers have now advanced through the ranks to become Lieutenant Commanders. At least one of these officers should have been fired for his role in this case!

These officers were able to use their position to mobilize a pseudo-independent investigative service to intimidate Captain Penman and his family at their home in rural Arkansas. It is also a sad commentary that compliant government civilian employees from other government agencies such as the Department of Health and Human Services that administer the Department of Transportation's drug testing program find it necessary to cower behind a shield of government immunity and anonymity and decline to testify in open court.

As previously recited, the Coast Guard revoked Captain Greg Periman's license on Mar. 26, 1999 as the result of a "positive" drug test. Working with the help of friends, family, and moral support from our Association, Captain Periman filed a formal appeal with the Commandant on Mar. 8, 2000 and a supplemental appeal on May 28, 2000 without the assistance of legal counsel. After considerable correspondence, the Vice Commandant issued a Decision on Appeal #2621 seven months later on Jan. 21, 2001.

This decision on appeal attempted to remand the case to the same Administrative Law Judge, Hon. Peter Fitzpatrick, that fumbled the ball in the first place to hear "new evidence" claiming that the Coast Guard still had a "prima facie" case. In effect, this would have allowed the Coast Guard to continue placing a large financial burden on Captain Periman to prove his innocence.

Hire Competent Counsel

However, by this time, and now fully aware of the difficulty of defending oneself, Greg borrowed the money to hire a team of qualified lawyers in Washington, New Orleans, and St. Louis headed by Attorney J. Mac Morgan that we recommended. He now clearly understood what many mariners still may not recognize: if you do not spend the money to hire competent counsel, a mariner can expect very little access to justice under the existing system.

When the Coast Guard revokes the license of a professional mariner, that decision has the power to destroy not only a career but also a person's life as well. "Life" includes the security offered by the pay check of a steady job and recognizes the rewards of seniority based on enhanced skill and abilities gained through years of service. "Life" includes the accumulation of wealth over time as a result of hard work in any form and the right to enjoy the fruits of your labor. "Life" includes your status in your residential and professional community. In the past and according to tradition of America's western rivers, a riverboat Captain was a person that the public looked up to ... in contrast to the treatment we have stood by and allowed too many Coast Guard civilian employees to employ that treats our mariners uniformly as boat trash. "Life" includes a mariner's enjoyment of his personal relationships with family and friends-among many other things.

Any working mariner like Captain Greg Periman who is confronted by a positive drug test, faces almost overwhelming odds to prove his or her innocence. First, because drug abuse is commonplace while and its effects in all transportation modes is devastating. There is now an almost automatic assumption of guilt for any person who is accused. In fact, the government has all the evidence it needs to present a prima facie case the moment that an approved laboratory conducting an approved test has the results of that test certified by an approved medical review officer (MRO). All of this occurred in the case of Captain Periman. – ***but it was all based on a lie*** but he had the burden of proving it.

After living with the consequences of his trial where he attempted to defend himself without a lawyer, Captain Periman sought and followed recommendations of the our Association and hired attorney J. Mac Morgan of New Orleans. Mac, a

licensed towboat Captain and attorney with considerable experience, assembled and headed Greg's defense team in three cities-Washington, St. Louis, and New Orleans.

Morgan and his associates first appealed the Commandant's decision to remand the case to Judge Fitzpatrick directly to the National Transportation Safety Board as allowed by 46 CFR §5.713 since he represented a "party adversely affected by the Commandant's decision." The Coast Guard, fully cognizant of the weight of the evidence and the large numbers of procedural errors that were made, incredibly continued to insist they had a prima facie case.

When the Coast Guard Vice-Commandant then tried to force Judge Fitzpatrick to schedule proceedings in St. Louis on May 22, 2001 on only a few very limited points, it looked as if Captain Periman was being "set-up" for another fall. This convinced Morgan and his Washington team to ***appeal for an immediate injunction to prevent this from happening directly to Judge Ricardo M. Urbina of the United States District Court for the District of Columbia***.

By this time, Greg felt the full weight of the Coast Guard (now represented by the U.S. Department of Justice) was being used against him. Even Judge Fitzpatrick sought direction from the Commandant as to whether he even had jurisdiction to reopen the case!

Meanwhile, Greg's attorneys formally filed his lawsuit titled Gregory L. Periman vs United States Coast Guard and Vice Commandant T.H. Collins. For the first time in over 2½ years, Greg felt he was on the road to obtaining a fair and impartial hearing in a Federal district court that was not under the thumb of the Coast Guard's administrative law system.

It was at this point that the ***Coast Guard prosecutor LT C.J. O'Neil filed his motion for dismissal*** that stated in part: "In preparation for the remanded hearing, the Coast Guard discovered further new evidence on Apr. 5, 2001. The new evidence compels the Coast Guard, in the interest of justice, to request that the Administrative Law Judge dismiss the case before you now. The Coast Guard requests the order (to) state that the Coast Guard may not file a new complaint in this matter." In effect, the Coast Guard had dilly-dallied with the facts for almost a year and was still in a dither when the bottom fell out from under them.

The Story Doesn't End Here?

We all know and respect the Coast Guard for saving lives, rescuing mariners from the sea and in the pursuit of safety. But, this organization did not live up to that reputation in the Periman case and a number of other cases as well.

If Captain Periman's story ended here, it would never even have an opportunity to be buried in the back pages of any legitimate newspaper. Out of sight is out of mind – which is exactly where the Coast Guard would like to bury this smelly matter as quickly and quietly as possible. However, burying this story would leave Captain Periman's name and reputation forever under a cloud. If he returned to the river, he would have to argue his innocence again and again to employers and to other mariners. Meanwhile, the Coast Guard officials who persecuted him can excuse their mistreatment of Periman and other merchant mariners by opining that he "won on some technicality."

The Coast Guard's whole investigative system should have been indicted for its violations of Greg's civil rights and forced to correct the problems previously cited in public documents. Along these lines, the government's conduct of this case was so egregious that it attracted the attention of the American Civil Liberties Union (ACLU) Drug Policy Division and continued to attract their attention with the return of Greg's license.

Moral Indignation

Captain Periman is an outstanding example of how vulnerable a mariner can be when clad only in the armor of moral indignation coupled with a sure and certain knowledge that he has not "done drugs" or done anything else in violation of the law. Yet, it was exactly this attitude led to his initial downfall.

On the other hand, "doing drugs" and then hiring a lawyer to bail you out does not work, either. The path leading away from countless "Commandant Decisions on Appeal" (CDOA) is littered with the remains of legal cases (and lawyers) that did not meet the test. All mariners need to note this important lesson. When it comes to winning "drug" cases, the Coast Guard has a zero-tolerance policy, and they are prepared to do anything to win drug cases at any cost. In only a very few cases (such as this one) will the cost in terms of violating a mariner's civil rights be too great to overlook!

Over the years, the Coast Guard built an entire legal framework of decisions that virtually closed the door on mariners escaping punishment for violating the drug testing laws. There are few "end runs" that have not already been tried and failed the test. No lawyer can expect to perform feats of magic for a guilty client. If you are guilty – and only if – don't waste your money and a lawyer's time.

As soon as the Coast Guard has a prima facie case, it wins – unless a mariner can prove that there is something wrong with the government's case. What this means is that the burden of proof, including the expense of proving you are innocent, passes from the government to the "guilty" mariner. The Coast Guard has dealt with so many drug cases that any mariner's chances of winning without a lawyer are practically zero and not much better with one.

The three elements of establishing a prima facie drug case are: (1) That you were tested for a dangerous drug in accordance with the regulations in 46 CFR Part 16 and 49 CFR Part 40, (2) the test gave a "positive" result indicating drug use, and (3) that the test results were confirmed by a medical review officer.

Long before Apr. 5, 2001, Captain Periman, with the help of family, friends, a former United States Attorney and several judges in his home state of Arkansas amassed cogent arguments that the Coast Guard's prosecutor, LTJG O'Neil, and Administrative Law Judge Fitzpatrick had violated a number of provisions of the Code of Federal Regulations [(1)] at his trial and during the 2½ years the Coast Guard withheld his license. *[(1) 49 CFR §40.23(a)(1)(ii-iii); .46 CFR §5.543(b); 49 CFR §40.29(g)(3),(5); 49 CFR §40.27(a)(7); 49 CFR §40.29(h) affecting rights under 49 CFR §40.25 (f)(10)(E); §49 CFR 40.33(b)(3); 46 CFR §5.551; 49 CFR §40.33(f)(1); 49 CFR §40.25(b)(3); 46 CFR §5.601(a); 46 CFR §5.541(b); 46 CFR §5.305(b); 46 CFR §5.501(c)(3); and 46 CFR §5.521(b).]*

Based on the assumption that every person that fails a drug test is guilty, the Coast Guard developed an administrative system to handle the problem of drug addiction and give mariners "a second chance" under certain limited circumstances. The second chance involves signing

a ***voluntary deposit agreement*** under the provisions of 46 CFR §5.201. Essentially, this involves admitting your guilt, voluntarily turning in your license and/or merchant mariner document, and participating in a rehabilitation program. If you provide written proof of rehabilitation you then can request that your license be returned.

For a mariner who is guilty of a drug offense, this program offers a valid and welcome opportunity to break a bad habit and a second chance to qualify to serve in the marine industry after rehabilitation. No valid purpose is served by speaking ill of this program or of any Employee Assistance Program (EAP) established pursuant to 46 CFR §16.401.

Enrolling in such a "rehab" program is a bitter pill for any mariner who knows that he has not "done drugs." Not only is it a bitter pill if you must admit guilt when you are innocent but you open yourself to constant brainwashing and reminders of your alleged failings and addictions during the process. "Rehab" is also expensive and time consuming, often taking between 12 and 18 months and can cost in excess of $10,000. However, for some mariners, this opportunity is more appealing than outright license revocation.

Since the suspension and revocation (S&R) regulations were revised, the Coast Guard pushed its Voluntary Deposit Agreement program vigorously as a fast and relatively painless way to dispose of a huge volume of drug cases in the least time and with the least expense possible. By assigning the cost of the program to employers, the program can float along with very little expense to the government. This allowed the Coast Guard to cut down on its drug case load and reduce the cost of prosecuting offenders significantly-to the point where administering the program no longer strains the system. While signing on the dotted line is all it takes to enroll a first-time drug offender, there is no such opportunity offered to second offenders!

Captain Periman was offered a Voluntary Deposit Agreement, not once but many times by an increasingly pushy prosecutor, LTJG O'Neil, the Eighth District's Drug and Alcohol Program Inspector (DAPI) in St. Louis. The harder LTJG O'Neil pushed, the harder Captain Periman resisted. Fending off repeated phone calls, Captain Periman couldn't seem to comprehend what it was about the word "NO!" that LTJG O'Neil didn't understand? After "preparing" for his day in court for over three months, Captain Periman was ready to "have at it."

USCG Has Powerful Weapons

In the game of "good cop-bad cop," the good Coast Guard had already offered Greg its generous voluntary deposit agreement that was rejected repeatedly. Now the bad Coast Guard, who had been forced to waste time and spend money on staging a court hearing, was not prepared to have its patience tested by a recalcitrant mariner who just didn't get the point that he was predestined to lose. The Coast Guard prepared to use their most powerful weapon and only alternative to the voluntary deposit agreement, outright license revocation.

As a riverboat captain, Greg was comfortable with situations where he was in charge, had to make important decisions, and knew his job cold. Like most "lower-level" mariners with an unblemished safety record, he was not intimately familiar with the marine investigation and personnel action regulations that appear in 46 CFR Part 5. Nor would he find studying these regulations without first watching them in action was particularly enlightening.

Many mariners report that finding a lawyer to represent them at a Coast Guard administrative law hearing is very difficult. ***Such hearings are supposed to be "remedial" in nature***. This mild terminology gives a false impression that these courtroom proceedings are really not all that serious. The Coast Guard does not provide legal counsel for indigent mariners.

Not only are lawyers expensive, but those who know Coast Guard administrative procedures and are familiar with the vast body of previous "Commandant Decisions on Appeal" are few and far between. One mariner in the Houston area reportedly sought representation by over 20 separate attorneys on an alleged drug case. When you live over eight hours driving time from the courtroom in St. Louis, finding a suitably experienced and well-positioned lawyer is particularly challenging and very expensive. In the end, the thought that "I'll just explain it to the judge" prevails by necessity.

The Coast Guard was so confident of the prima facie nature of its case that, instead of calling on one of their qualified Coast Guard attorneys with formal legal experience to represent their position, they simply used their investigations officer, LTJG O'Neil, to prosecute Captain Periman. LTJG O'Neil, now facing a mariner who would not quit and refused to sign his rights away on the dotted line, still had to rush to produce a few items of evidence to bring to court. How he obtained this evidence as well as the nature of this evidence are both questionable and highly suspect. Legal proceedings in state court in St. Louis provided definitive answers to many remaining questions outside the purview of the Coast Guard's administrative law system.

The Coast Guard goes to great lengths to stage its proceedings, even to the point of flying its own Administrative Law Judge (ALJ) from Norfolk, Virginia. This is the first clue that even the most obtuse mariner should pick up; the Coast Guard takes itself very seriously. Captain Periman was even treated to a "dry-run" when he had an opportunity to watch another unfortunate mariner whose case was tried before his "bite the dust."

Was There a Company Policy?

The Coast Guard presented its paid witness including Greg's employer Mr. Vance Lawson. Remarkably to Greg, Lawson stated that his company had a formal written drug policy. But, if he did have one at the time, there were a number of employees including Greg who knew nothing about it and even reported it virtually impossible to have Lawson remove known drug abusers from the vessels he operated. However, the focus of Captain Periman's frustration was that both LTJG O'Neil and Judge Fitzpatrick artfully dodged his request to subpoena witnesses he wanted to testify on his behalf. The same problem appears in numerous other ALJ cases.

It was evident after a very smooth telephonic presentation by LabOne's Chief of Toxicology, Mr. Alan Earl Davis, from his drug lab in Kansas, that things were not going well for Greg. Davis described drug test procedures approved by SAMSHA and performed in flawless fashion on superb, expensive, state-of-the-art drug testing equipment. Davis calmly reiterated that nothing could possibly be wrong with the testing procedure that resulted in Greg's positive test. Testimony by the Medical Review Officer, Dr. Ashokkumar

Patel, representing a prestigious medical clinic in St. Louis clinched the case. The fact that the specimen collector left the sample bouncing around in the trunk of her car for the weekend and that she had little knowledge of drug-testing regulations was blown off as inconsequential fluff.

Captain Periman left the courtroom feeling abused by the system for a number of other reasons. His opinion, backed by significant scholarly research, strongly indicates that the Coast Guard was willing to violate their own drug regulations on a distressing number of occasions. What should be chilling to every mariner is the fact that the Coast Guard's administrative law system is so flawed that it offers no assurance to mariners that they have any protection under existing law and regulation at any level in the Coast Guard. ***Also, the more often a mariner tests, the greater the chance he will come face to face with a glitch in the system.***

Many of these facts showed that Captain Periman's trial in St. Louis was a mix of wrongly admitted exhibits, lying witnesses, incompetent witnesses, and a prosecutor and an Administrative Law Judge who either did not understand their duties or were willing to twist the Coast Guard's system of justice to their own desires. ***Although the Eighth Coast Guard District at first denied it, some allegations clearly called for a criminal investigation of their own officers.***

Maintaining Composure

There is no doubt that these reverses frustrated Captain Periman who still does not have a clue as to why he had falsely tested "positive" for marijuana. Yet, almost 250 pages of court transcript does not reflect that he lost his temper. Remarkably, however, during a court recess the judge called in Federal Marshals to accompany Captain Periman whenever he went in the Federal Building. From that moment on, a Federal Marshal sat on both sides of him until the hearing closed on the first day and throughout the second day. Sitting between a pair of Federal Marshals alone is enough to intimidate any mariner attempting to present his own case and make him regret he ever entered the court without a lawyer. The same thing occurred in the SHINE case we report on.

While drug testing may be necessary to control the drug crisis facing mariners and other transportation workers throughout the country, the program must be conducted correctly and honestly. Errors must be admitted and results must not be forced in a drug lab as appears to have been done here. Paperwork cannot be lost or forged as may have occurred in this case.

Junior Coast Guard officers must not disregard the civil rights of working mariners who reject voluntary deposit agreements because they have good reason to demand their day in court. Administrative Law Judges must treat mariners fairly in all regards, as clearly did not happen in this case. The Coast Guard must not allow its "investigative service" and administrative procedures to be used to intimidate mariners.

Other Flaws Exist in the System

There are other problems with the drug program as reported by mariners not connected to this case including:

- Coast Guard reliance solely on employers to report cases of drug and alcohol abuses on their vessels. Many Captains who report drug abuse to their employers or directly to the Coast Guard are repeatedly ignored. Yet, most Captains do not want to have their licenses at risk with drug users on the vessel.
- Some employers cut back on drug testing and allow known drug users to continue to work when they are short of crew. The same employers conduct a vigorous drug-testing program when work is slow so they can terminate workers for cause and avoid paying unemployment.
- Cases where crewmembers lace the food of a captain or other employee they don't like with drugs so that person will test positive and/or be fired for drug use. A person so abused has no way to prove his or her innocence.
- Employers who test a mariner after his tour of duty when they know he will be "clean" or when they will have plenty of time to hire a replacement before his next tour of duty.
- Employers who knowingly allow a mariner convicted of a drug test to continue to work on a vessel.
- Personnel managers contribute specimens in place of a "dirty" employee or otherwise control the submission of specimens and then hold that act of suppression over that employee's head.
- Mariners who are falsely accused discover too late that the system denies them all avenues to prove their innocence. The result of bending the system is that an unknown number of good mariners are forced out of the merchant marine service and a better-known number of drug abusers are detected at an unacceptably high level, usually above 1.5 percent.
- The Coast Guard serves as one of our nation's armed forces in times of war and governs her civilian merchant mariners under an administrative law system similar to a court martial. The judges in this administrative law system are civilians, but the persons who prosecute mariners usually are Coast Guard commissioned, warrant, or petty officers.

Knowledge is Key

Captain Alan Spears, a San Diego attorney who represented many mariners in administrative law proceedings stated" in part: "After reading the new (1999) rules and regulations," I can offer this advice to licensees who find themselves before the ALJ: Hire a trial lawyer who is extremely conversant in U.S. Coast Guard suspension and revocation proceedings.

"It will be much less expensive paying a lawyer going into these proceedings than paying one in what may prove to be a futile attempt to undo the damage (suspension or revocation) resulting from incompetent self-representation."

We urge our mariners not to remain blissfully unaware of drug laws and drug testing procedures.

CHAPTER 6 – THE COAST GUARD ABUSES ITS POWER TO SILENCE ITS CRITICS

[Source: NMA Report #R-396]

How Western Rivers Mariners Lost Their Administrative Law Judge

While reading the Coast Guard hearing transcript of bridge allision involving a Western Rivers Pilot in 2004,[(1)] I was somewhat surprised to find that the Administrative Law Judge that was flown in from Seattle to Joliet, Illinois, for the sole purpose of conducting the trial had no concept of what role a "pilot" on a western rivers towboat plays in the vessel operation. *[Refer to our Report #R-399.]*

A towboat "Pilot" regularly acts as the ***second in command*** on an inland towing vessel. He does not perform the same function as a ship's pilot who, armed with a Coast Guard "First Class Pilot" endorsement and often commissioned by the state, is hired one trip at a time to serve as an ***advisor*** to the ship's Master based upon his current and specialized knowledge of pilotage waters. The towboat pilot, on the other hand, is part of the crew of the vessel not an adjunct to the crew.

Even at the end of the trial, the Judge seemed to be uncomfortable with the concept even after it had been thoroughly explained to him. The Judge had little knowledge of the western rivers system and only a sketchy knowledge of the tug and barge industry in mid-America and seemed to think that anchors were in common use on river tows.

What Happened to the Judge Who Knew the Western Rivers

Previously**, i**n June 1996, as I had done for the previous decade, I was editing the Newsletter for the National Association of Maritime Educators. At that time, some important changes were made that would impact a number of river mariners in the years to come. The following information is taken from both NAME Newsletter #57 and from the Waterways Journal.

The Power of the "Old Boy Network"

In 1995, NAME prepared several articles about the Coast Guard's plan to revise the marine investigations and personnel actions regulations in 46 CFR Part 5. "Part 5" deals with the Coast Guard's administration of justice to merchant mariners and is ***not*** an area most maritime educators visit on a daily basis. We were indebted to Captain Alan Spears for his commentary and for alerting us to a situation that – if allowed to continue unopposed – could have adversely affected our nation's merchant mariners.

In dealing with merchant mariners in her courtroom in St. Louis, Administrative Law Judge Rosemary Denson, may have had some reservations about some decisions the Coast Guard was making in Washington. Consequently, when the Second and Eighth Coast Guard Districts were merged in June 1996, Judge Denson found herself out of a job.

On the surface, it appears that Judge Denson was the innocent victim of government downsizing. But, we have reason to believe that the final rendering of this chapter in the Coast Guard's "institutional history" will show there is more to this matter than meets the eye. We see the outline of a possible conspiracy within the "old-boy" network at Coast Guard Headquarters that can be interpreted as discrimination against the Coast Guard's only female Administrative Law Judge; or to silence her in speaking out on behalf of the rights of merchant mariners; or in repayment for "***whistleblowing***" that brought about the retirement of a former Chief Administrative Law Judge who thought his "perks" included unlimited travel and vacations at taxpayer's expense – or for "all of the above."

The story was brought to our attention by several of our members. The basic story and an editorial appeared in two issues of the Waterways Journal on June 3 and June 17, 1996. In the editorial, there appears mention of a Coast Guard Quality Action Team (QAT) report[(1)] that "…bares the vulnerable underside of a Coast Guard whose procedures leave a lot to be desired." We have a copy of this report[(1)] that was handed out at a Towing Safety Advisory Committee meeting and are in complete agreement with this statement. It was interesting and revealing reading but a sad commentary upon the state of "justice" rendered to our credentialed merchant mariners. *[(1)Our file #A-312-B]*

In making her case to keep the ALJ office in St. Louis open, Judge Denson went "by the book" and presented a well-reasoned position paper to authorities in Washington. Apparently, a high-level decision already had been made and cast in concrete. This apparently made additional discussion an exercise in futility. We believe that the decision was made much earlier as a result of an internal memorandum Judge Denson sent to Washington in 1988 that ultimately called upon the Chief ALJ "…***to eliminate any further discriminatory, inappropriate, and unprofessional behavior to me.***" We shared copies of that document with a number of important government officials and trusted that the Coast Guard would be forced to deal with Judge Denson in a fair and equitable manner and restore her to the bench.

Merchant mariners can benefit from having a person of her background and talent hear their cases and hoped that Judge Denson would continue to fight what appeared to be inequitable treatment and discrimination because she had the guts to point out inequities in the system.[(1)] We hoped in vain that she would regain her position as an Administrative Law Judge with the Coast Guard based on her outstanding reputation and background. We learned in 2003 that ALJ Denson took the Coast Guard to court and won a satisfactory settlement although we lack further details.

Business as Usual

*[**Source:** An Editorial from the Waterways Journal, June 3, 1996]*

The inland towing industry is familiar with diesel engines, wheels, shafts, bearings and rudders. The U.S. Coast Guard is about to shaft the industry again.

Fresh on the heels of merging the 22-state Second Coast Guard District with the seven-state Eighth Coast Guard District, the Coast Guard's Washington hierarchy plans to close the Administrative Law Judge office in St. Louis and put ALJ Rosemary Denson, most qualified of the nine ALJ's in the U.S., out to pasture. Its downsizing they say.

The Coast Guard determined to make the maritime industry enjoy having its teeth pulled without Novocain.

This dictatorial attitude has long been reflected in the

promulgation of regulations, most of which relate more to bluewater than not. We've seen it in the failed New Orleans VTS project. And we saw it most recently when Second District comments about the merger were trashed.

Judge Denson learned of her forthcoming demise – "My drop dead date is June 24, 1996," she says – from November 22, 1995, memorandum to Chief Administrative Law Judge Joseph Ingolia from Vice Admiral Kent H. Williams, U.S. Coast Guard Chief of Staff. She got a copy in December.

Judge Denson stands up for what she believes is right, which obviously has not pleased her superiors. Most recently, the Coast Guard, in a policy letter, changed the rules that guide ALJ procedures. The policy letter takes away from individuals charged the right of appeal in consent decrees and constrains the judges in their handling of these cases.

While with the Justice Department, Judge Denson litigated marine cases for eight years before becoming an ALJ in 1982. Today, only two other ALJs both now in their 70s, may have litigated marine cases, and they do not include Chief Judge Ingolia. Were their ages considered when the Coast Guard decided to eliminate Judge Denson's job?

Judge Denson may be a tough judge who demands decorum at her hearings, but she is highly respected for having ridden towboats and visited marine schools to learn how things are done on the rivers. If she "goes," ALJs from blue-water locations will be flow in (at no small cost) for hearings.

ALJ offices are located in Washington, D.C. (the Chief ALJ); Norfolk, VA; Jacksonville, Fla; New Orleans; Houston, Texas; Long Beach and Alameda, California; Seattle, Washington; and St. Louis is the only city with an ALJ office in the Mid-west, which has the largest number mariners licensed as operators of uninspected towing vessels.

Downsizing to save money doesn't cut it. In February, the Marine Safety Investigation Process Quality Action Team presented studies and recommendations at public Towing Safety Advisory Committee meeting in New Orleans. The report bares the vulnerable underside of a Coast Guard whose procedures leave a lot to be desired. If the Coast Guard follows the advice, it will save millions of dollars by eliminating unnecessary activities, including the practice of making mariners report accidents in which no damage or injuries occur.

There is no sound reason to abolish the ALJ office in St. Louis. Legislators who do not know the full story on this plan should get answers and stop it. Industry should insist the office be retained here.

All mariners should contact their Congressmen to express displeasure with the plan. Closing ALJ office would be a disservice to mariners of the Midwest in general, and to a highly qualified judge in particular.■

St. Louis ALJ: Reasons Challenged for Closing Office

[Source: The Waterways Journal, June 17, 1996.]

On Nov. 22, 1995, Vice Adm. Kent H. Williams, Coast Guard chief of staff sent a memorandum to Chief Administrative Law Judge Joseph Ingolia advising him to proceed with plans to close the Administrative Law Judge (ALJ) offices in St. Louis and New York as a streamlining measure to save money (WJ, June 3). "Please ensure that the closures are completed by the summer of 1996," Adm. Williams wrote.

To preface his instructions to Judge Ingolia, Adm. Williams pointed to the streamlining plan announced earlier by Adm. Robert E. Kramek, Coast Guard Commandant. "These consolidations [ordered by the Commandant] were made possible, in part, by the combination of new business practices with applications of new technologies that require fewer people to provide the same level of customer service. I am certain that these same principles can be applied to the Administrative Law Judge Program," Vice Adm. Williams wrote.

During the last week of May, several telephone calls were received by this writer from industry people concerned over the forthcoming loss of the ALJ office in St. Louis and ALJ Rosemary Denson, who many feel is the most qualified ALJ in the program.

The Issues

At first glance, the marine industry might conclude that downsizing to save money is the key. But the existing paper trail clearly indicates that Judge Denson's "drop dead date" of June 24 is far more complicated than that. If Judge Denson's documents are accurate, there seems to be little realistic justification for closing the St. Louis ALJ office.

Even if closing the St. Louis office could save money, one must consider whether it is an appropriate move. Judge Denson has prepared a "Position Paper on Why the Coast Guard ALJ Office in St. Louis Should not be Closed and the ALJ Should not be Eliminated." The St. Louis ALJ office, traditionally, has been the only office handling inland marine cases for 22 states – the former Second Coast Guard District. If the office is closed, wrote Judge Denson, "there will be no ALJ in the Midwest. The Midwest has the largest number of mariners licensed as operators of uninspected towing vessels.

Considering the economics, geography, unique characteristics and needs of the Midwest river industry, the sounder decision would be to keep the St. Louis ALJ office as a viable presence in the Midwest."

According to Judge Denson, the marine industry and maritime practitioners view the planned closing "as another snub by the federal government." They receive little appreciation by the Coast Guard and the federal government for their industry's strategic value to the nation and the important contributions they make by keeping the country competitive in the world marketplace," she wrote.

Fly-in Judges

The reason given by the Coast Guard and Chief Judge Ingolia for eliminating the St. Louis office is that it handles fewer cases than other ALJ offices. But caseloads for the Ninth Coast Guard District and other districts without judges are assigned by the Chief ALJ's office. If the number of caseloads is down in the office of the only ALJ traditionally handling cases for the Midwest, it may be merely a product of scheduling. The jurisdiction of all ALJs extends throughout the United States and its territories.

One concerned captain, speaking out against the planned closing, said Judge Denson is fair and knows the demands of the profession. Perhaps dearer to the hearts of rivermen, Judge Denson is known to fight valiantly for them. In one case the action became pretty heated before the license of a longtime mate was returned to him, generally against the wishes of the Coast Guard.

The mariner had voluntarily given up his license when he was diagnosed with epilepsy, and after more than five years

was applying to get it back. Judge Denson was with the Department of Justice at the time and was assigned to defend the Coast Guard's position that a captain who had been seizure-free from epilepsy for more than five years with medication could not have his license back. She could find no doctor, in or out of the government, who would testify that he would be a threat to safety aboard a vessel.

Even when Coast Guard attorneys agreed with her, the admiral in charge of public health did not. They were finally able to persuade the admiral to agree and returned the man's license in order to avoid embarrassment to the Coast Guard in court and a precedent-setting decision against the Coast Guard.

Questioning Change

In addition to trying to be fair in the courtroom, Judge Denson has a reputation for questioning policy changes and proposals that she believes would take away the rights of the mariner and put more power in the hands of the Coast Guard.

A Coast Guard-initiated Quality Action Team, reporting before the Towing Industry Advisory Committee in New Orleans in February, distributed the results of its study. A major concern in the report is that the quality of Coast Guard investigations and reports has declined over the past 20 years while the costs of the program have not. Also pertinent to this issue is that there is no program for training investigators.

These same investigating officers appear in the courts of ALJs and make statements that only the judges are qualified to decipher and evaluate., questions of jurisdiction are among them. "No mariner can afford to face the full power of the federal government and all of its resources in court," said Judge Denson. ***Many of the respondents appear before me without legal counsel, and they are not qualified to make some decisions that might strip away their rights.***"

The Iron Hand

Judge Denson always questions policy she believes weakens the position of the accused (respondent) and the independence of the judges, and further strengthens the Coast Guard's hand. For example, by recently imposed policy the accused (in consent decrees) must give up his/her right to appeal – a demand Judge Denson believes to be an injustice. ***On the other hand, proposed changes to the Code of Federal Regulations, if passed, would give the Coast Guard the right to appeal ALJ decisions that favor the accused***.[1] *[**NMA Editorial Note:** [1]Following an experience involving legal fees of almost $10,000 for an attorney to defend a mariner from a Coast Guard appeal that was dismissed, the Gulf Coast Mariners Association appealed the "proposed" changes that had become final on June 23, 1999. Our letter of July 16, 2001 is included in Docket #USCG-2002-12578 but was summarily dismissed.]*

In May of 1995, Judge Denson wrote extensively to Chief ALJ Ingolia. She commented on a Coast Guard policy letter (as it relates to ALJ procedures) and sought justification for provisions she believed not to be beneficial to mariners nor to the system. She wanted to know to whom the policy letter applied, and concluded that if it applies to ALJs, ***she questions "whether or not such a letter as this is an infringement upon the independence and decision-making responsibilities of the judges***."

Caseload

In her position paper, Judge Denson said, "The information supplied by the Chief ALl's office to Secretary Pena leads one to believe that the St. Louis ALJ docketed only 76 cases for the past three years, when in fact the St. Louis office docketed 192 cases in the past three years and has averaged 72 cases per year for the past two years. The caseload for 1996 is already averaging more than that, even without the Chief ALJ assigning new cases." Her paper indicates 48 cases for 1993, 74 for 1994 and 70 for 1995.

And it is appropriate to say that in response to a West Virginia congressman's letter, Adm. Kramek wrote: 'While there are currently no vacant ALJ positions in the Coast Guard, Judge Denson will be placed on the Coast Guard re.-employment priority list. The Coast Guard will work quickly and proactively with Judge Denson to identify and place her into a job for which she is well qualified. ..."

If industry and the congressional delegations of the Midwest do nothing to reverse this highly controversial Coast Guard action, the Midwest faces the loss of its ALJ office and Judge Denson on June 24.■

Judge Denson Appears in a Congressional Hearing

Fast forward to July 31, 2007. Summoned to appear before the Coast Guard and Maritime Transportation Subcommittee, former ALJ Rosemary Denson provided damning written testimony **(R-429-K)** in an outline of the problems she encountered in her years with the ALJ system.

After recounting full pages of testimony dealing with issues we previously addressed, her she continued…"My testimony may provide you with an insight into the long-standing insidious and vindictive culture that exists in the Chief Administrative Law Judge's Office. That being done, hopefully I may give some information that would assist in some way in the reconstruction. My desire is to influence in some way the reconstruction of a program centered on the ideals and objectives of the Administrative Procedures Act (APA), justice and good will – not on the petty egos of small minds threatened by those around them. How do you effectuate this?"

Retired Judge Denson made the following recommendations that our Association belives are "on-target" These are outlined in a letter to the Coast Guard's Judge Advocate General in Chapter 21 (below).

Congress is the custodian of the Administrative Procedures Act under which the Administrative Law program operates. With the full written testimony available to all in attendance, the members of the House Coast Guard and Maritime Subcommittee and its parent Transportation and Infrastructure Committee, other witnesses, and the audience that packed the hearing room listened in rapt attention to Judge Denson's oral testimony.

CHAPTER 7 – CAPTAIN KEN:
VINDICTIVE EMPLOYER SEEKS REVENGE ON AN "AT WILL" EMPLOYEE
***[Source:** Report #R-315-C, Rev. 1]*

Treatment of an Employee-at-Will

Mariners, who are not union members and as a result are ***not*** working under a union contract, are "employees-at-will" and can be dismissed by their employer at any time for any reason or no reason at all – even after years of service. However, this coin has two sides. An employee can quit at any time, for any reason for any reason at all. Our Association is not a union, does not engage in collective bargaining with any employer, and were observers at a series of ALJ hearings held in the Coast Guard's Marine Safety Office in downtown New Orleans.

While the Periman Case was in progress, another towboat Captain we will identify as "Captain Ken, was under attack by an investigator from the Marine Safety Office in New Orleans on "drug" charges that were trumped up by his employer.

Some employers retaliate by "blacklisting" employees that quit under a cloud. This practice can destroy a mariner's job prospects for a new job or can even end his career at sea. Captain Ken was an employee at will and quit his job. However, the employer thought he could damage or destroy Captain Ken's career by using the Coast Guard to take his license away. Unfortunately, a Coast Guard investigator fell for it!

Through the efforts of our Association, Captain Robert Lansden, Esq., a deep-sea unlimited Master and attorney eventually represented "Captain Ken". The Coast Guard Investigator, Commander Andrew Norris, had a weak case to start with. However, he remained adamant, aggressive, and persistent in his attempt to convict Captain Ken. He failed miserably, but in attempting to do so, he dragged Captain Ken before Administrative Law Judge Archie Boggs on three separate occasions and left the man a nervous and broken wreck.

Captain Ken's case dragged on for almost a year. It was this case, more than anything else, that convinced our Association that ***some Coast Guard officers will go to any length to win their case***. It was the abysmal tone of this "***investigation***" that led to these charges that led us to so vigorously question the Coast Guard's entire investigation process in a report we titled Report to Congress: How Coast Guard Investigations Adversely Affect Lower Level Mariners. *[Refer to our Report #R-429]*.

It became evident to us during this hearing that ***Coast Guard prosecution of mariners may have little to do with justice and much more to do with winning***. A Coast Guard investigating officer should be able to distinguish between cases that should and should not be prosecuted. However, this distinction is blurred when pressure exists to turn the full powers of the government against any mariner who will not sign a "settlement agreement."

Captain Ken's Story

Captain Ken waited for a company representative after docking his towing vessel up-river from New Orleans. A few minutes earlier, he reported a minor allision between a barge in his tow and a docked ship that caused no reportable damage, but some scratched paint.

Tired of waiting for his Port Captain who never showed up, after several hours out in the hot sun, Captain Ken simply went home. As a result, his employer charged him with ***refusing to take a drug test*** and ***desertion***. These actions subsequently reported to MSO New Orleans, spurred the Coast Guard to charge him and seek to revoke his license.

Represented by attorney Robert Lansden, Captain Ken won an Administrative Law Judge decision in which the complaint alleging use of or addiction to the use of dangerous drugs and desertion were dismissed.

Prosecution or Persecution?
The Coast Guard "Drug" Hearing

As Secretary of our Association, I was asked to be an "expert witness" on behalf of one of Captain Ken, one of our members. While I unequivocally support the goals of the Coast Guard to eliminate drug use in the workplace, I was uncertain as to why I was considered an "expert"-and especially in a drug case. Drug abusers can find little sympathy in my basically "hard-line" outlook summarized by: "If you did the crime, don't waste my time."

An expert witness is, among other things, ***a person who did not actually witness an event take place*** but has expertise in some particular area. I soon found that the area of expertise I was to be called on was in regard to the "12-Hour Rule." After editing our Report #R-302, Mariners Speak Out on Violations of the 12-Hour Work Day , based on personal experiences of 58 of our member mariners in that report, I was confident that I could approach the matter with an adequate background in that area.

When I reviewed the paperwork provided me by attorney, Captain Robert Lansden, I came across the following Coast Guard form letter that was terse, direct, and to the point about one of the charges related to the alleged drug use:

"Dear Mr. (correct name typed in),

Enclosed is a complaint and answer form regarding your (correct date typed in) Mar. 4, 2000 refusal to submit to a drug test. Please read the complaint form carefully. You have twenty days to file the answer form. If the charges in the complaint are found proved, your Coast Guard license or Merchant Mariner's Document will be permanently revoked.

You have ***three options*** regarding this matter:

1. Surrender your License or Merchant Mariner's Document outright to the Coast Guard. The hearing will be cancelled and your license or merchant mariner's document will be revoked. ***[Comment:*** *You can give up your license without having to hire a lawyer or face court proceedings. This is the cheapest route for the Coast Guard to follow because preparing for and conducting hearings is expensive for the Coast Guard in time and manpower. For a guilty mariner this may be the cheapest and easiest route to follow because few lawyers are willing to take cases of this nature and fees are steep. Our member contacted approximately a dozen local attorneys on his own but to no avail. However, after*

listening to the case carefully, our Association recommended Captain Robert Lansden, a highly qualified master mariner who is also an attorney. Captain Lansden is a member of the American Maritime Officers (AMO) and an unlimited deep-sea Master. If you are innocent, you are treated as if you are guilty and will find it hard to prove your innocence under the system the Coast Guard has in place. In a "drug" case, proving your innocence will require the testimony of medical experts who are not cheap, either.]

2. You may contest the charges and present your case at a hearing before an Administrative Law Judge. To do this, mark the appropriate block of the answer form and follow the directions to file an answer. At the hearing, you must present all original Coast Guard licenses and documents that you hold to the Administrative Law Judge. ***[Comment:** Putting the check mark in the right spot is the easy part. Then, you must file your answer with the Coast Guard within 20 days. That appears deceptively easy to do. Yet, if you are innocent and plan to defend yourself you won't get to first base without a lawyer.]*

3. Deposit your license or merchant mariner's document with this office and enter into a ***settlement agreement*** to prove cure from drugs. The hearing will be canceled and once all the requirements of the agreement are met, your license or merchant mariner's document will be returned and the case will be closed. ***[Comment**: The terms of the "settlement agreement" will keep you off the water for at least 1 to 1½ years, require "rehabilitation" to prove your cure from drugs, involve weekly meetings, frequent drug tests, and the completion of a bundle of paperwork. Although the case "will be closed," the record of it will remain even if you are successful in regaining your license. Including loss of pay, and the costs related to your compliance with this "settlement agreement" can run into thousands of dollars. This "settlement" is particularly hard to take if you are innocent and do not need to be cured of an addiction to drugs or alcohol or "rehabilitated" in any way, shape or form!]*

If you chose to do nothing, the Judge will issue an order revoking your license or merchant mariner's document outright."

The Case

These, then, were the choices facing Captain Ken and have faced thousands of other mariners as well. Clearly, if you are guilty of drug use, you should be a man and take your punishment. You are wasting your time and the time of others who may be inclined to help you try to "beat the rap." Face it, you deserve nobody's sympathy when you dump serious problems you have created in someone else's lap! Thankfully, this has not happened many times to our Association – but it *has* happened, but not in this case.

Captain Ken, was the operator of a small 65 foot towboat employed as a fleet boat on the lower Mississippi River. Simply by being accused in a drug case, he will have to recover his damaged reputation from other mariners and employers who have heard tall tales through the grapevine and now may be biased against him as a drug abuser. This long process cannot be reversed by flashing a 20-page Decision and Order written by an Administrative Law Judge at your next job interview.

Captain Ken was cited with ***refusing to take a drug test when ordered to do so by his employer*** after what was reported as a "serious marine incident!" Administrative Law Judge Archie Boggs did not find the small amount of scratched paint fit the definition of a "serious marine incident" that appears in the regulations. Specifically, Coast Guard regulations at 46 CFR §4.06-5 require the marine employer to test all persons directly involved in a serious marine incident. However, a "serious marine incident" is defined in 46 CFR §4.03-2(a)(3) as damage to property in excess of $100,.000.

The Coast Guard prosecutor was a lawyer and should have been capable of reading and correctly interpreting this regulation. In addition, the prosecutor's main witness "...testified that several days after the incident he got word from a company representative that the damage was insignificant." We ask: Why didn't the Coast Guard simply drop the case?

An employer can order a mariner to take a drug test ***at any time***. Such a test can be a pre-employment, random or post-accident drug test. Coast Guard regulations at 46 CFR §4.06-5(c) state: "No individual may be forcibly compelled to provide specimens for chemical tests required by this part; however, ***a refusal is considered a violation of regulation*** and could subject the individual to suspension and revocation proceedings under Part 5 of this chapter and removal from any duties which directly affect the safety of the vessel's navigation or operations." In brief, if you refuse to take a drug test your employer orders, you can lose your license.

In this case, Captain Ken's tow of two grain barges suddenly and accidentally parted a coupling and brushed alongside a moored tank ship, the T/S CRUDESUN. Fortunately, and due in large measure to Captain Ken's long experience on his "sixth-issue" license and his skill as a boat handler, damage was limited to nothing more than scratched paint on the ship – no indents, fractures, holes, spills, fires or other damage. After a brief inspection, even the Master of the tank ship saw no reason to even file an accident report.

Indeed, Captain Ken's acting port captain, Michael Hebert of L & L Marine, saw no need to personally inspect the "damage" to the ship although it would have taken him less than 30 minutes to drive to the scene and do so. However, Hebert and his employer were willing to spend several days in court in an attempt to damage Captain Ken's career by attempting to have the Coast Guard take away his license!

The Coast Guard should have spent its time, effort, and resources examining the employer's records and equipment than in bringing trumped-up charges against the mariner. Perhaps, in light of the recent sinking of another company-owned vessel accompanied by loss of life, the Coast Guard could have spent its time in vessel inspection rather than investigating a trivial paint scrape.

Following company policy, Captain Ken notified his employer of the accident and truthfully stated there was no damage. Nevertheless, his employer told him that he would have to submit to a drug screen. According to court testimony, ***Captain Ken did not offer any objection or in any way refuse to take such a drug test***.

After re-coupling his barges and then dropping them off at their destination as required, Captain Ken safely moored

his boat to a dock and waited for acting Port Captain Hebert to arrive. However, after tiring of waiting for him to arrive after a number of hours to be tested, he called a neighbor who had a car, gathered his few personal belongings and was driven home. "Home" was located within 8 to 10 blocks of the company office and was easily accessible to it.

For reasons that are quite common and understandable, when Captain Ken left the boat safely moored and with a deckhand on board, he also quit his job with the company. An interesting, fact revealed at trial was a clause that he signed when applying for a job with the company in 1997 stating that: "I understand that if employed, my employment will be for an indefinite period of time, and that ***I may terminate my employment at any time for any reason***, and the company may do likewise..." This is only fair, but it is also unusual for an employer to make such a clear and unequivocal written policy statement. Exceptionally unusual in this case was the fact that the employer went on to claim that Captain Ken "***deserted***" the vessel. The Coast Guard prosecutor, LCDR Norris, went after him with renewed vigor to keep his case from entirely collapsing in its entirety!

The very next day, Captain Ken found a new job that was more to his liking and, one day after that, took and passed a pre-employment drug test for his new employer with no problems. It should have been obvious to any reasonable Coast Guard prosecutor, including LCDR Norris, that Captain Ken was not a drug user. But, it is a well-established precedent that the Coast Guard will not consider the result of any other recently-taken drug test. If you fail or refuse any drug test for any reason whatsoever, you are in big trouble!

Apparently, Port Captain Hebert was very upset that Captain Ken had quit his job without notice – and on a weekend thereby leaving him in the lurch while his immediate superior was enjoying the wonders of distant Disneyland. Several days later, he vindictively informed the Coast Guard investigators in the New Orleans Marine Safety Office that Captain Ken had both ***refused to take a drug test*** and had ***deserted the vessel***. These are fighting words!

The Coast Guard scooped that up, were hot on the trail, and subsequently served Captain Ken with a notice of a suspension and revocation hearing giving him the four options cited above, and throwing his life into a turmoil for an entire year. The Coast Guard's "wheels of justice" were grinding into motion and in the process assumed they would grind down Captain Ken.

However, the towing company conveniently failed to mention that Captain Ken had been on duty from 6:00 PM the previous day to 6:00 AM on the day of the accident ***and was still on duty at 1:00 PM*** because the company failed to provide him with a licensed relief officer to run the boat. Captain Ken remained on duty until the vessel was tied up at 1 p.m. on the day of the accident after safely delivering its tow of empty grain barges.

In court, Port captain Hebert stated that he could not find a relief after the previous relief Captain and two deckhands quit at 6:00 PM the previous evening. Hebert stated that he expected Captain Ken to go back on duty at 6:00 PM the same evening, only 5 hours later. Having finished working approximately 19 hours in one 24-hour day, the company expected Captain Ken to follow this with another 12-hour hitch. This was an obvious attempt to coerce Captain Ken to violate the 12-Hour statute at 46 U.S. Code §8104(h) – and as such is a common tactic in the poorly-regulated towing industry.[(1)] *[[(1)]Refer to our Report #R-370 Series that deal with this issue.]*

However, acting Port Captain Hebert was not the brightest bulb in the chandelier. He was not sufficiently informed to understand that this practice is against the law! Apparently, his attorney hadn't bothered to clue him in ... nor did the Coast Guard prosecutor. As an observer in the courtroom, I considered LT Norris' inattention to the importance of the 12-hour statute reprehensible and insupportable as an attorney and a Coast Guard law enforcement officer and told him so to his face later in the presence of his unit's Executive Officer and other officers at MSO New Orleans following the trial.

On the first day of the hearing, the Coast Guard attempted to offer the Port Captain's testimony by telephone. After the testimony started, Judge Archie Boggs learned that the Port Captain was present in his company attorney's office less than six blocks away from the courtroom. Thereupon, the Judge ordered Port Captain Hebert to come to the courtroom immediately and offer his testimony in person. He appeared on the scene a few minutes later.

The proceedings resumed but were interrupted after only a few minutes in the middle of Hebert's testimony because the Coast Guard prosecutor Norris failed to make arrangements to hire the court reporter for a session that would continue into the afternoon. In fact, the hearing dragged on for four separate sessions to the great inconvenience and expense of all involved ***except*** the Coast Guard.

As a result, the court was adjourned for several weeks to arrange for a mutually agreeable date to continue. However, at that time, Judge Boggs returned Captain Ken's license to him. Thereupon, the ***Coast Guard investigating officer, LT Andrew Norris, presented Captain Ken with a district policy letter that told him, in effect, that he could not use his license even though he was in physical possession of it***. As an observer, I viewed this as clearly a tactic of harassment and intimidation on the part of the Coast Guard. Even though the Coast Guard had possession of pertinent copies of the vessel logs, ***they were not even slightly interested in the fact that the employer plainly had caused Captain Ken to commit violations of the 12-hour rule***. Further, when confronted by the defense's "expert witness" the 12-hour rule, they attempted to have the Judge bar all "12-Hour Rule" testimony that would be offered as "irrelevant." Captain Bob Lansden, representing Captain Ken objected stating that this testimony was an important part of his client's defense. Subsequently, in another session, Lansden entered G-MOC Policy Letter #4-00 into evidence to "clarify" the 12-Hour rule over the continued objection of the Coast Guard investigators. Interesting as far as timing was concerned, was the fact that we had received Policy Letter #4-00 only a few hours earlier after months of pleading with the Coast Guard to clarify its position on hours-of-service. We considered this a "victory" and mailed over 5,000 copies of this letter to other "lower-level" mariners informing them of their rights and obligations under the 12-Hour rules.

Although working over 12 hours in a 24-hour period did not bother LCDR Norris, this Coast Guard policy clearly influenced Judge Boggs who in his Decision and Order

accepted that "At the time of the allision on 4 Mar. 2000 at 0720, Captain (Ken) ... had been on watch for over 13 hours" and "...that by 1300 hours 4 March, Captain (Ken) ... had worked 18 hours with no relief."[(1)] *[(1)Refer to Decision and Order, p.13]*

The matter of "***desertion***" is an issue that most mariners know very little about because the Coast Guard requires them to know next to nothing on this subject in order to obtain a credential. In reviewing the Coast Guard's deck examination databank with well over 10,000 questions, only one question on desertion appears in the entire data bank. Actually, desertion is far more significant than this simple question and answer would indicate. *[Refer to Norris, M.J. The Law of Seamen, 4" ed., §8:381*

The Coast Guard views the matter of walking off a vessel without notification as a very serious event – a point of view that we caution our mariners to take very seriously. It has nothing to do with being an employee-at-will as discussed earlier. If nothing else, quitting without giving notice certainly isn't a "professional" thing to do. But, in this industry, the employer always has the last word which often includes "blacklisting." This reprehensible tactic helps to explain the large turnover of "lower-level" mariners throughout the industry and is equally "unprofessional."

In this case, Captain Ken left the vessel safely moored to the dock with another crewmember on board. Judge Boggs' Decision and Order states: "On Sept. 27, 2000, a rebuttal witness was brought forward, Mr. Gary Lerille, an employee of L & L Marine. The key facts presented in his testimony were the following: "1) The vessel was safely moored at Upper St. Rose Fleet. 2) Leaving one deckhand aboard was acceptable."

So, when all was said and done, and in light of the employer's own testimony backed up by a signed statement on its own application blank, Captain Ken was free to quit at any time and availed himself of the opportunity. *[Decision and Order, p.20]*

However, things could have been quite different. Even though it has been a common practice for "lower-level" mariners to walk off a job when working conditions become intolerable as they had become for Captain Ken, and as an employee-at-will you can be fired for any reason at any time, be warned that if you hold a Coast Guard license you can be held responsible for any events that take place when you are not on the vessel at a time when your employer reasonably expects you to be there. Fortunately, nothing out of the ordinary happened while Captain Ken's vessel was safely moored. The deckhand that stayed on the boat was a new employee and pretty much an unknown quantity. Several months later, he could not even be located to serve as a witness to events that had taken place.

Legal Representation is the Key

In a meeting at MSO New Orleans following the trial but before Judge Boggs' decision was published, our Association protested the actions of the Coast Guard prosecutor LCDR Andrew Norris. Norris pushed this case as if it was a "zero-tolerance drug case" with a vengeance using the full resources of the government.

Captain Ken had been too upset to work for weeks after the incident. He had beaten the bushes in an attempt to find a lawyer to handle the case until he turned to Penny Adams, then our Association's President, for advice.

The Coast Guard clearly has any mariner over a barrel and can easily run up his legal expenses without batting an eyelash. At the time when we brought this up before a meeting of officers at MSO New Orleans, the legal expenses involved in appearances on four separate occasions approached an estimated $10,000. We asked how an average mariner like Captain Ken can afford "justice" on his salary with the prospect of better jobs in the future dashed after being falsely accused as a drug abuser. We pointed out that Captain Ken was a Vietnam veteran and that he was on the sixth issue of his license and was deserving of respect.

Judge Boggs stated "...a prima facie case was not established and the complaint with regard to use of or addiction to the use of dangerous drugs was dismissed when the Investigating Officer rested the case." *[Refer to 'Decision and Order p. 9.]*

Judge Boggs went on to state: "It is important that the federal government's drug testing program be administered so as to eradicate the use of drugs in the American workplace. However, it goes without saying, the ***program must be administered with justice and fairness to each person tested, or directed to be tested***. *[Emphasis ours.]*

"The employer's function in the drug testing procedure is a vital link. The laboratory's function is a vital link. The medical review officer's function is a vital link. All of the persons involved in the procedure must strictly abide by the regulations." *[Refer to Decision and Order p. 9. Emphasis ours.]*

The judge's order concluded: "The complaint alleging use of or addiction to the use of dangerous drugs and the desertion of the M/V Lillie Louise on 5 Mar. 2000 is dismissed.

In this case, although Captain Ken clearly prevailed, he was left with $10,000 in legal fees that his attorney was unable to recoup under the Equal Access to Justice Act following procedures outlined in 49 CFR Part 6. In fact, as we later discovered in a FOIA request and after an attempt to recover legal fees for another mariner, only one mariner has ***ever*** succeeded in squeezing legal fees from the penny-pinching Coast Guard bureaucracy when they lose a case under the provisions of this act.

The Coast Guard clearly lost its case, but they had to pay no penalty and the only condemnation that Commander Norris had to face was the embarrassment that I may have caused him when I brought up this incident before his peers and his Commanding Officer at a subsequent meeting at the New Orleans Marine Safety Office. He had fallen hook, line and sinker for a tale spun by a vindictive employer angry that his frustrated employee had walked off the boat and found a better job. ***There was no penalty for the employer, either***.

Conclusion

The problem lies in the basic system of "investigations" and the Coast Guard's policy of constantly transferring officers from one set of duties to another throughout their careers. The result is a lack of specialization as was accurately reported in two government reports and one of our own. *[Refer to our Reports #R-429-A, #R-429-B, and #R-429-M.]*

Another loser was Attorney Robert Lansden whose client never paid for his services.

Glasnost

As had become routine by 2006, I requested copies of transcripts, depositions, and motions whenever they were available in hearings that I devoted the time to observe whether they involved mariners I knew or never met. This was largely a local effort. It was rare when any mariners other than the accused or witnesses would attend these hearings although all hearings are open to the public. I asked for documents such as transcripts, depositions, motions etc. from attorneys, respondents, the Coast Guard so I could better understand the evidence presented in the hearings. I received the kind assistance of Jim Wilson, a retired Coast Guard officer, who eventually rose run the Investigations Department of the Marine Safety Office in Morgan City, LA.

The openness that Jim Wilson brought to that office was in stark contrast to the policies of two Lieutenants that were in charge of the office before his arrival. They placed enough procedural roadblocks in our Association's path both as investigators and providing information of scheduled ALJ hearings.

While we still had to submit FOIA requests for documents, it is fair to say that we received each and every document that we requested along with assistance on legal questions as long as we requested information that was not barred by privacy or confidentiality. Often, not understanding some of the subtleties, I received welcome guidance from Jim Wilson. I had the opportunity to attend hearings conducted by most, but not all, of the Coast Guard's sitting ALJs and learned the basics of what a mariner should face at an ALJ hearing.

Not being a lawyer, I never tried to categorize the judges as "good" or "bad."

Putting Out the Trash
[Source: Newsletter #43]

While our Association often focuses upon how difficult it is to obtain and renew a license and attacks the roadblocks the system puts in our path, it can be almost as difficult an exercise for these bureaucrats to take a license away from a mariner. There are some times when we wonder why this is the case. Is it to protect the mariner and his rights? Or is it just to make more work to shuffle papers across their desks and justify their paychecks?

Case in point. Captain ■ is a mariner who was on the fifth issue of a 100-ton near-coastal Master's license. He was serving as the Master of a 43-foot aluminum crewboat that ran aground on a marshy island near Port Fourchon, LA, at full speed, in broad daylight, and in clear weather. The boat left the waterway and slid up on the island until the stern of the boat was 6 to 8 feet away from the water. A spectacular color photograph displayed as evidence showed the boat up in the marsh grass completely out of the water.

A passing fishing boat witnessed the accident and called the Port Fourchon Harbor Police. The police patrol boat rescued the Master, who was the only person on the boat, and took him to his Company dispatcher's office in Port Fourchon. The police officer told him to wait at the dispatcher's office – something Captain ■ subsequently decided not to do.

The dispatcher notified the boat owner who then left to drive to Port Fourchon. In the meantime, Captain ■ asked to borrow the dispatcher's truck to go to the store – reportedly a three-minute drive. He never returned from the store and never returned the vehicle to the dispatcher.

Stolen Truck

An hour or so later, the dispatcher became concerned about his truck and called the Harbor Police. About five hours later, a friend of the dispatcher called and reported the dispatcher's truck was parked at a bar about 10 miles up the road in Golden Meadow, LA. The local police were called, but when they arrived, the truck was gone.

Several days later, Captain ■ called his company office and demanded his paycheck. By that time, the truck was reported stolen and a Judge in Terrebonne Parish had issued an arrest warrant. The Sheriff arrested Captain ■ when he went to the company office to pick up his paycheck – not in the stolen truck but with a "friend" who drove him in another vehicle. The stolen truck was recovered with drug paraphernalia found inside.

Of Interest to the Coast Guard

Several years ago, our Association representing concerned mariners, asked to be notified of every hearing before an Administrative Law Judge held in the Morgan City Marine Inspection zone. Since then, I attended hearings in the Coast Guard's Morgan City hearing room as well as cases presented in Federal Court in Houma and in Lafayette, LA. I reported on a number of these cases in our Association's newsletter – the good, the bad, and the ugly.

The Coast Guard Marine Safety Unit in Morgan City investigated this matter and prepared a case against Captain ■. Captain ■ as master of the vessel, failed to report the accident to the Coast Guard either ***immediately*** over the radio or by telephone as required by 46 CFR §4.05-1(a) ***or in writing within 5 working days*** as required by 46 CFR §4.05-10(a) – regulations we believe all mariners should be familiar with. These regulations are as follows:

46 CFR §4.05-1 Notice of marine casualty.

(a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—

(a)(1) An unintended grounding, or an unintended strike of (allision with) a bridge;

(a)(2) An intended grounding, or an intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of paragraphs (a) (3) through (8);

(a)(3) A loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel;

(a)(4) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems;

(a)(5) A loss of life;
(a)(6) An injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties; or
(a)(7) An occurrence causing property-damage in excess of $25,000, this damage including the cost of labor and material to restore the property to its condition before the occurrence, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage.
(a)(8) An occurrence involving significant harm to the environment as defined in §4.03–65.
(b) Notice given as required by 33 CFR 160.215 satisfies the requirement of this section if the marine casualty involves a hazardous condition as defined by 33 CFR 160.203.
(c) Except as otherwise required under this subpart, if the marine casualty exclusively involves an occurrence or occurrences described by paragraph (a)(8) of this section, a report made pursuant to 33 CFR 153.203, 40 CFR 117.21, or 40 CFR 302.6 satisfies the immediate notification requirement of this section.
[CGD 94–030, 59 FR 39471, Aug. 3, 1994, as amended by USCG–2000–6927, 70 FR 74676, Dec. 16, 2005; USCG–2006–25556, 72 FR 36330, July 2, 2007]

46 CFR §4.05-10 Written report of marine casualty.
(a) The owner, agent, master, operator, or person in charge shall, within five days, file a written report of any marine casualty required to be reported under §4.05–1. This written report is in addition to the immediate notice required by §4.05–1. This written report must be delivered to a Coast Guard Sector Office or Marine Inspection Office. It must be provided on Form CG-2692 (Report of Marine Accident, Injury or Death), supplemented as necessary by appended Forms CG-2692A (Barge Addendum) and CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).
(b) If filed without delay after the occurrence of the marine casualty, the report required by paragraph (a) of this section suffices as the notice required by §4.05–1(a).
[CGD 94–030, 63 FR 19192, Apr. 17, 1998, as amended by USCG–2006–25556, 72 FR 36330, July 2, 2007]

The Captain did not make himself available for drug or alcohol testing after the accident. Although the police officer said Captain ■ did not appear to be intoxicated at the time. Later, one empty and one partially-filled bottle of vodka were found on the boat and were later presented as evidence.

Expedited Hearing

46 U.S. Code §7702(d)(1) states: "The Secretary may ***temporarily***, not for more than 45 days, suspend and take possession of the license…or merchant mariner's document held by an individual if (A) that individual performs a safety sensitive function on a vessel as determined by the Secretary; and (B) there is probable cause to believe that the individual – (i) has, while acting under the authority of that license, certificate, or document, performed the safety sensitive function in violation of law or federal regulation regarding use of alcohol or a dangerous drug; (ii) has been convicted of an offense that would prevent the issuance or renewal of the license, certificate, or document; (iii) within the 3-year period preceding the initiation of a suspension proceeding, has been convicted of an offense described in section 30304(a)(3)(A) or (B) of Title 49: or (iv) is a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

46 U.S. Code §7702(d) goes on to state in subsection (2) "If a license, certificate, or document is temporarily suspended under this section, an ***expedited hearing*** under subsection (a) of this section shall be held within 30 days after the temporary suspension.

Here Comes the Judge

Administrative Law Judge Peter Fitzpatrick flew down from Norfolk, Virginia, to preside over the hearing. The judge was prepared to conduct the "expedited hearing" as provided for by law, the witnesses were assembled, the hearing room prepared, and the date of the hearing was set with the cooperation of the "respondent" who was fully informed as to what was expected of him.

After hearing both witnesses, the judge opened and sniffed a partially empty vodka bottle offered as evidence. He then accepted the vodka bottles as evidence that Captain ■ had violated written Company policy by allowing alcohol on his vessel, but he did ***not*** accept it as evidence that Captain ■ was intoxicated at the time of the accident. The lesson here, as repeated in other cases we have attended, is that ***a mariner can be punished for violating Company rules established by his employer*** – i.e., "Misconduct" as per 46 CFR §5.27. Our advice here is to pay attention as you read the company rulebook!

Other Charges and Evidence

In order to "temporarily suspend" the Captain's license, a pair of empty vodka bottles was not enough. The Coast Guard had to delve into the Captain's past record to satisfy 46 U.S. Code §7707. In doing so, they discovered an impressive rap sheet and evidence of manipulating the system in the past that led to other charges detailed below:

- Violation: 46 CFR §5.27 – Misconduct for failing to declare all convictions on his latest license application.
- Violation: 46 CFR §5.35 – Previous conviction for a dangerous drug law violation, use of, or addiction to the use of dangerous drugs.
- Violation: 49 CFR §40.261 – refusal to test. Leaving the scene of an accident to evade a drug test is just one of a number of examples of "refusal to test."
- Conviction: A 2001 conviction for possession of drug paraphernalia in St. Mary Parish, LA. He received a six month suspended sentence on one-year's probation, a $350 fine, 10 days of community service from Louisiana's 17th Judicial District Court.
- Conviction in Galveston, TX, for theft of property.
- Conviction in Houston for theft of services over $20 and less than $500, and unlawfully fleeing a police officer with 45-days incarceration in the Harris County jail.
- A driver's license suspended for one year.
- A previous drug conviction and "Sweeney" cure after which his license was returned to him. Although the Coast Guard will give you a "second chance," apparently, they allowed him to go through "rehab" twice and returned his license to him twice – which is

unusual. We believe the REC was criticized for letting Captain ■ put this over on them.

- Grand jury indictment and conviction for a threat to commit murder and to interrupt public transportation services resulted in one year's incarceration in Harris County, TX.

No Show

The Captain did not show up for his hearing before Judge Fitzpatrick although he promised to do so. However, the harbor police officer and a representative of the boat owner did appear in person. This presented a problem for the judge who called a 15-minute recess after learning that the investigating officer had spoken with Captain ■ earlier in the morning and he assured her he would be at the hearing. We heard a comment that Captain ■ reportedly said that he would bring Jesus with him, but He apparently declined the invitation as well.

Administrative law hearings are limited in their scope – in this case limited to suspending or revoking a mariner's license. In order to do this, the conduct of these hearings is structured to put as little burden as possible on mariners as well as upon witnesses. In this case, the witnesses appeared in the courtroom and were heard in their entirety, with questioning by both the Coast Guard and the judge as appropriate. The entire hearing was "on the record" and was recorded electronically by a certified court reporter. In ALJ hearings, telephonic testimony often is permitted and is carefully monitored.

According to 46 CFR §5.569, the investigating officer and the respondent may suggest an appropriate order and present arguments in support of their suggestions during the presentation of aggravating or mitigating evidence.

The Coast Guard recommendation was that Captain ■'s license be revoked and offered "aggravating" evidence, some of which is listed above. Since the Captain was not present, he was unable to offer any "mitigating" evidence on his own behalf. Thereupon, Judge Fitzpatrick issued his decision and order revoking Captain's license.

Decision and Order

The Judge issued his order verbally, but is also required to provide a complete written opinion. If the Captain decided to hire an attorney, he could appeal that decision within 30 days.

Judge Fitzpatrick noted that Captain ■ had one of the longest rap sheets he had ever seen. He pointed out the recidivist (i.e., repeat) nature of his offenses.

However, ***Judge Fitzpatrick also questioned why, for safety reasons, the Coast Guard allowed a crewboat to operate with only a crew of only one man*** but didn't push this line of questioning very hard. This is a very basic question that we think the Coast Guard should consider, not only for small crewboats but also for small towing vessels The judge accepted the Coast Guard's evidence "in aggravation" of the offense and stated that Captain ■ was a danger to life and property at sea. He decried Captain■'s "scofflaw attitude" and said that a person of such character should never have been placed in charge of a vessel. He concluded by saying that this was "an absolutely terrible record."

As observers, we could only watch and wonder. Captain ■ apparently mentioned to the harbor police officer that he must have fallen asleep and that the drilling rig he was running the boat for was driving him 20 hours a day. In the recess, we questioned the Coast Guard investigating officer who stated that the rig had hired two crewboats so it was covered for 24-hour service and that the vessel logs did not substantiate Captain ■'s unsupported allegation. While we could request copies of the logs under FOIA, we were so disgusted with the testimony and evidence presented in open court that we declined to do so. Testimony from the vessel owner could not explain what his crewboat was even doing in the area where it ran aground.

Drugs, Alcohol and Responsibility

Over the years, we have seen Coast Guard "approved" license preparation classes emphasize many subjects from the rules of the road to piloting. One of the subjects that the exams do not cover is the regulation that covers alcohol and dangerous drugs. Mariners report to us that some license prep classes tend to gloss over the issue of assuming personal responsibility in their rush to cover other subjects.

Nevertheless, every mariner must take pre-employment, random, and post-accident drug tests throughout his career. These tests, or more accurately, the refusal to take a drug test, as well as attempts to adulterate these tests are behind many lost licenses. In fact, the system became so clogged with drug cases in the mid-1990s that the "Sweeney" cure was invented to relieve the administrative burden. Congress recently put its foot down and specifically authorized the "expedited hearings" mentioned above.

[NMA Comment: We recommend that the Coast Guard require all mariners to read, understand, to the point where they can take and pass an open book test covering the most important features of existing drug and alcohol regulations in 33 CFR Part 95, 46 CFR Part 16 and 49 CFR Part 40.]

[NMA Comment: We recommend the National Maritime Center require "approved" basis credential preparation courses set aside appropriate instructional time devoted to detailing the responsibilities of a merchant marine officer.]

Operating a 43-foot crewboat involves at least the same and perhaps more responsibility than operating a motor coach that carries the same number of passengers. It is not just the ability to operate the boat or the value of the boat, but also the ***human value of the lives of each and every passenger and crewmember*** – a figure that the government believes the public is willing to spend to avert the loss of one human life. That figure currently is calculated to be $2,700,000 and has appeared in a number of Coast Guard rulemaking projects.

Perhaps we are being selfish if we highlight lost and injured "crewmembers" but our Association has felt the pain through talking with the parents, wives, and brothers and sisters of mariners lost or seriously injured through preventable accidents over the years. In light of his deplorable conduct and lost license, we no longer need to count Captain■ as one of us. We are glad that the Coast Guard "put out the trash," cleaned house, and rid our ranks of this liability. Somebody must restrain the "bad guys "in our society.

Rot at the Bottom; Corruption at the Top

Though I had known attorney J. Mac Morgan since shortly after our Association was founded in 1999 and later for his very effective work in the Periman case, I knew little about the case of Christopher Dresser that became his most famous case.

The Coast Guard's administrative law system cranks our suspension and revocation orders for ***individual mariners***. When the individual mariner is brought before an Administrative Law Judge, he and his lawyer face the ***unrestrained power of the United States Government***. The Coast Guard created their own ALJ system. It is a small fiefdom ruled by the Chief Administrative Law Judge and a cadre of Coast Guard employees that becomes extremely hostile to any individual that dares to challenge it and publicize any of its faults. The "system" will do everything possible to win every case regardless of cost at the expense of the taxpayers and of individual mariners that happen to fall in its web.

In 2005, ***eight years*** after J. Mac Morgan took on the Dresser case, he took the time to explain and outline the Dresser case to me. Several months later, it came as a surprise when I heard rumblings that DRESSER case would focus attention on the entire Administrative Law system not just the mess that had started to simmer around a number of cases in Louisiana.. I would pull up and study most of the court filings on PACER, an internet system that makes federal court filings available to the public for a modest fee – since DRESSER had moved out of the Coast Guard's captive ALJ system into Federal District Court.

The Dresser case broke at the end of June 2007 with an in-depth ***investigative report*** published in the Baltimore Sun. Over the years, few mariners and their attorneys had been able to penetrate the ALJ system and question its practices. The Baltimore Sun article showed just how shabby some of these practices really were. This article attracted the attention of Congress as well as most maritime attorneys who had often suffered under the excesses of the system. The stage was set for a Congressional hearing that my wife and I traveled to Washington to attend. *[Refer to our Report #R-429-K.]*

Justice Capsized

[Source: "Justice Capsized?" By Robert Little, Baltimore Sun Reporter, June 24, 2007. Emphasis in this article is ours.]

The Coast Guard court system is supposed to be impartial in its handling of charges against mariners. But records suggest the system may by stacked against the seagoers.

Hundreds of tugboat captains, charter fishermen and other professional mariners face charges of negligence or misconduct every year under the U.S. Coast Guard's administrative court system, a forum established to be fair and impartial, like any other court.

The stakes are high for mariners. Even a temporary suspension can often end a career.

But a Sun investigation – based on evidence in federal court records, computer data files, internal memos and the sworn testimony of a former agency judge – suggests that ***the system isn't merely tough on mariners but is stacked against them.***

Judge Jeffie J. Massey, who retired this year, said in a sworn statement that she was told by Chief Judge Joseph N. Ingolia to always rule in the Coast Guard's favor and came under intense pressure when she did not.

Judicial instructions Ingolia circulated privately to other judges have spawned not only outrage in the small community of attorneys who appear before the Coast Guard but also several lawsuits calling the practice illegal rulemaking and obstruction of justice.

A computer analysis of the court's records reveals a striking imbalance in the decisions of its judges, with ***mariners losing virtually every case before the court over the past eight years***. Of more than 6,300 charges filed by Coast Guard investigators since 1999, mariners have prevailed in just 14 cases – three of which the agency is trying to reverse on appeal. Including dismissals, the Coast Guard wins or reaches a settlement in 97 percent of its cases. The Social Security Administration, by comparison, prevails in 43 percent of the cases heard by its administrative law judges.

Ingolia and other officials in the Coast Guard's administrative law office, based in Baltimore, declined to comment at the behest of the U.S. attorney in Louisiana, who is representing them in the suits. A spokeswoman for the agency said any perceived imbalance in the court's decisions is a ***reflection of the system's efficiency*** and the Coast Guard's reluctance to pursue weak cases. More than half the cases involve mariners who fail a drug test and acknowledge their guilt.

"These are fair hearings that offer mariners the opportunity to present their cases before impartial administrative law judges," said Cmdr. Jeff Carter, a spokesman at Coast Guard Headquarters in Washington, D.C.

One former Coast Guard judge, James Lawson, said he was never coerced by Ingolia or anyone else.

"I always found everyone in Baltimore to be courteous and professional," Lawson said. "They were there to help, not to tell me what to do."

But comments from Massey, and details spelled out in interviews and a complex matrix of court records, raise questions about the integrity of the Coast Guard system and could cast into doubt administrative actions brought against civilian captains, engineers and other seafarers around the country, several of whom are seeking redress in federal court. Among The Sun's findings:

- In two internal memos obtained by The Sun, Ingolia issued ***private instructions telling other judges how to rule***, a practice legal experts and judges from other agencies call inappropriate, and a possible violation of federal laws that require judicial rules to be published and subject to challenge.
- Attorneys on the chief judge's staff and an attorney on the Commandant's staff who helps write appellate decisions have met privately with prosecutors about open cases, according to internal e-mails and court records, ***an ethical breach that defense attorneys and legal experts are calling obstruction of justice***.
- Records at the Coast Guard's docket center in Baltimore are rife with complaints from defense lawyers who describe hostile hearings, with judges behaving as advocates for the

Coast Guard and taking over the interrogation of mariners.

- ***One judge expressed fear for his job if he didn't rule in favor of the Coast Guard***, despite his belief that the mariner had offered compelling evidence of his innocence, according to court records.

Careers at Risk

While the court system handles administrative matters rather than criminal charges and jail terms, rulings of the administrative law judges, or ALJs, are often vital to the nation's 200,000 captains, engineers and crew members, who need a Coast Guard-issued license or other document in order to work.

The charges are investigated and prosecuted by uniformed Coast Guard officers. ***The harshest penalty a Coast Guard judge can hand down is revocation of those credentials, but even a brief suspension can cause turmoil in the life of someone who has built a career working on the water.***

Mississippi barge pilot ***Greg Periman*** lost his license for almost three years when he failed a drug test – a charge later thrown out when Periman proved that a laboratory official had lied under oath – and lost a construction business and most of his savings while he couldn't work. Even now, with his license restored, the 50-year-old captain says some employers won't hire him, because after a long court battle, he is perceived as an enemy of the Coast Guard.

Tugboat captain Domenic Rizzo got a two-month suspension in 2001, after a barge he was towing sank in the Chesapeake Bay, and his boss told him he couldn't work because of the negligence claim on his record. The veteran captain, who now works for a tugboat company in New York, could have accepted a one-week suspension if he had admitted guilt but said he had invested too much time and money in his career to take the blame for something he didn't think was his fault.

"It was all by the book," Rizzo said of his actions on the water that day. "No one got hurt, we were in contact with the Coast Guard the whole time. Honestly, I thought we'd be commended for how it was handled. Instead I lost my job, and now every time I renew my license or go for a new job, I have to say I've been found guilty of negligence."

Complaints about the system are common on the waterways.

"Mariners have for decades suspected that the Coast Guard's administrative law system was unfair and completely devoid of due process," said Louisiana attorney J. Mac Morgan, who represents numerous clients before Coast Guard judges.

"There certainly is a perception that if you go before a Coast Guard ALJ, you're going to lose," said Ralph J. Mellusi, a New York attorney who has represented dozens of clients before the Coast Guard. "I think everyone loses."

That sentiment was given strong credence in March when ***Massey, within days of her retirement, gave a sworn statement describing direct pressure from the chief judge to find in the Coast Guard's favor in all cases***.

"***I was specifically told [by Ingolia] that I should always rule for the Coast Guard***," Massey, an experienced judge who has held similar posts at other agencies, said in the statement. "He said 'the Coast Guard are out there keeping our seas safe and we have to do everything we can to support them. They know when to bring these cases and we're just supposed to help them."

When she resisted efforts by Ingolia and his staff to sway her rulings, Massey said, the chief judge informed her that she was the only one "making trouble." ***She says she retired under pressure***.

Massey's experience contrasts with that described by former judge Lawson, who said he suspects that what his former colleague perceived as pressure was actually CALJ Ingolia's attempts – perhaps awkward or heavy-handed – to counsel a judge that he might have viewed as a rogue.

"My experience with Judge Ingolia was that he left me alone to do what I needed to do," said Lawson.

Still, statistics from the Coast Guard bear out any suggestion that the agency's judges are unlikely to rule in a mariner's favor.

40-to-1 Success Rate

Of more than 6,300 charges brought by Coast Guard investigators ***since 1999***, when the agency restructured its judicial system to broaden rights for defendants, just 16 have been ruled "not proved," equivalent to an acquittal. One of those cases was subsequently overturned by the Coast Guard commandant's office, which hears appeals of the court's decisions, and one is listed in the Coast Guard's records as both a win and a loss for the mariner. Appeals in three other cases are under consideration by the commandant.

Another 142 charges were dismissed, for reasons that are not apparent from the Coast Guard's electronic records. If each was considered a victory for the defendant, the Coast Guard's success rate is roughly 40 to 1.

In contrast, a prosecutor's odds of winning in federal criminal court are roughly 9 to 1, according to the U.S. Justice Department.

Most Coast Guard cases are settled without a hearing, and attorneys familiar with the system say large numbers of those mariners are clearly guilty and should be barred from piloting valuable cargo and lives on the water. ***They also suspect that some innocent mariners reach a settlement, rather than face the near-certainty of a guilty finding and a harsher penalty months later***.

Since Ingolia took over 16 years ago, efforts have been made to improve the Coast Guard's legal system. Before 1999, the cases were handled informally, with judges setting their own rules and generally granting mariners little opportunity to subpoena witnesses or demand evidence in their defense.

Today the system, managed from the fourth floor of the 100-year-old Custom House in downtown Baltimore, more closely resembles a traditional court, with judges based in Baltimore, New York, Houston, Seattle and Alameda, Calif., presiding over an adversarial prosecution-style process. ***Mariners are entitled to "discovery" of evidence for their defense, all at the discretion of the ALJ***. Attorneys say they prepare for Coast Guard cases much as they would for any trial in federal court, albeit with a near-certainty that in a Coast Guard case the government will win.

But a review of Coast Guard records suggests that some rulings mariners get from the bench are predetermined by specific judicial policies circulated privately from Ingolia to the other judges.

When Edwin Turbeville failed a drug test for marijuana use in March 2001 – the first blemish, he said, on a 31-year record of sailing as an able seaman on ocean-going cargo ships – he chose to fight it. The Baltimore resident believed the test result was caused by dietary products he had been

consuming that contained ***hemp oil***.

In prior years, several military and civilian courts had thrown out drug-use charges against defendants who ingested hemp because of studies showing it contained the same ingredient laboratories search for to detect marijuana use. The Coast Guard had resolved the issue for uniformed service members by prohibiting them from using hemp products, ***but no such rule applied to civilian mariners***, and TurbevilIe said he was unaware of the problem.

In September that year, he filed notice with the Coast Guard that he would raise hemp oil ingestion as his defense. Then in October, at a hearing before Ingolia, he brought in a witness who had seen him use hemp products and a scientist who said the products caused his positive test result.

"I'll never forget after the hearing, the judge seemed so sincere," said Turbeville, 65. "He told me, 'I just don't know how I'm going to rule in this case. I just don't know."

Yet eight days earlier – three weeks AFTER Turbeville filed notice of his defense – Ingolia had sent a memo to all the Coast Guard's judges instructing them that "hemp oil should not be accepted as a defense." The memo was never mentioned at the hearing, or in the 17-page order Ingolia issued several months later revoking Turbeville's merchant seaman's credentials.

[NMA Comment: During this time period, the Coast Guard was part of the Department of Transportation (DOT. The DOT first published its drug testing procedures regulation,[(1)] as an interim final rule based the rule on the Department of Health and Human Services (HHS) guidelines for Federal agency employee drug testing, with some changes to fit the transportation workplace. The DOT published a final rule responding to comments on the interim rule a year later[(2)] and thereafter made major additional changes in 2000.[(3)] . ***[(1)49 CFR part 40) on Nov. 21, 1988 (53 FR 47002. (2)54 FR 49854; Dec. 1, 1989. (3)65 FR 79526.]***

Drug testing procedures utilizing the Federal rulemaking process was easily accessible to the Coast Guard. Yet, Chief Administrative Law Judge Joseph Ingolia acted unilaterally *outside the public rulemaking process* and banned civilian merchant mariners from consuming hemp-seed oil simply because it interfered with the drug-testing process. Even if hemp-seed oil's use posed a serious threat to an important agency drug-testing program, then banning its use should have triggered public input through the rulemaking process. Instead, Chief ALJ Ingolia bypassed the rulemaking process and created his own rule through the back door using his own small group of ALJs to enforce his own private wishes. This clearly was an abuse of his authority.]

Angela Hirsch, a Coast Guard spokeswoman, said that the timing of Ingolia's memo was "***a coincidence***" and that it was meant to establish policy for future cases, and not those active at the time, such as Turbeville's.

Some legal experts say the memo's mere existence is disturbing, however, because ***it appears to establish a judicial rule without giving defendants the right to challenge it or even know about it. For a judge to circulate such a statement while presiding over a case in which the issue is under consideration – and to do so without telling the parties involved – is so improper, some experts said, that they found it hard to believe.***

"That's just extraordinary, and highly inappropriate," said William Funk, a professor at Lewis and Clark Law School in Portland, Ore., and co-author of two textbooks on administrative law.

Ingolia's decision forced Turbeville, then 59, to retire six years early; before his savings and pension had reached the level he was counting on. His attorney, John A. Bourgeois, called the memo "highly troubling," on learning about it from The Sun, and said he likely would have handled the mariner's case differently if he had been aware of it at the time.

"Public confidence in the fairness and impartiality of judges is an absolute requirement for any judicial system to work," Bourgeois said. "***The mere appearance of impropriety or bias on the part of a judge is sufficient to damage that confidence***. We intend to investigate this matter fully."

The system was hardly what Massey expected in 2004, when she gave up a job as an administrative law judge for the Federal Energy Regulatory Commission in Washington to take the Coast Guard position in New Orleans, closer to her family in Texas.

'Big Happy Family'

Massey declined to discuss her time with the Coast Guard, saying she preferred that the issues he handled in court. But her experience is spelled out in affidavits and an 87-page sworn statement she gave to a lawyer who represents mariners, along with detailed notes, memos and correspondence obtained by The Sun.

A veteran lawyer and an experienced ALJ, Massey had also once served as chief administrative law judge for an office of the Social Security Administration. Yet from her earliest experiences with the Coast Guard, Massey said she encountered disturbing differences.

In April 2004, during a job interview, she said, Ingolia referred twice to the Coast Guard's "big happy family" and that ***the Coast Guard Commandant, the agency's top official, told her that "we take care of our own.***" She recalled Ingolia talking on the telephone with another administrative law judge, then hanging up and saying, "He calls me from time to time and we talk about his cases."

She dismissed the comments as meaningless pleasantries but says they made her uncomfortable. Because ***administrative law judges are employed by one of the parties that appear before them in court, they are particularly sensitive about chumminess with the agency they work for, or any other perceived bias***. Other agencies where she worked frowned on judges discussing open cases with anyone, much less someone in a position of influence and authority.

"I certainly never had a chief judge tell me anything like that before," she said of the "family" references.

Within eight months, Massey's simple concern grew into a firm belief that the Coast Guard system was not just different but rigged against the mariners.

On. Dec. 7, 2004, Judge Walter J. Brudzinski, an ALJ for the Coast Guard in New York, came to New Orleans to hear a case concerning, a marine engineer named ***Christopher Dresser***, whose charge of failing a marijuana test had been plodding through the Coast Guard system since 1997. (Dresser's brother, Michael, is a staff reporter for The Sun but played no role in the newspaper's investigation.)

Massey attended the hearing as a spectator, and after

listening to testimony from a scientist and from Dresser's mother, she and Brudzinski went to lunch. According to Massey's statement, Brudzinski expressed frustration that the evidence made him inclined to rule in Dresser's favor, but added: "***If I ruled that way, the chief judge would have my .job.***"

"He was not saying this in a kidding way," Massey said.

Brudzinski never directly said that Ingolia had told him how to rule, Massey said, "But the gist of the conversation was, in my professional opinion, that there had been conversations and the Chief Judge had indicated to him how the case needed to come out."

Massey left lunch convinced that the outcome of the case had been predetermined, and two days later began taking notes on her encounters with Ingolia and his staff. She said later in an affidavit, "***The whole goal of the day was simply to go through the motions of holding a hearing. The hearing didn't make any difference. There was never an issue of the outcome of the case. Mr. Dresser was going to lose and the Coast Guard was going to win***."

On June 14, 2005, Brudzinski ruled for the Coast Guard. He declined to discuss the case or Massey's statements with The Sun.

Rosemary Denson, a former Coast Guard ALJ in St. Louis who left her position 10 years ago, said she, too, found the Coast Guard's court system to be manipulated by her boss and biased against mariners, although less overtly.

Several years after she joined the agency in the early 1980s, Denson said, the chief judge – Ingolia's predecessor – began urging lawyers in the commandant's office to overturn her rulings. When she complained, the judge began assigning cases in her district to other judges, according to a letter she wrote to the Coast Guard chief of staff.

Once Ingolia arrived, Denson said, he asked her to help train Coast Guard investigators who prosecute cases. She refused, suggesting it would be inappropriate unless the training were also extended to defense attorneys.

But other judges complied, she said. It was just one sign of a relationship between Coast Guard judges and investigators that she considered improper, and even unethical. ***During her tenure, judges routinely lunched with investigators, she said, or asked them for rides to the airport***. Court files show mariners sometimes complained about the practice, but they were overruled.

"It's always been like that," said Denson, who was an attorney for the Department of Justice before joining the Coast Guard. "***They don't care about even the perception of a conflict of interest***."

As her own cases matured, Massey said, she came under increasing pressure to rule in favor of the agency. Another attorney on Ingolia's staff, at the chief judge's request, sent analyses of her cases that Massey hadn't asked for, identifying "problems" and suggesting "solutions."

By early 2005, Massey had three separate cases in which she had ordered the Coast Guard to provide evidence to mariners for their defense. In each, the Coast Guard refused, saying it would provide only what it believed was required.

Evidence Refused

One case involved a tugboat captain named James Elsik, who was accused of bumping into a barge on the Mississippi River but said he was unaware of the incident and asked for the Coast Guard's evidence that the collision took place. Massey ordered Coast Guard investigators to produce the evidence.

They refused; arguing that federal law doesn't permit a Coast Guard judge to order evidence until after each side exchanges a list of potential witnesses and exhibits – lists that don't need to be produced until 15 days before a hearing.

Massey disagreed and noted that the relevant law begins with the words, "Unless the ALJ orders otherwise."

Coast Guard investigators frequently complained that Massey was hostile to them and biased in favor of mariners. Vice Adm. Terry M. Cross, the Coast Guard's vice commandant, noted in an order overturning one of Massey's decisions a year later that she "consistently ruled against the Coast Guard, often in a derogatory manner," but concluded that ***she was not biased against the agency***.

On Feb. 24, 2005, lawyers from Ingolia's office in Baltimore and Coast Guard Headquarters in Washington met in New Orleans with Coast Guard investigators and discussed the issues in Massey's open cases, according to accusations filed in several lawsuits in federal court. Exact details of the meeting are unclear, but its existence is confirmed by e-mail messages – viewed by The Sun – between Massey and lawyers in Baltimore. Administrative law judges from other agencies, who were not familiar with the Coast Guard system or with Massey, said ***a private meeting between a judge's staff and investigators to discuss issues in open cases is unfair to the mariners involved and would be grounds for a dismissal***.

"That would be so unusual that it would surprise me if it actually happened," said David F. Barbour, an administrative law judge for the Federal Mine Safety and Health Review Commission and former chief judge for the agency. "I mean, no one would stand for it. Not around here."

One lawyer who allegedly attended was Hanna Lidington, an attorney on the commandant's staff who works on appeals of decisions by Coast Guard judges. Coast Guard officials said Lidington and other lawyers from the agency would not comment. But Funk, the administrative law professor, said if an attorney from the commandant's office discussed with investigators details of cases that were subsequently reviewed by her office on appeal, it would be a violation of federal laws guaranteeing separation of a court's judicial and appellate functions.

Two attorneys in New Orleans filed complaints this year with the Justice Department and the U.S. attorney in Louisiana suggesting that the meeting, and other claims from Massey, amount to criminal obstruction of justice. The Justice Department and federal prosecutors in Louisiana declined to comment about the complaint.

Shortly after the meeting, Ingolia issued a memo saying judges should not order subpoenas or other evidence until after witness lists are exchanged, using the same argument that Coast Guard investigators had offered.

Like the hemp oil memo, the directive about evidence was never published or circulated among defense attorneys. J.C. Johns, an attorney adviser for the Coast Guard in Baltimore and the only attorney the agency would allow to talk with The Sun, said the memorandum is simply guidance to Coast Guard judges that they can disregard at their discretion.

Lawson, who reviewed both memos at The Sun's request, said he considered them legitimate vehicles for Ingolia to share his interpretations with other judges.

"The timing may he another matter," Lawson said. "The timing of the discovery memo could certainly, arguably be

seen as an attempt to influence [Massey].

"But it sounds like he had a judge who had gotten herself entangled in a procedural morass and maybe he was just trying to rescue her from it."

Feeling Pressure

Jeffrey S. Lubbers, an administrative law specialist at American University's Washington College of Law, said a private memo "is not an appropriate way" for a chief judge to attempt to change agency procedures.

"The appropriate way would he for the agency to amend its procedural rules or for the Commandant to issue an appellate decision," said Lubbers, who also reviewed the memos at The Sun's request.

As for the attorneys charging obstruction of justice, he said: "Given the timing of it, I can see why the counsel would make this claim. And I can also understand why Judge Massey might feel pressured."

A review of Coast Guard case files shows that mariners and their lawyers frequently complain that they are denied fair treatment or access to evidence by Coast Guard judges.

William Hewig III, a Boston lawyer who has represented mariners in Coast Guard hearings since the early 1980s, said he had a case several months ago in which a mariner was accused of misconduct, but the Coast Guard's complaint didn't say who was making the claim or what specific conduct was in question. He petitioned Judge Parlen L. McKenna for more evidence but was denied.

"He said he doesn't believe in discovery, that it turns his courtroom into a circus," said Hewig. McKenna declined to speak to The Sun.

In Savannah, Ga., last year, a federal harbor pilot, John McCarthy, was accused of piloting a ship too fast past a liquefied natural gas tanker, creating a wake that caused the tanker's gangway to collapse and several of its mooring lines to break. McCarthy asked Judge Peter A. Fitzpatrick for numerous subpoenas and documents, trying to show that a pair of tugboats alongside the tanker had not performed their duties and had ignored several radio calls he made announcing his intention to sail past. All but one of his requests was denied.

Two weeks before his hearing, the Coast Guard announced that it would call 16 witnesses, and McCarthy quickly asked for more subpoenas and documents. The requests were denied, partly because his hearing was nine days away and "would impose undue burdens on the companies required to respond."

McCarthy was subsequently found guilty of negligence, and his pilot's license was suspended for eight months –long enough, he said, that vessel operators have told him they'll be reluctant to hire him if the penalty stays on his record.

"They wouldn't even listen to what I had to say," said McCarthy, who has been allowed to continue sailing while his case is appealed. "I got one month less than what the captain of the Exxon Valdez got, for what was basically a wake violation. They might as well have given me a death sentence. I'll have to find another job."

Fitzpatrick could not be reached for comment, either at his home or through the Coast Guard.

Attorney Craig Weston represented an Oregon charter fisherman, Theodore Howell, whose boat flipped and killed two people. After determining Howell had not been negligent, the Coast Guard charged him with failing to post a safety checklist and conduct a proper passenger safety briefing. ***A transcript shows that throughout Howell's hearing, which was videotaped to be used as a Coast Guard training tool, the judge berated the captain and frequently took over interrogation from the Coast Guard.*** Howell was found guilty and his license was revoked.

"In 25 years of practicing law I have never observed a judge engage in such an adversarial role," Weston wrote in Howell's appeal, which was denied.

In a 2004 California case, the Coast Guard charged a crewmember of a government transport ship with "incompetence," arguing that during a voyage he was "unable to safely perform his required duties." The charges did not contain any more specific information, and the mariner argued that he needed more details to build a defense. After a private phone conversation with McKenna, Coast Guard investigators amended the charge to read "professional incompetence" but still included no specifics. McKenna later ruled that was sufficient and ruled against the mariner.

The decision also was upheld by the National Transportation Safety Board, which hears appeals of the commandant's decisions, though one member objected that the mariner had so little time to build a defense.

"***I feel compelled to express disappointment in the U.S. Coast Guard's procedural handling of this case," wrote NTSB member Deborah A.P. Hersman. "The Coast Guard's boilerplate complaint provided no details or facts from which the appellant could formulate a defensive argument***."

Private conversations between a judge and representatives of one side of a case are forbidden in judicial proceedings, except for strictly procedural discussions. And administrative law judges from other federal agencies say that even discussions between a judge and his or her boss are taboo because of the perceived infringement on the judge's impartiality.

But ***Denson said such ex parte communications were tolerated while she worked for the Coast Guard. The agency's court files hold numerous allegations about it***.

Periman, the Mississippi pilot whose drug case was overturned on appeal, was preparing for a new hearing in his case when the judge suddenly dismissed the charge based on "newly discovered evidence." Notes from the Coast Guard investigators in the case, which Periman said he obtained from the Coast Guard, show they discussed the evidence privately with the judge. The details have never been revealed.

"The appellate people, the prosecution, the investigators, the judge, they all receive their paychecks out of the same bucket," said Periman. "What do you thinks going to happen? You know you're not going to win."

A Judge is a Tool for the Agency

Massey was summoned to Baltimore on April 8, 2005, soon after she complained about the meeting in New Orleans and the memo Ingolia circulated afterward.

"[The Chief Judge] started in on me about how I obviously didn't understand what the program was about and that my rulings were causing problems for his big happy family and that I needed to stop," Massey said in an affidavit filed in federal court.

Ingolia, Massey said, made clear that she should not consider herself a judge but rather a tool for the agency to implement policy that it knows to be correct.

"He said that I was the only person making trouble for him," she said.

On the plane back to New Orleans, she scrawled out a note detailing CALJ Ingolia's directives during the meeting: ***She was never to make the Coast Guard do more work than it wanted and should not concern herself with the hardship that caused mariners***. ***Even if the Coast Guard can't really prove allegations, it knows what it's doing, and she should rule in its favor, she said she was told***.

Massey eventually dismissed all three cases in which investigators refused her orders to produce evidence. Elsik's was later reinstated by the commandant's office, partly using the same logic in Ingolia's memo. The other two are under appeal.

Massey retired from the Coast Guard on March 3 this year and 10 days later testified in a detailed statement with Morgan, the attorney who represented Elsik and Dresser.

Her comments have quickly spread though the small community of mariners and lawyers who specialize in Coast Guard cases, sparking additional lawsuits.

"No one who has been within a mile of a law school could possibly think this kind of conduct is correct**,"** said Hewig.■

Dresser Appeals to the Commandant

***[Source:** Commandant Decision on Appeal #2626]*

On ***Nov. 13, 1997***, Christopher J. Dresser, a licensed First Assistant Engineer, voluntarily provided a urine sample for a pre-employment drug test. Subsequently, Dresser's specimen was sent to a Department of Health and Human Services (DHHS) certified laboratory that conducted the prescribed tests in accordance with 49 CFR Part 40. The screening test was positive for marijuana/tetrahydrocannabinol (THC) metabolite. The laboratory forwarded the test results to the Medical Review Officer (MRO). On Dec. 15, 1997, the MRO determined that Appellant's specimen was positive for marijuana/THC metabolite that led to Coast Guard Suspension and Revocation proceedings

During the presentation of Dresser's defense before ALJ Archie Boggs in ***Spring 1998***, he denied the charge and specification for marijuana use and claimed ***he ingested liquid hemp seed oil, a legal dietary product***, which caused Appellant's urine specimen to be reported as positive for marijuana metabolite. Dresser claimed he used liquid hemp seed oil since Nov. 1996, claiming that it was good for the heart and cardiovascular system. He stated that he used the hemp seed oil approximately four to five times a week during this period.

Following the hearings before ALJ Boggs but before ALJ Boggs issued his decision and Order, Dresser filed a ***products liability lawsuit*** in Federal District Court in New Orleans ***against the manufacturers of the liquid hemp seed oil*** which he consumed and which he asserted had caused his drug screen to test positive for THC metabolite.

The Dresser case was brought up during casual conversation between ALJ Boggs and his son who was a lawyer. ***As soon as Judge Boggs realized his son represented a party in Dresser's products liability lawsuit – a civil action in District Court***[(1)] ***he ended the conversation***. Apparently, neither the Judge nor his son knew about the other person's involvement in this matter. However, Judge Boggs reported the ex parte conversation to Chief ALJ Joseph Ingolia and sought an "advisory opinion" from him. Chief ALJ Ingolia sought guidance from the Coast Guard ethics counselor to determine whether Judge Boggs should continue to preside over Dresser's case. The Chief ALJ determined that there was no a conflict of interest and Judge Boggs was allowed to continue to preside over the Dresser case. However, ***Dresser's recusal motion would follow the ALJ's self¯reporting of the occurrence.*** *[*[(1)]*Christopher J. Dresser vs. The Ohio Hempery, et. al.]*

In a subsequent appeal to the Commandant, Admiral T.H. Collins, the Acting Commandant, affirmed Judge Boggs' ruling to revoke Dresser's license. *[TR. CDOA-2626, p. 11-12]*

On Mar. 18, 1999, a little over a month after Judge Boggs revoked Dresser's license, , the Commandant of the Coast Guard issued an ALCOAST message to ***all Coast Guard personnel***[(1)] that prohibited the use of hemp seed oil to prevent Coast Guard personnel from inadvertently testing positive during Coast Guard random drug tests. In other words, the Coast Guard at the highest command levels became convinced that hemp seed oil could cause a false positive and upset their drug testing program for Coast Guard personnel. *[*[(1)]*It is important to note that Dresser was not "Coast Guard personnel." He was a licensed **civilian** mariner in the merchant marine..]*

Dresser appealed Judge Boggs' ruling to the Commandant on Mar. 17, 1999. After the Commandant affirmed ALJ Boggs' Decision and Order revoking Dresser's license on ***Feb. 19, 2001***, Chief ALJ Ingolia issued a policy memo ***on Oct. 22, 2001*** to all of his subordinate ALJs titled "Hemp Oil Cases." In this memo, he instructed his ALJs that "hemp oil should not be accepted as a defense to the charge of use of a dangerous drug…which was the charge that applied in Dresser's case.

Dresser Appeals to the National Transportation Safety Board (NTSB)

***[Source:** NTSB Order #EM-135]*

Christopher Dresser further appealed the Commandant's Decision on Appeal[(1)] that affirmed Judge Boggs' earlier license revocation ruling. *[*[(1)]*CDOA #2626, dated Feb. 19, 2002.]*

In his appeal to the NTSB, Dresser raised essentially the same objections he previously presented, to no avail, to the Commandant. However, the NTSB decision rendered on ***June 9, 2003*** concluded that the Commandant's decision failed to apply the appropriate legal standard in reviewing Dresser's contention that Judge Boggs should have recused himself following his ex-parte communication with his son. Consequently, ***the NTSB reversed the Coast Guard's decisions and remanded the proceeding for a new hearing before a different ALJ.***.

Dresser defended himself against the Coast Guard's drug charge by contending that ***the positive test result on which it was based was not attributable to an unlawful use of marijuana, but, rather, by his lawful ingestion of liquid hemp seed oil,*** a legal dietary supplement, that can also cause metabolites of marijuana to show up *in* a hemp seed oil user's urine. ALJ Boggs had not been persuaded by the contention and concluded that Dresser's defense should be rejected as "a latter-day fabrication."

The Commandant, in his Decision on Appeal, in "taking care of his own," essentially determined that the law judge was not required to remove himself as the hearing officer because Dresser had not proven that Judge Boggs had "a personal bias in this matter or prejudged the case based on his alleged ex parte communications with his son and the Coast Guard."

The full NTSB, however, shared Dresser's view that this was not the appropriate standard to apply. The issue was not simply whether actual bias or prejudgment had been demonstrated, but whether the circumstances presented ***an unacceptable appearance concerning Judge Boggs' impartiality***. A conclusion that such an appearance existed seemed inescapable to the Board members both in light of generally accepted ethical principles on conflicts and the Coast Guard's own written policies on the subject.

The NTSB ruling said that Coast Guard's Administrative Law Judges, in the suspension/revocation proceedings over which they preside, are expected "***to strive to avoid even an appearance [of partiality] to the position of either party to a proceeding" and "are held to the same standards regarding bias, prejudice and interest as are all members of the federal judiciary"*** Under 28 U.S. Code §455, which set forth the relevant standards for the federal judiciary, a judge must disqualify himself whenever "his impartiality might reasonably be questioned" and whenever, among other times, he "or a person within the third degree of relationship to "him "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding" The Board thought the circumstances confronting ALJ Boggs in this case fell well within the intent of these provisions.

The Board noted at the outset that nothing in the record before them suggests that ALJ Boggs' decision was based on anything but the evidence adduced at the hearing, and they commended him both for disclosing the communication with his son and seeking advice on the propriety of continuing to preside over the case. Nevertheless, several circumstances over which the Judge Boggs had no control, but which should have been recognized as warranting his recusal, created ***an appearance of conflict that would support a finding that "his impartiality might reasonably be questioned***."

Although the particulars of Dresser's civil lawsuit were not in the record, it appeared reasonable to assume, in the context of a product liability action, that the appellant seeks to hold the manufacturer of the hemp seed oil liable for damages caused by the positive drug test result that led to this proceeding. ***Because the ALJ's son represented the hemp seed oil manufacturer, it should have been apparent that a decision finding that the positive drug test was not the result of hemp seed oil ingestion would directly benefit the manufacturer and, therefore, his son as we11***. A process dedicated to fairness in practice and appearance cannot tolerate the potential for partiality created by the propinquity of the players in the inter-related cases. In the Board's view, since there was no way to objectively evaluate the possible impact of Judge Boggs' son's connection to this matter on the judge's decision-making, ***the resolution of Dresser's fate in the adjudication should have been re-assigned by the Coast Guard to a law judge who could not be said to have, or appear to have, a personal interest in the outcome of either proceeding***.

Accordingly, the NTSB[(1)] ordered that the docket be ***remanded to the Commandant for further proceedings consistent with this Opinion and Order***. *[(1)Chairman Engleman, Vice-Chairman, Rosenker, and members Goglia, Carmody, and Healing concurred in this opinion and order.]*

Dresser Gets a New Trial Mired in Controversy

In 49 U.S. Code §1133(3) Congress gave the NTSB the authority to ***review on appeal*** a decision by the Commandant of the Coast Guard based on an appeal from the decision of an administrative law judge denying, revoking, or suspending a mariner's credential.

The relationship between these two government agencies has not always been comfortable. As far as mariners are concerned, the Coast Guard has the power to "enforce" while the NTSB has the authority to "recommend."

The NTSB's ruling gave the Coast Guards a slap on the wrist, especially to Chief ALJ Joseph Ingolia whose decision allowed Judge Boggs to continue to conduct the Dresser case as well as to the Commandant who glossed over the impropriety. Nevertheless, the case Guard did grant Christopher Dresser a new trial before a different judge – Judge Walter Brudzinski.

Enter Administrative Law Judge Walter Brudzinski

Judge Brudzinski was hand-picked by Chief ALJ Joseph Ingolia to conduct the re-trial. However, by this time it was well understood by all his ALJs (including Judge Brudzinski) that Chief ALJ Ingolia had given firm instructions that a hemp seed oil defense would not be accepted – even though that rule by the Chief ALJ did not exist during the original trial where consuming the product was a legal dietary supplement.

During this re-trial Judge Brudzinski had lunch with the new ALJ Jeffie J. Massey and several Coast Guard lawyers sent to New Orleans to assist and advise him – as was reported in the Baltimore Sun.

Judge Brudzinski was selected by Chief ALJ Ingolia to preside over this case just as he was chosen later to preside over the SHINE case. The only reason that makes sense in both cases would be that Judge Brudzinski would render a decision that would please Chief ALJ Ingolia. Judge Massey saw this happen right before her eyes and then reported on it.

The Coast Guard had to work overtime to cover up this travesty on justice and discredit those who found fault with the system. Yet that is exactly what these public employees did. "All the King's horses and all the King's men" frantically glued the Coast Guard's Humpty Dumpty administrative law system's together again.

CHAPTER 10 – "JUDGE JEFFIE J. MASSEY" REPORTS CORRUPTION AT THE TOP

Before April of this year, we could not have predicted the information released by investigative journalist Robert Little in his article "Justice Capsized?" that covered the front page of the Baltimore Sun on Sunday June 24, 2007 and the firestorm that it stirred up. The story is based upon fact and hinges on an affidavit written by Coast Guard Administrative Law Judge Jeffie J. Massey on the inner workings of the Coast Guard's ALJ system.

I have been an observer in Judge Massey's courtroom on a number of occasions and in parts of two of the three cases where mariners filed lawsuits against the Coast Guard and other cases as well. At the heart of this report and of these three lawsuits is the following affidavit. News accounts indicate that Congress wants to hear from former Judge Massey in person, and the same accounts indicate her willingness to appear.

AFFIDAVIT OF JEFFIE J. MASSEY
Christopher J. Dresser V. Joseph N. Ingolia, Etc., Et Al. –
Civil Action #No. 07-1497
United States District Court, Eastern District Of Louisiana

BEFORE ME, the undersigned: Notary Public, personally came and appeared, Jeffie J. Massey, who after being first duly sworn by me, did depose and state the following.

l. I am over the age of eighteen (18) years. I have personal and direct knowledge of the facts set forth in this Affidavit.

2. I graduated high school in 1971 in San Antonio, Texas. The next fall, I began undergraduate studies at Southern Methodist University in Dallas. Texas. Three years later, I graduated with a Bachelor of Arts, major in political science. In August, 1974, I started law school at Southern Methodist University and graduated with a JD[(1)] in May, 1977. I took the bar exam in the State of Texas in July, 1977. I had a provisional law, license granted in January, 1977, before I took the bar exam, because I was in criminal clinic, so I actually started representing clients under supervision in January 1977. I became a fully licensed lawyer in November. 1977 and opened my own law office. *[(1)JD = Juris Doctor, or Doctor of Laws degree.]*

3. My first position as an Administrative Law Judge began in September 1997, with the Social Security Administration. I began in the Social Security Administration's Miami, Florida Hearing Office. I stayed in Miami until May 1999. In May 1999, I became the Chief Administrative Law Judge for the Social Security Administration's San Antonio, Texas Hearing Office. I resigned the Chief Judge position after 20 months and became a regular ALJ at that office about January 2001. I then interviewed for an ALJ position with the Federal Energy Regulatory Commission in Washington. D.C. I was offered the job, accepted it and began working at the Federal Energy Regulatory Commission as an Administrative Law Judge about September 30, 2001.

4. In about February 2004, I applied for a position as a United States Coast Guard Administrative Law Judge in New Orleans, Louisiana. I was first interviewed in New Orleans, Louisiana by Joseph N. Ingolia, the Chief Administrative Law Judge for the Coast Guard. CALJ Ingolia has an office at the ALJ Docket Center in Baltimore, Maryland, and an office in Washington, D.C., in the same building as the Commandant of the Coast Guard. As another part of the interview process for the Coast Guard ALJ position, I met the Commandant at his office in Washington, D.C. with CALJ Ingolia. I was then offered the job, accepted it and began working as a Coast Guard ALJ about July 11, 2004. I took over the Coast Guard ALJ position in New Orleans, which had previously been held by ALJ Archie Boggs.

5. Before I started as a Coast Guard ALJ, I went through a training and orientation seminar held in Baltimore, Maryland, which was a yearly get together of all Coast Guard ALJs. We had a speaker from the National Oceanic and Atmosphere Administration, a speaker from the Bureau of Industrial Science, a speaker on drug testing, a speaker on regulatory changes, and other updates.

6. During the seminar, I learned about CALJ Ingolia's 10/22/01 Hemp Oil Cases Policy Memo and the Dresser case. After completing, the seminar, it was very clear that, no matter what, hemp seed oil use was not a valid defense under any circumstances in a Coast Guard Suspension and Revocation action. Further, after completing the seminar it was very clear that, no matter what, a Coast Guard ALJ should never find inadvertent hemp seed oil use as credible evidence in a Coast Guard Suspension and Revocation action.

7. During this seminar, I met the Coast Guard ALJ from New York, Walter J. Brudzinski. ALJ Brudzinski was a relatively new Coast Guard ALJ having come from the Social Security Administration as an ALJ at that agency for approximately one year. I was told by CALJ Ingolia that even though the ***Dresser*** case was a New Orleans case, he was going to assign it to ALJ Brudzinski.

8. Before the seminar, during the continued part of the interview process. I met the Commandant at his office in Washington, D.C. But, before going to his office, I went to CALJ Ingolia's office in the same building. CALJ Ingolia was on the phone. When he got off of the phone he told me that he was talking to AL.J Brudzinski and that he and ALJ Brudzinski, from time to time, talk about active cases being handled by ALJ Brudzinski.

9. On December 7, 2004, ALJ Brudzinski held a hearing in Coast Guard v. Christopher J. Dresser, at the Regional Transit Authority Building in New Orleans East. I attended that hearing. Before the hearing, I met ALJ Brudzinski, and two attorneys from the ALJ Docket Center, Ken Wilson and Alyssa Paladino, at their hotel. I brought them to the hearing.

10. When the hearing recessed for lunch, I accompanied

ALJ Brudzinski, Mr. Wilson and Ms. Paladino to lunch. During lunch, ALJ Brudzinski was talking about the evidence that Mr. Dresser had presented that morning. ALJ Brudzinski and Mr. Wilson talked about the testimony of a doctor. It was clear that ALJ Brudzinski was struggling with that testimony in the sense that he found at least part of it compelling, and he was concerned about how it would impact his ruling in the case. The sense that I got from what ALJ Brudzinski was saying was that he had been ready before the hearing to rule against Mr. Dresser, and he found the doctor's testimony troublesome, how to reconcile that testimony with a ruling against Mr. Dresser. ALJ Brudzinski then commented that a ruling in favor of Mr. Dresser would really be a boon to his products liability case. Once ALJ Brudzinski mentioned the effect a ruling in favor of Mr. Dresser would have on his products liability case, he said "If I ruled that way, the Chief Judge would have my job." He was not saying that in a kidding way. He was serious. ALJ Brudzinski then repeated, while shaking his head, "If I ruled that way, the Chief Judge would have my job."

11. On December 9, 2004, I prepared a memo on what had been said at that lunch. I prepared the memo because what ALJ Brudzinski had said bothered me. It bothered me from the sense that I knew I was sitting next to a man who was not an independent fact finder. It bothered me to the effect that we had a Chief ALJ who would dare to tell an ALJ how to rule in a case. Attached hereto and made a part hereof as Exhibit "A" is a copy of the memo.

12. The outcome of the ***Dresser*** case was predetermined before Mr. Dresser ever put on any evidence at the 12/7/04 hearing before ALJ Brudzinski. From what was said by ALJ Brudzinski at the lunch on December 7, 2004, the whole goal of the day was simply to go through the motions of holding a hearing. The hearing didn't make any difference. There was never an issue of the outcome of the case. Mr. Dresser was going to lose and the Coast Guard was going to win.

13. On February 24, 2005, a meeting was held in the Hale Boggs Building in New Orleans, Louisiana under the pretext of a need to discuss my demeanor during Coast Guard hearings. The real purpose of that meeting was to discuss how I was ruling on discovery issues in three pending cases, *Coast Guard v.* ***Elsik***, *Coast Guard v.* ***Rogers***, and *Coast Guard v.* ***Boudreaux***, and to lobby CALJ Ingolia to pressure me to rule in favor of the Coast Guard. Attached hereto and made a part hereof as Exhibit "B" is an April 4, 2005 Memorandum which I sent to CALJ Ingolia on the February 24, 2005 meeting.

14. After the February 24, 2005 meeting, on March 7, 2005, CALJ Ingolia issued a Policy Memo on Guidelines for Discovery Requests in Coast Guard Suspension and Revocation actions. Attached hereto and made a part hereof as Exhibit "C" is a copy of CALJ Ingolia's 3/17/05 Policy Memo on Guidelines for Discovery Requests in Coast Guard Suspension and Revocation actions. That policy memo was almost a duplicate of the arguments that the Coast Guard and Coast Guard District 8 Legal had been making on the discovery issues which I had under active consideration in *Coast Guard v.* ***Elsik***, *Coast Guard v.* ***Rogers*** and *Coast Guard* v. ***Boudreaux***. On March 31, 2005, I sent a Memorandum to CALJ Ingolia discussing the improprieties of his Policy Memo on Guidelines for Discovery Requests. Attached hereto and made a part hereof as Exhibit "D" is a copy of my 3/31/05 Memorandum to CALJ Ingolia.

15. On April 8, 2005, after being summoned to come to Baltimore for a meeting with CALJ Ingolia, I attended that meeting. In attendance at that meeting were CALJ Ingolia, George Jordan, Ken Wilson and Megan Allison. At that meeting, CALJ Ingolia started in on me about how I obviously didn't understand what the program was about and that my rulings were causing problems for his "big happy family" and that I needed to stop. CALJ Ingolia made it very clear in that meeting that "we're one big happy family" means I need to do my part to support the Coast Guard. And by support(ing) the Coast Guard, I was specifically told that I should always rule for the Coast Guard and that if I ever found myself faced with a circumstance when I just absolutely, positively could not find any way to rule in favor of the Coast Guard on an issue, that I should rule against them, but word it delicately and just apologize for it as much as I could. CALJ Ingolia informed me that I was the only Coast Guard ALJ making trouble for him, the Coast Guard and the Commandant, and that it had to stop. CALJ Ingolia told me at that meeting that I should never ever make a ruling, that caused the Coast Guard to do one more minute's work than they wanted to do and that I should never concern myself with how hard it was on a respondent to go through the discovery process or to get discovery, that was just not a concern of mine. All of CALJ Ingolia's statements at that meeting reinforced what I had observed and heard when I had lunch with ALJ Brudzinski on how CALJ Ingolia expected him to rule in the ***Dresser*** case, in favor of the Coast Guard and against Mr. Dresser, no matter what. Attached hereto and made a part hereof as Exhibit "E" is a typed copy of my notes I made on the plane ride home from the April 8, 2005 meeting with CALJ Ingolia. Attached hereto and made a part hereof as Exhibit "F" is a copy of my 5/31/05 Memorandum to CALJ Ingolia in Follow-Up to the April 8 meeting with CALJ Ingolia in Baltimore.

16. The facts contained in this Affidavit are true and correct to the best of my knowledge, information, and belief.

s/ Jeffie J. Massey, Sworn to and subscribed before me, on this 9th day of May 2007. Notary Public – Signature.

Initial Comments Following Publication Of "Justice Capsized?"

The day after the story broke in The Baltimore Sun, U.S. Representative Elijah Cummings, Chairman of the House of Representatives' Coast Guard and Maritime Transportation Subcommittee was quoted in The Baltimore Sun as follows: "I practiced law for 20 years, and I can't imagine some of this stuff happening."

Cummings had a general law practice in Baltimore before being elected to Congress in 1996. "You don't have investigators and judges' staff talking to each other, not if what you're looking for is fairness. If these things that are being said are accurate, then anyone in the mariners' position would be hard pressed to believe that they're going to have their case heard in a fair and impartial manner. And we need to address that."

Cummings said he hopes to have Massey testify before

members of Congress, and Massey said yesterday that she would if asked.

"I am willing to tell the truth about what happened at the Coast Guard with anyone who will listen," said Massey, reached at her home in Texas. "What they are doing is wrong, and people need to know about it."

Our Association Responds to Coast Guard Press Release on "Justice Capsized"

On June 27, 2007, Rear Admiral Mary E. Landry, the Coast Guard's Director of Governmental and Public Affairs immediately issued a press release critical of the "Justice Capsized?" article and an editorial titled "A Listing Court" in the Baltimore Sun. On behalf of our Association, I independently responded to the press release making the following points citing paragraph numbers and quoting from the document. We never received the courtesy of a reply:

¶1- While "…pending litigation prevents me from addressing other allegations in the article and editorial…"

NMA Comment: It appears that the Coast Guard, for whom you are the spokesperson, discounts the importance of the fact that our mariners no longer perceive that the Coast Guard's administrative law system is conducted with fairness or impartiality. If the Coast Guard were at all attentive to our mariners, you would immediately come up with answers to the following questions, which we posed in our last newsletter, namely:

- What action will the Commandant take, especially since he is now a party to three lawsuits?
- How soon will he take action? *(He has known about this scandal for well over two months!)*
- How many cases that were previously decided will have to be re-opened?
- How many mariners' careers were interrupted or destroyed when they were denied "due process."
- Can the Coast Guard remedy the situation alone, and if not, who will clean up the mess and when?
- How deeply are others in Coast Guard "management" involved in secret meetings and ex parte communications that will be exposed by these and subsequent lawsuits?
- Should Congress still allow the Coast Guard to superintend the U.S. Merchant Marine?

I suggest that you address these questions in future press releases to more fully inform the public. However, we never received acknowledgement of our letter. In May 2009, Admiral Landry became the Commander of the Eighth Coast Guard District in New Orleans.

¶2- "(F)ew violations are serious enough to reach administrative law judges."

[NMA Comment: With your years in Coast Guard service, you should realize that this statement is not factually correct. Administrative law judges must approve most if not all settlement agreements. Consequently, the ALJs routinely sign off on every significant action taken against our mariners.]

[NMA Comment: By citing large numbers of drug and alcohol cases in your press release to the public by citing raw statistics, you unwittingly insulted the overwhelming percentage of mariners who never become involved in these illegal activities. Drug use is a societal problem and is not one that centers on our mariners. If you are unhappy with the Baltimore Sun's use of statistics, you might mention the most recent low annual percentage of positive drug tests to better balance and put into more accurate perspective the information you report to the public.]

¶4- "The vast majority of mariners charged with drug and alcohol offenses take advantage of rehabilitation programs we have established."

[NMA Comment: To the best of my knowledge, the Coast Guard is not actively involved in any rehabilitation program that impacts our lower level mariners working on commercial vessels.]

Our Association tried to work with the Coast Guard for the past seven years. We are NOT "soft" on drugs or drug use anywhere in the transportation industry. I invite you to read, study and review (our reports) posted on our internet website to ascertain why we are upset with the way the Coast Guard and its ALJs have treated our mariners.

We are distressed that when the Coast Guard takes our mariners' credentials, (the Coast Guard) simply throws our people to the wolves by telling them to find some state, county, or private rehabilitation program. It is your bureaucracy's way of passing the buck to some other agency. Then you require that agency to generate the necessary paperwork in such a manner as to be acceptable to the Coast Guard to allow our mariners to return to work. Many Coast Guard investigators have been less-than-helpful in providing accurate guidance to our mariners…

While there are many excellent rehabilitation programs (including union-sponsored programs) that treat mariners, ***these are not YOUR programs*** by any stretch of the imagination. A number of mariners reported to us that some rehabilitation programs have great difficulty adjusting their procedures to meet inflexible Coast Guard requirements. This leaves mariners who attempt to turn their lives around out in the cold and out of work until they can comply.

The Coast Guard's goal appears to be to permanently cut loose from the maritime industry any mariner associated in any way with drugs or alcohol by providing them with as little help, guidance, or encouragement as possible. Aggressive Coast Guard behavior goes much farther than that – and that, in our eyes is absolutely inexcusable. ***Your Administrative Clemency program*** established at Headquarters, although its intentions appear honorable, is simply ***another "black hole" of bureaucratic avoidance and is not "user friendly***." Once our mariners lose their credentials, they lose their jobs. Most employers treat them as "employees at will," and also cut them loose because many cannot work without credentials. Most mariners take the hint and leave the industry taking with them the experience they have accrued over the years. Mariners suffer, industry suffers, and the Coast Guard goes on its merry way!

Our Association views the drug program as it has been enforced in the Eighth District over the years as a complete and unmitigated disaster. If you contact LCDR Jim Stewart on Admiral Whitehead's staff, you will understand the depth of our dismay, disillusionment, and dissatisfaction with the conduct of the current drug program. We believe the Coast Guard needs to more adequately support the efforts made by its professional Drug and Alcohol Program Manager, Mr.

Robert Schoening.

¶4- "As a result, few cases are contested and fully adjudicated by administrative law judges."

[NMA Comment: It costs a minimum of $5,000 for the average mariner to secure legal representation. Most experienced maritime attorneys knew that the Coast Guard's policy was to win at any cost long before Judge Massey's revelations appeared in the Baltimore Sun. They knew the odds were stacked against them and they could not win. Why would an honest lawyer accept a client's hard-earned money if he cannot possibly win?]

If you take the time to examine our Report #R-342, Rev. 5 on our website, you will understand why we urge all mariners to purchase license insurance. However, even that path is rendered useless when Coast Guard ALJs operate under policies like those Judge Massey alleges were put in place by Judge Ingolia. I think that the Commandant needs to consider making some immediate changes – or, as an alternative, he needs to consider recommending a successor.

History. During World War II, the Coast Guard absorbed the functions of the former Bureau of Marine Inspection and Navigation (BMIN) under a Presidential Executive Order as a wartime emergency measure. These functions were scheduled to revert back to civilian control six months after the war. Nevertheless, in 1946, the Coast Guard persuaded Congress to replace civilian control of the merchant marine with control by the Coast Guard – a military organization. We question the value of continuing to exercise control by military officers over at the expense of further mismanaging and alienating a vital segment of the transportation industry.

Included in this postwar government reorganization plan, came the power to investigate marine casualties and the power to discipline merchant mariners – powers that were hotly contested at the time in public hearings before the U.S. Senate by the nation's major maritime labor unions.

A previous Commandant, when urging Congress to grant it permanent control over the merchant marine,[(1)] stated in part: "Should the person desire counsel but have no means of securing it, the Coast Guard supplies an officer to act in his defense. Further, it is the duty of the examining officer to subpoena any or all of the witnesses that the person charged desires to appear in his behalf….The testimony at the hearings is taken down by a reporter. If an appeal from the decision of the hearing officer is made, a copy of the transcript is made available to the appellant."[(2)] ***After gaining control over the merchant marine in 1946, the Coast Guard forgot most of these obligations to protect our merchant mariners***. Lenin's comment that "Promises are piecrusts, made to be broken" fits well. *[(1)Adm. Joseph F. Farley, Commandant, through Capt. A. C. Richmond on Plan #3 of the Reorganization Act of 1946. (2)One "respondent" in appealing a decision in a hearing before Chief ALJ Ingolia, had to pay $322.50 for a copy of his transcript for the privilege of filing an appeal that subsequently was denied.]*

It has been over six decades since the Reorganization Act of 1946. During this time, the Coast Guard expanded its power over the merchant marine to include not only investigation of casualties, regulation of licensing, documentation, and training of merchant marine personnel, as well as inspecting an increasing number of smaller vessels. – a fact that brought them into contact with more and more of our "lower-level" mariners who serve on vessels of less than 1,600 gross register tons.

¶6- "Coast Guard administrative law judges are bound to fairly and impartially adjudicate cases."

[NMA Comment: Evidence appears to show that that was not done.]

[¶7. NMA Comment. This is a new issue apparently overlooked by both the Baltimore Sun and the press release – an extremely important gender issue. To the best of my knowledge, Judge Jeffie J. Massey and Judge Rosemary Denson were the only two women the Coast Guard has employed as ALJs. Both of them were driven from the bench by the Coast Guard's "old boy" network. I believe that this issue needs to be thoroughly evaluated and not pushed politely under the carpet.]

CHAPTER 11 – CONGRESSIONAL TESTIMONY BY PROFESSOR ABRAHAM DASH

While it is clear that journalist Robert Little of the Baltimore Sun and his editors consulted many professional sources before publishing their landmark story in the Baltimore Sun, Chairman Cummings of the House Coast Guard and Maritime Transportation Subcommittee called on his own expert in Administrative Law and the Administrative Procedures Act (APA) to summarize his findings on certain key points in the case.

Like all parties who offered oral testimony, Professor Dash was limited to a five-minute presentation. Fortunately, the clarity of his presentation and his direct approach to the major issues presented by the Baltimore Sun article were captured in his written statement available to members of the press and public. A careful reading of this statement, and especially its ***conclusions*** even by a layman exposed the depth of the legal issues that Chairman Cummings and Ranking Member LaTourette, both experienced lawyers, had to put in perspective for their committee and resolve with proposed legislation.

Statement of Professor Abraham A. Dash[(1)]

[(1) "This statement has used the following sources: Administrative Law — Schwartz and Corradu; Understanding Administrative Law — William F. Fox, Jr.; and Administrative Law — Gellhorn and Byse."]

My name is Abraham A. Dash. I am an Emeritus Professor of Law at the University of Maryland School of Law where I have taught Administrative Law for over 30 years. Prior to teaching at the Law School, I was Deputy Chief Counsel and Director of Litigation for the Comptroller of the Currency (Administrator of National Banks) where I was involved in adjudications not covered by the Federal APA, but was required to comply with Due Process under the Fifth Amendment as interpreted by the U.S. Supreme Court. Prior to this position, I was a Trial Attorney with the Criminal Division of the U.S. Department of Justice.

It is my understanding that I have been invited to attend this hearing; as I ***may*** be of some assistance to the Committee regarding issues of Due Process that may exist in adjudications conducted by the United States Coast Guard.

Procedure Due Process is defined in two related areas of law – The Federal Administrative Procedure Act (5 USC 551 et. seq.) and the Fifth and Fourteenth Amendments (Due Process Clauses), of the United States Constitution. A multitude of Supreme Court cases deal with Due Process in state administrative adjudications under the Fourteenth Amendment (i.e., *Goldberg v Kelly*, 397 U.S. 254 (1970).

A further line of cases deal with Federal adjudications (not under the APA) where Due Process under the Fifth Amendment will apply (i.e., *Wong Yang Sung v McGrath*, 339 U.S. 33, (1950) and *Ins v Doherty*, 502 U.S. 314, (1992).

The Federal ***Administrative Procedure Act*** was enacted shortly after the World War in 1946. This statute was an attempt to correct Due Process problems that arose from the growth of new regulatory agencies during the New Deal. There were no standard procedures for rule making or adjudications; each agency had its own way of operating regarding rule making and adjudication. Today, with some limited exceptions, all Federal agencies are under the APA.

Sections 554-559 of the APA regulate adjudications and more than satisfy the Due Process requirements of the Fifth Amendment. However, this section only applies when the statute of the agency requires that its adjudications be determined by a "***hearing***" on the record. It is my understanding that the adjudications of the United States Coast Guard are under Section 551 et. seq. of the APA. It is apparent that the three areas of procedural Due Process of the APA more relevant to this hearing are as follows:

1. Independence and impartiality of the fact finder (i.e., Administrative Law judges).
2. Ex parte contacts with the fact finder (i.e., Administrative Law judges).
3. Discovery for respondents in Coast Guard adjudications.

1. Independence and Impartiality.

Congressional intent to insure the independence and impartiality of fact finders under the APA is clearly expressed when Congress changed the name of "Hearing Examiners" to "Administrative Law Judges."

"In 1978, Congress confirmed the change in title by a statute providing that "hearing examiners" in the relevant APA sections should be changed to "administrative law judge." This change has elevated the status of hearing officers more than any other step could have done. And the judicial apotheosis has been achieved at no. cost – simply by a change of name that was as painless as it was beneficial. See *Butz v Economou*, 438 U.S. 478 (1978)." See also *Ramspect v Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

2. Ex parte Contacts with the ALJ

"The drafters of the APA took this issue quite seriously. The Act contains a number of express provisions on ex parte. First, §554(d) prohibits an ALJ from consulting "a person or party on a fact in issue, unless on notice and opportunity for all parties to participate ...." Second, §557(d)(1) sets out ex parte contact rules applicable to all agency employees who participate in the decision.

"Ex parte contacts go both ways: parties are prohibited from contacting the agency deciders, and the agency deciders are prohibited from contacting the parties."

The Federal Courts are, of course, equally concerned with ex parte contacts and have often expressed their disapproval when it comes up in a case. (i.e., See *Home Box Office Inc. v F.C.C.*, 434 U.S. 829 (1977), and *Wong Yang Sung v McGrath*, 389 U.S. 33, (1950).

3. Discovery

The APA says very little about discovery in agency proceedings. Agencies, under Section 555(d), are authorized to issue subpoenas to parties on request. Section 556(c) authorizes ALJs to take depositions or have depositions taken. The Attorney General's manual on the APA, 67 (1947) states that parties should be given the same access to discovery as the agency's staff.

However, agencies differ in the types of discovery permitted. Despite the fact that the administrative conference in 1981 (recommendation 70-4, 1 CSR Section 305. 70-4) strongly recommended that agencies spell out a comprehensive discovery system; few have done so.

There is, of course, some discretion with the ALJ to authorize discovery in a given case, but the regulations and policy of the agency will control. There is a Due Process requirement for basic information that respondents would need to defend themselves, (See *Hess and Clark v FDA*, 495 F2 975 (D.C. Cir. 1974). But, other than that, discovery is discretionary with the agencies.

Conclusion

It is clear that any attempt by agency personnel to make ex parte contacts with an administrative law judge, on a pending case, is a violation of the Administrative Procedure Act and the Fifth Amendment to the United States Constitution.

It is clear that any attempt to pressure an administrative law judge by a superior or the agency to rule favorably for the agency is a violation of the Administrative Procedure Act and the Fifth Amendment.

It is also clear that if discovery by a respondent in an APA adjudication is so limited that it inhibits the ability of the respondents to present their case that would violate the Fifth Amendment of the United State Constitution. This would probably violate the intent of the adjudication sections of the Administrative Procedure Act.

I will be happy to answer any question the committee may have.

Proposed Legislation

In addition to Professor Dash, Congressman Cummings subcommittee received both oral and written testimony from three retired Coast Guard retired Administrative Law Judges, Rosemary Denson (as previously mentioned), Jeffie J. Massey (the center of controversy in the Baltimore Sun Article), and Peter Fitzpatrick as well as attorney William Hewig who has represented a number of mariners in administrative hearings. Invited, but notably absent from the hearing, were Coast Guard Commandant Thad Allen and Chief Administrative Law Judge Joseph Ingolia. These key figures had been sued both individually and in their official capacities in two separate lawsuits filed by DRESSER as mentioned in the Baltimore Sun article and ROGERS, whose case we explore next. The two cases were quite different in nature, but both allege ***abuse of their due process rights*** by the Coast Guard through abuse of the administrative law system established under the Administrative Procedures Act.

Both Chairman Cummings and Representative LaTourette recognized that the U.S. Attorney for the Eastern District of Louisiana had advised Commandant Allen and CALJ Ingolia not to testify in order not to prejudice the lawsuits in which they were named as defendants. However, they were invited to return at a future date to appear before the subcommittee. This is unlikely as both lawsuits were recently re-filed. However, the Coast Guard position that there was no problem with the ALJ system was voiced by RADM Brian Salerno and Captain Thomas Starks and covered by all sorts of palliative publicity cranked out by Headquarters for the occasion.

It is clear that the Subcommittee was concerned with the information they heard at the hearing. In legislation brought through the parent Transportation and Infrastructure Committee and carried before the whole House of Representatives in April 2008, they ***proposed*** to transfer appeals to ALJ decisions from Suspension and Revocation (S&R) hearings from the Coast Guard to the independent National Transportation Safety Board. This was only the tip of the iceberg. There was much more contained in H.R. 2830 that passed the House by a vote of 395 to 7. Unfortunately, since 2008 was an election year, the 110th. Congress adjourned before the U.S. Senate could consider the bill. This left the issue up in the air for reconsideration in the 111th. Congress.

CHAPTER 12 – CAPTAIN MURRAY ROGERS CASE – UNRESTRAINED COAST GUARD VINDICTIVENESS

Three years before the July 31, 2007 Congressional hearing, a Coast Guard "complaint "…allege(d) that between June 20-22, 2004 (Captain Murray R. Rogers) while serving as Master of the M/V Bailey Ann (O/N 560994) wrongfully absented himself from the wheelhouse of the vessel and engaged an unlicensed individual to direct and control the vessel in violation of ***46 CFR §15.401***."

Subpart C – Manning Requirements; All Vessels
46 CFR §15.401 Employment and service within restrictions of credential.

A person may not employ or engage an individual, and an individual may not serve, in a position in which an individual is required by law or regulation to hold a license, certificate of registry, merchant mariner's document, transportation worker identification credential, and/or merchant mariner credential, unless the individual holds all credentials required, as appropriate, authorizing service in the capacity in which the individual is engaged or employed and the individual serves within any restrictions placed on the credential. Beginning April 15, 2009, all mariners holding an active license, certificate of registry, MMD, or MMC issued by the Coast Guard must also hold a valid transportation worker identification credential (TWIC) issued by the Transportation Security Administration under 49 CFR Part 1572. *[USCG–2006–24371, 74 FR 11260, Mar. 16, 2009]*

Captain Rogers was a towboat "pilot" and did not hire or "engage" anybody. In fact he was a newly-hired employee. He was hired on as Pilot – second in command – not as the Master of the towboat Bailey Ann. As often happens in the towing industry, his employer – a "fly by night" company – took advantage of him. Consequently, Murray found himself on a towing vessel in 24-hour service on which he was the only licensed officer. This is a simple story but not at all unusual in the towing industry, especially in southern Louisiana. Left to cope with this situation, Murray did the best he could until the company could furnish another suitably licensed officer. This was their obligation as an employer that was ignored in the Coast Guard's ensuing rush to judgment.

Based on the factual evidence gained when a young investigator boarded the vessel as it entered Morgan City, Louisiana, the Coast Guard ***first*** offered to settle the offense by issuing Captain Rogers a "Letter of Warning." This was confirmed four years later as ALJ Judge Bruce T. Smith would write: "I note that a prior investigating officer, LCDR Patrick, testified that the Coast Guard agreed a letter of warning was an appropriate sanction in this case.

However, Captain Rogers for personal reasons he disclosed to our Association, and for good reason refused to accept a "Letter of Warning" because firmly believed that he had dealt with a complex situation that confronted him honorably and in the best way he knew how to under the circumstances. It was for this reason and with an understanding of his personal background that I urged Rogers to immediately make an appointment to discuss the situation with the Marine Safety Office's Commanding Officer.

The Real World

Under conditions that exist in the towing industry, every towboat officer that comes face to face with a similar problem, is left on his own to solve it with very little to work with including any regulatory references to cite. So, I believe our mariners would be well advised to draw upon the unfortunate results of Murray's experience.

At this point, let's examine ***46 CFR §15.401***, an important regulation in this case**.** This regulation was put in place, and unchanged since Jan. 4, 1989 although recently amended. The regulation ***appears*** to hold both the "employer" (i.e., the boat owner) and the "employee" responsible for not "employing or engaging" ***unlicensed*** employees to perform a task that must be performed by a ***licensed*** mariner. We ask:

- Why was the entire thrust of the Coast Guard assault aimed at Captain Rogers? He had no authority to hire a second licensed officer.
- Why didn't the Coast Guard hold his employer accountable for allowing his towing vessel to continue to sail without a second licensed officer? They were fully cognizant that this was taking place.
- Why did the Coast Guard allow this case to drag on for over 4½ years at great expense to taxpayers and, above all, to Captain Rogers?

Captain Rogers paid an employment agency to find this job for him. He accepted temporary employment as the ***Pilot*** (i.e., not Master) of the dilapidated[(1)] towboat M/V BAILEY ANN and worked hard to bring it up to snuff with the limited resources available to him. *[[(1)]The towboat sank several weeks later after Captain Rogers left the vessel.]*

Captain Rogers was a "new employee." Although he met the owner of the small company, he knew little about the company except that it was a small company struggling to stay afloat. In my early conversations with Rogers, he showed great loyalty to his employer. During Rogers' tour of duty, the Master of the vessel walked off the boat leaving him short-handed. He informed his company ***but was urged to continue to operate the tow to help the company fulfill its obligations to its customers until the owner could locate a replacement***. He made arrangements with the owner to relieve him and meet the vessel in Morgan City. In fact, the owner of the company was waiting for him at the dock in Morgan City while the Coast Guard boarded and held the vessel mid-stream in the Atchafalaya River just below Morgan City. The investigation, including conversations with other crewmembers and the preparation of a hand-written statement by a deckhand, continued while Captain Rogers was fully occupied holding his tow in mid-stream in the current.

The Coast Guard, using the evidence gathered at the boarding, first proposed a penalty of a "Letter of Warning" – ***but apparently never put the offer in writing***. Thereafter, they upped their proposed penalty several times – finally asking for outright suspension of his license for three months followed by a probationary period of three months, followed by a twenty-four month probationary period. In real terms, this would result in a loss of pay of approximately $36,000 and leave his license under a cloud where it could be revoked for the slightest infraction for the next two years.

A Call for Help

Captain Rogers approached our Association for the first time in early July 2004 shortly after the boarding. I initially suggested that he accept the "Letter of Warning." However, I also understood and respected some very significant reasons why he rejected the "Letter of Warning "and the effect it ultimately would have on his career. Based on this information and aware of his background as a former Coast Guard enlisted man, I urged him to make an appointment to discuss the entire situation with the Commanding Officer of the Morgan City Marine Safety Office at his earliest convenience.

I regret that this turned out to be ***very bad advice***. Since, as Secretary of our Association and previously as owner or manager of several boat companies both in Louisiana and New York, I never had a problem speaking or visiting any Commanding Officer or Officer in Charge, Marine Inspection in any port from New York to Anchorage. I ***incorrectly assumed*** that Captain Rogers, as a licensed merchant marine officer, would be accorded the appointment he subsequently requested on several occasions. The Coast Guard, by denying this simple request, allowed the case to be blown far out of proportion to its importance. A case in which there was no accident, no injuries, and no property damage escalated into a situation that eventually contributed to the persecution of Administrative Law Judge Jeffie J. Massey and convinced Captain Rogers to file a lawsuit impugning the integrity of the Coast Guard's entire administrative law system. The lawsuit named as defendants the Commandant, Chief Administrative Law Judge Joseph Ingolia, Coast Guard appeals staff lawyers, and the Chief of Investigations in Morgan City. The lawsuit against these Coast Guard officials was taken to Federal District Court in New Orleans and was appealed to the Fifth Circuit Court of Appeals before it was finally dismissed in May 2012.

Coast Guard Too Busy to Listen

At the time of the offense, there was a "Change of Command" underway at the Marine Safety Office in Morgan City. Apparently, neither Commanding Officer was interested in speaking with Captain Rogers. ***OR***, perhaps, the "investigating officers" decided on their own that their Commanding Officer should not be bothered by a lowly towboat Captain who had previously served as a Coast Guard enlisted man. ***In any event, Rogers was not allowed to make an appointment to see either of the unit's two Commanding Officers.***

[NMA Comment: We believe the matter could and should have been settled then and there. What value is a senior Coast Guard officer (Pay Grade O-7) who manages more than 100 civilian and military employees who refuses to step in and deal with an aggrieved member of the public. Either of these two senior officer's failure to address this "local" problem allowed it to snowball into a larger "national" problem that subsequently was mismanaged at Headquarters level.]

[NMA Comment: If the Administrative Law process is supposed to be "remedial" in nature, it was at this point where it should have been remediated. I had confidence gained through dealing with both of these senior Commanding Officers that either one could have handled the situation well. I pointed out that the situation demanded their personal attention. Since neither officer stepped up to the plate, "punishment" became the foremost consideration for the investigators. This represented an abject failure of Coast Guard leadership at the highest level and points to a serious staff failure as well.]

After Captain Rogers made a number of futile attempts to speak with either of the two Commanding Officers and before he sought legal counsel, he wrote several letters to the Coast Guard District Commander as well as to members of Congress. These letters clearly ***infuriated*** the Coast Guard sending them on a rampage.

The Coast Guard supervising investigator brought the case before Administrative Law Judge Jeffie J. Massey in October 2004. Several hearings were held and Judge Massey finally dismissed the case on Mar. 25, 2005 "with prejudice." The reasons for dismissing the case were clearly stated in her Decision and Order issued on that day based upon the ***Coast Guard's failure to comply with her subpoenas.***

[NMA Comment: The case should have ended then and there when Judge Massey dismissed it. However, when the Coast Guard appealed Judge Massey's decision, the case took on a life of its own and headed to Federal court where it would be bundled with the DRESSER case. The Coast Guard, in their arrogance, had bitten off more than it could chew but continued to pour taxpayer dollars on the fire to "win at any cost." The eventual cost to Captain Rogers in lost wages and out-of-pocket expenses was estimated at $500,000.]

The Coast Guard's Ability to Appeal an ALJ's Ruling

We will turn the clock back to 2001 to a petition our Association filed on July 16, **2001,** long before we ever heard of Captain Murray Rogers or Christopher Dresser. On that date, we formally petitioned to Coast Guard to reconsider the provisions of 33 CFR §20.1001, a recent rulemaking that came into effect in 1999.[(1)] ***That new rule allowed the Coast Guard to appeal a decision made by an Administrative Law Judge that was adverse to their interests***. Until then, the Coast Guard did not have the ability to go after a mariner if they failed to convince their own ALJ of the merits of their case. Until the time the new regulation came into effect, there was no "second chance" for the Coast Guard if, in spite of all their resources, they screwed up and lost a case.

Our Association first encountered the unfairness of this new rule as it applied to the "Periman" case described earlier in this report.. Before the Coast Guard changed the rules, they could only take "one shot" at our mariners. If the Coast Guard, with its overwhelming assets could not get its act together and convincingly present its case before an Administrative Law Judge the first time, ***they now would be able to try and try again until they finally overwhelmed the mariner***. There appears to be no limit as to how long or how many times this process can be repeated.

The Coast Guard has all the advantages from the very beginning. ***The Coast Guard writes the regulations, trains and pays their "investigators" to uncover factual evidence, prepare the case, provide the courtroom, pay the judges' salaries, pay the court reporter (and charge mariners***

hundreds of dollars for the transcript of the hearing), and open the door to all sorts of legal support – all paid for by the taxpayers in the name of "Marine Safety." ***However, after arming their investigators to prosecute the case, there are no provisions to pay the costs for an attorney to defend the mariner who has no idea what awaits him***.

The clear lesson for mariners to draw from this and other cases is that the administrative law system as practiced by the Coast Guard does not give a mariner much chance of finding "justice." These are "show" trials meant to demonstrate the power of the Coast Guard and keep mariners in line.

In any event, our Association filed our petition to change the rule on July 16, **2001**. This petition, along with several others, was mishandled – for which the Vice Commandant even apologized in writing. However, our petition was denied three years later on July 13, **2004**. This is only one of many reasons why we lack confidence in the Coast Guard "appeals" process and urge Congress to change it.[(1)] *[(1) Refer to NMA Report #436, Rev. 3.]*

The Coast Guard "Remands" the Rogers Case to a New Judge

The Coast Guard appealed Judge Massey's decision in a 32 page brief. Almost four years later, on Apr. 30, 2008, Vice Admiral V.S. Crea issued a Vice-Commandant's Decision on Appeal that remanded the case to a different Administrative Law Judge for a new hearing. By the time the decision reached by the Vice Commandant, appeared to be more concerned with discrediting rulings made by Judge Massey than it was with Captain Rogers. By this time, the Coast Guard's entire apparatus had turned on Judge Massey and forced out of office.

Judge Massey, an Administrative Law Judge with ALJ experience in several other Federal agencies, leveled damning criticism of the Coast Guard's administrative law system that reached the pages of the Baltimore Sun in June 2007 as mentioned above. As an interested courtroom observer, who had been in her courtroom a number of times, I watched this story play out.

Even though I have written about the system, as an American citizen and student and teacher of American History, I start out with a deep respect for our nation's court system and judges at all levels. Not being a lawyer, I cannot "evaluate" a judge – but I can read transcripts in plain English. I read many court documents related to the cases I observed as well as other cases brought to my attention by our Association's members, many of whom are attorneys.

After careful consideration, ***I believe that Judge Massey seldom received the respect that her position deserved from the Coast Guard. Even the Vice Commandant's opinion bears this out in these words:*** Captain Murray Rogers asserted that Judge Massey acted with great integrity.

The Vice Commandant stated: "With respect to the first action, the Coast Guard's action in unilaterally determining LCDR Patrick would not comply with the subpoena rather than filing a motion to quash or modify the subpoena ***was not proper*** under rules governing these proceedings. The (Investigating Officer's) "subpoena response" simply announcing ***the Coast Guard's unilateral refusal to comply with the subpoena, rather than following the rules of procedure as provided in 33 CFR §20.609, is inexcusable***. There is a right way and a wrong way to challenge a subpoena; the (investigating officer) and his supervisor in this case inexplicably chose the wrong way. That choice complicated the proceedings unnecessarily and ultimately led to the ALJ's dismissal of the case with prejudice. ***It is my hope that I will not see such conduct emulated by Coast Guard (investigating officers) or their supervisors in the future***." Nevertheless, this was just a slap on the wrist.

It is hard to ask our mariners to respect the Coast Guard's ALJ system when Coast Guard officials abuse one of their own judges in public. I recalled observing a case brought before ALJ Massey in the Federal courthouse in Lafayette, LA, on Aug. 26, 2005.[(1)] Our Association had no role in that case although both my wife and I attended the hearing. This case involved a well-publicized fatal accident involving a towing vessel officer on the Intracoastal Waterway. We witnessed Judge Massey's frustration followed by her decision to throw out the case after the Coast Guard supervisor and investigating officer flatly refused her subpoena to produce the original investigators at the hearing. Unlike the ROGERS case, this important case – in which the defendant was well represented by a prominent attorney – was never retried. The Coast Guard's administrative law system is much better prepared to deal with individual mariners than it is to battle with a mariner who is well represented by counsel. *[(1)U.S. Coast Guard vs. Roy Paul Boudreaux, Docket # CG S&R 05-0016, CG Case #2078998.]*

In conversations and paperwork in my files stretching over a decade, it is clear that ***the Coast Guard's ALJ system has a serious "gender" issue with its female Administrative Law Judges***. It is noteworthy that Congress called upon the only two female ALJs that served the Coast Guard to appear in its July 31, 2007 hearing and learned about the "good old boy" network that Coast Guard officials including Chief ALJ Ingolia have nurtured.

My lasting impression from this hearing is that the ALJ system is a "good old boy" system that must prove its value to the Coast Guard by its astoundingly high conviction rate. While it does an impressive job of chasing drug abusers off the water, it has shown that it is determined to win every case no matter what it costs and regardless of any collateral damage. In many cases the Coast Guard has raised mountains from anthills and destroyed any mariner who may be guilty of even the most minor infraction to serve as an example to others as to the Coast Guard's power and authority. ***In the Rogers case, there was no accident; there were no injuries.***.

Almost 4½ years after the original complaint and many thousands of dollars in legal fees later, Captain Murray Rogers appeared on "remand" in a borrowed courtroom in Houma, Louisiana, before Judge Bruce T. Smith. The hearing, at which ***no fewer than 10 uniformed Coast Guard officers sat in attendance***, lasted for the better part of two days and produced some very interesting testimony.

Essentially, the Coast Guard alleged that Captain Rogers allowed or directed an unlicensed mariner to steer, operate, or control the M/V Bailey Ann. However, no evidence was collected or presented that he ever violated the 12-hour rule. In his decision, Judge Smith cited a previous Commandant decision on appeal (CDOA)[(1)] that stated in part: "If the circumstances are such that an unlicensed crewmember can temporarily steer the vessel without any appreciable risk to its safe navigation, then the licensed operator may momentarily leave the wheelhouse (after giving appropriate

instructions to the crewman) and still maintain `actual direction and control.' Thus, where the course is straight, the visibility good, and the traffic sparse, the licensed operator might allow an unlicensed mate to take the wheel for training purposes. And where the ***proven navigational competence of the crewmember*** is high, the licensed operator might ***briefly leave the wheelhouse*** and still maintain actual control of the vessel." *[[(1)]CDOA 2058 (Sears) (1976).]*

In his decision, Judge Smith stated that the Commandant had previously held that a licensed operator's temporary absence from the wheelhouse of a towing vessel is not, in every case, an absolute violation. The mere absence of the licensed operator might not constitute relinquishment of "actual direction and control" over the vessel.[(1)] *[[(1)] CDOA 2566 (Williams) (1995).]*

Taken together with a third CDOA, the precedents "suggest that it is incumbent upon the Coast Guard to prove more than the mere absence of the licensed operator from the wheelhouse. The Coast Guard must prove the circumstances attendant to that absence in order to prove a violation contemplated by 46 CFR §15.401."

"Sailing Short"

Judge Smith correctly pointed out that "At no time between June 20, 2004 and June 22, 2004 or thereafter, did Murray Randall Rogers file a "Report of Sailing Short" with any appropriate agency per the dictates of 46 CFR §15.725."

46 CFR §15.725 Sailing short.

Whenever a vessel is deprived of the service of a member of its complement, and the master or person in charge is unable to find appropriate licensed or documented personnel to man the vessel, the master or person in charge may proceed on the voyage, having determined the vessel is sufficiently manned for the voyage. ***A report of sailing short must be filed in writing with the Officer in Charge, Marine Inspection (OCMI) having cognizance for inspection in the area in which the vessel is operating, or the OCMI within whose jurisdiction the voyage is completed***. The report must explain the cause of each deficiency and be submitted within twelve hours after arrival at the next port. The actions of the master or person in charge in such instances are subject to review and it must be shown the vacancy was not due to the consent, fault or collusion of the master or other individuals specified in 46 U.S.C. 8101(e). A ***civil penalty*** may be assessed against the master or person in charge for failure to submit the report.

We present this regulation, which is either unknown or simply not observed by most of our mariners, to illustrate what a Master is expected to do in similar circumstances. The Master bears the burden for making this report. Judge Smith later stated that "…it is apparent that (Rogers) was caught in an unfortunate set of circumstances, ***probably occasioned by his employer***. His response to the Coast Guard's investigation appears, from admitted evidence, to have been forthright, reasonable, and cooperative."

Justice Delayed is Justice Denied

Keeping this case in limbo for almost 4½ years also wreaked havoc on the Coast Guard's case. The Coast Guard's case, such as it was, was based almost entirely on the testimony of a junior marine safety investigator who boarded the M/V Bailey Ann to make his initial investigation. The investigator made no handwritten notes of his investigation and, 4½ years later, was forced to testify almost exclusively from memory. Nor did the investigator bother to examine the vessel's logbook to build the case to determine the number of hours the vessel had been in operation. At the hearing, he was unable to recall the vessel's point of origin, its destination, or manning level. Nor could he recall the prevailing vessel traffic conditions, the weather, the number of barges the vessel had in tow, or even the identity of the Coastguardsmen who accompanied him on the boarding. The ten or so Coast Guard officers in attendance – most apparently in attendance to provide "moral support" – were unable to offer him any meaningful assistance.

At the time of the boarding, the investigating officer was relatively new and inexperienced. I have known this officer for several years and am confident that he is a good Coast Guard officer who, perhaps, in retrospect, either was not sufficiently prepared to execute this particular boarding or allowed admittedly insignificant details to fade from his memory. I would be very upset to learn that this unfortunate episode, blown out of proportion, would damage his career as a Coast Guard officer. During his boarding, the investigator spoke with the deckhand but never recorded that conversation nor met with both the deckhand and Captain Rogers together.

Training Investigators

What should we expect of Coast Guard investigators? The Coast Guard does have a school that trains investigators. However, this apparently is the type of job that does not offer the kind of career advancement that appeal to many young Coast Guard officers. This is borne out in two longstanding government reports available on our website.[(1)] *[[(1)]Refer to our Reports #-429-A and #R-429-B.]*

In 2008 testimony before the House Transportation and Infrastructure on the COSCO BUSAN accident in San Francisco, the Department of Homeland Security found that 5 out of the 6 Coast Guard investigators assigned to that oil-spill case did not meet Coast Guard minimal requirements. In an earlier report[(1)] submitted to members of Congress almost a year before Congressman Cummings' 2007 hearing, we reported our Association's profound dissatisfaction with the Coast Guard's investigations process. In addition, we submitted over 15 volumes of material to the Department of Homeland Security's Inspector General's office to support our views. *[[(1)]Refer to our Report #R-429.]*

The deckhand on the M/V Bailey Ann provided a written statement that read in pertinent part: "I helped Mr. Murry (sic) steer vessel on the dates of 06-20-04 through 6-22-04, no rotation just held wheel when Mr. Murry was tired the longest at wheel was 6 to 10 hrs." *[sic]*

Captain Rogers understood that his "deckhand" previously held a towing license and demonstrated to Rogers' satisfaction that he knew how to steer and handle the tow. However, Judge Smith correctly pointed out that the deckhand's "high navigational competence was not ***proven***." In any event, the Coast Guard, for reasons only

they know, never produced that deckhand to offer testimony at the hearing.

The judge noted that investigator's memory of his conversation with the deckhand differed in certain respects from the written version in evidence. The investigator was unable to recall what hours or on what days Captain Rogers allowed him to run the vessel. Although Captain Rogers told me that he believed the investigator had lied under oath, at this point, Captain Rogers' attorney objected to the Coast Guard's "inadequate discovery response." The judge sustained the objection and ***discounted the investigator's entire oral testimony***. Essentially, the Coast Guard failed to prove its case with its lone eyewitness.

As an observer, I noted that the Coast Guard did not present the deckhand who could have provided many of the answers the investigator could not recall. Captain Rogers did not have the opportunity to confront the one person whose written document appeared to be at the center of the whole case. As an observer, it was never clear to me why the Coast Guard did not produce this man to tell everything he remembered about this incident. It was evident that the written statement quoted above would not, by itself, prove the charges.

As previously mentioned, ***before Captain Rogers hired an attorney to defend him***, he wrote several letters to Coast Guard officials and to members of Congress in an attempt to defend his actions, and, as well in frustration because he was never allowed to speak with the Commanding Officer of the Morgan City Marine Safety Office. This especially bothers me because neither of the unit's two Commanding Officers would grant him an appointment. ***Whether the blame falls on these officers or on the investigators is uncertain, but this action needlessly cost both the government and Captain Rogers tens of thousands of dollars and Rogers' career in the marine industry.***

Captain Rogers' attorney objected to the Coast Guard's presenting these letters and using them as "admissions" of guilt. Judge Smith, however, held that through complex legal reasoning that "…although (they) may have been made during the pendency of an investigation, neither (letter) was apparently made in direct response to an investigator's questioning or investigation techniques. Indeed, both appear to be entirely voluntary statements made by (Rogers) outside of the course of an investigation and to persons other than Coast Guard investigators. Hence, the exclusionary rules set forth in 33 CFR §20.1311 and 46 CFR §5.101(b) are inapplicable…."

[NMA Comment: Our advice to our mariners must remain simple and constant: "Do not speak with any Coast Guard investigator unless you *first* have the advice of a lawyer." This extends to writing or signing *anything*. There is no way that our mariners can properly apply the Coast Guard's complex regulations in 33 CFR Part 20 and 46 CFR Part 5 (among others) and have insight into the mountain of case law without the help of a good *Admiralty* lawyer. If you hold a Coast Guard credential, plan ahead and arrange to have a lawyer before you need one as per.] *[Refer to our Report #, R-342, Rev. 3.]*

[NMA Comment: Unfortunately for mariners, many good lawyers will refuse to represent you at an ALJ hearing. Word about the Coast Guard's "40-to-1 success rate" was discussed at Congressman Cummings' ALJ hearing on July 31, 2007.] *[Refer to our Report #R-429-K regarding the statement of William Hewig, Esq.]*

ALJ hearings have become a circus sideshow where numbers of Coast Guard officers congregate in the courtroom to watch the show. It is easy to do when the courtroom is at the Marine Safety Office as ALJ Massey graphically described it in her oral testimony before Congressman Cummings' (below), as did ALJ Denson (above).

In the Rogers case, the hearing was held in a courtroom in Houma, 35 miles away from the Marine Safety Office in Morgan City. My informal estimate of the dollar value the time extraneous Coast Guard officers spent away from their duties attending this two-day sideshow as the cheering section held exceeded $5,000. ***Don't they have something better to do with their time***?"

If cases like this are so important to the Coast Guard, wouldn't it be less expensive for the government to hire a trained lawyer to present the Coast Guard's case. A trained lawyer might have the discretion ***not*** to push such an insignificant case to extremes and exercise a greater awareness of the costs of continued litigation and appeals for all concerned.

By this time the case reached ALJ Smith in December 2008, it had very little to do with remediation of Captain Rogers alleged offense. It contained absolutely no penalty for the employer who failed to provide his vessel with proper manning for a towing vessel in operation over 12 hours in a 24-hour period. Continued prosecution of this case was nothing more than a last vindictive act to pay back Captain Rogers direct communications with Members of Congress and the Eighth District Commander.

The Case Continued in Federal Court

Nevertheless, after the ALJ Smith's decision, Rogers re-filed his case against the Coast Guard in May 2008 again naming the Commandant, Vice Commandant, Chief ALJ and numerous other Coast Guard officials. The DRESSER case also was re-filed and focused on the Coast Guard's clumsy attempts to unduly influence former ALJ Masseys' decisions, ex parte communications, and due process violations in both cases. If the Coast Guard thought continuing their case before ALJ Smith and attempting to discredit Captain Rogers would save the Commandant, Chief ALJ, and their staff from future embarrassment, they must have been dismayed. Yet, the attempt to discredit Captain Rogers apparently was enough to rate the attendance of a full-fledged Coast Guard cheering section at the ALJ hearing in the Houma courtroom!

Why, in their elaborate show trials, won't the Coast Guard pay a qualified lawyer to help defend the mariner? This just might be "fair" to our mariners as well – but that's not how the Coast Guard wrote their rules. ALJ Bruce T. Smith arranged with several law schools and law firms to provide "pro bono" law students to assist mariners to prepare their cases. Our Association appreciates these actions and several of our members, who are successful attorneys in private practice, applaud his efforts. It is painfully evident that our mariners need any assistance they can obtain in these lopsided battles.

"Remedial in Nature"

Any punishment handed out by the Coast Guard is supposed to be "remedial" in nature. In a number of cases the Coast Guard appears to have twisted the meaning of the word to an extent that is almost beyond belief. In the DRESSER, ROGERS, and SHINE cases that drag on endlessly, lawyers often try to move these cases from the Coast Guard ALJ system into Federal District Court. The Coast Guard will not give up until they can no longer remand the cases back to the ALJ system. Trapped and buried within the Coast Guard's spider web, these cases will drain the mariner mentally and financially.

Our mariners are working people. If the fact that ROGERS has been hanging fire for ***4½ years*** with no real evidence appears out of line, what about DRESSER? Dresser was deprived of his license for ***13 years***. SHINE, a Merchant Marine Academy engineering graduate has been without a license for ***6 years***. His career and reputation were ruined forever. After reviewing over a thousand pages of ALJ transcripts, his hearing ordered by the Vice Commandant was a travesty. Our Association filed a formal complaint with the Coast Guard's Vice Commandant citing all sorts of irregularities only to find that the Vice Commandant isn't even a lawyer – but claims to have a competent staff that does her thinking for her. All she has to do is sign their finished product!

Framing the Case

During the course of the hearing, Judge Smith made a statement to the effect that "***all of you know more about this case than I do.***" It was far from a statement of ignorance, but rather one of wisdom – and, above all, it is true. The judge can only know the facts that are presented to him by both sides to any controversy. The idea that I could know more about the case than he did was intriguing. I followed the case carefully since June 2004. I am not a lawyer and do not have the years of training in applying statute, regulation and previous case law to a situation like this. It is the ability to weigh all these factors that we must respect in a judge. My concern is for the damage that protracted proceedings cause our mariners, the fact that they end a mariner's career, and deprive the marine industry of their services at a time when Congress, and the maritime industry are trying to attract men and women into the industry in light of an increasing personnel shortage. By driving Captain Rogers out of the industry – and make no mistake that is what this is all about – the industry will lose the years of experience of a licensed officer who originally was trained and served as an enlisted man in the U.S. Coast Guard. This is just one example an egregious waste of taxpayer dollars.

In reviewing Captain Rogers' letters that played an important role in determining his guilt, Judge Smith wrote: "***Both documents reflect a mariner who clearly did not display a dangerous, cavalier, or scofflaw attitude. Quite the contrary: (Rogers) appears to be a thoughtful, conscientious, and able mariner who almost immediately accepted personal responsibility for his actions***….(he) did lawfully have a mariner's license which had never been the subject of previous disciplinary action. Nor did the Coast Guard present any evidence to suggest (that he) has been the subject of any other disciplinary action before or since the onset of this case….it appears that despite the filings of several sets of increasingly severe charges against him, he remained honest, reflective, and insightful about the real world economic conditions that forced him to "sail short" on the dates alleged."

ROGERS: Decision and Order

"It is hereby ordered that all elements of the Complaint filed against respondent Murray Randall Rogers are found proved. It is further ordered that, in accordance with 46 CFR §5.19(b), the undersigned notifies Respondent that he is admonished to hereafter observe the requirements of 46 CFR §15.401. This admonition will be made a matter of official record. Please take notice that issuance of this Decision and Order serves as the parties' right to appeal under 33 CFR Part 20, Subpart J. A copy of Subpart J is provided as Attachment B."

The penalty or sanction was the least possible punishment and equivalent to the initial "Letter of Warning" offer that was subsequently jacked up to the point where Judge Massey felt obligated to reject it. A verbal reprimand by the Commanding Officer of MSO Morgan City for making a flawed judgment call could have achieved the same ends 4½ years earlier. Such an ending would not have cost the mariner his career and a small fortune in legal expenses.

Is it all over?

The fact that the Coast Guard has dragged many of our mariners' cases through constant "remands" within the ALJ is absolutely inexcusable. The Rogers case is just one example. Nevertheless, the only way to change the system is to convince Congress that change is necessary. It is reasonable for our Association to pose this question: ***Is this the way that Congress intends to allow the Coast Guard to continue to "superintend" our mariners as part of their Marine Safety mission?*** This is an open question that attracted the attention of Congress largely through the efforts of attorney J. Mac Morgan – a lawyer who came up through the ranks as a mariner to become a "heavy tow" pilot on the western rivers.

"Indictment of the Office of the Inspector General of D.H.S"

[Letter filed by Capt. Murray Rogers with U.S. Attorney for the Western District of Louisiana, Jan 23, 2011]

Madam Prosecutor:

I submit this letter to inform your office of new information concerning allegations I have filed with your office previously, concerning criminal acts committed by top Coast Guard Administrative Law officials. This additional information displays the critical necessity that those federal crimes must be prosecuted. The additional acts identified herein expose that the crimes and cover-up committed by United States Coast Guard (USCG) officials do continue, and are now evidenced to be further expanded than previously alleged. In this letter I will present, identify, and evidence additional federal criminal violations that also supplement, support, and confirm the criminal allegations I have previously filed with your office. Moreover, evidence on paper now clearly shows that the cover-up of crimes as previously alleged extends to department-level officials within the U.S. Department of Homeland Security (DHS).

This letter also serves as my response to correspondence I received from an Assistant U.S. Attorney in your office dated July 28, 2010, sent in response to criminal allegations against USCG officials I previously filed. Finally, I will also be submitting a copy of this letter to the office of H.

Marshall Jarrett, Director of the Executive Office of U.S. Attorneys- in my continued effort to compel your office to prosecute the perpetuating and continuing obstructions to justice and cover-up committed by persons within the DHS and USCG. Said crimes have allowed Coast Guard officials to continue to exercise unconstitutional powers, allowing for further crimes and abuses of power and authority to be committed against citizens of the United States. These crimes were and are still being committed by officials entrusted with the duty of law enforcement for the government of The United States of America. Notably, this case and related cases have already gained both national and international attention.

In the allegations I previously submitted, I identified and evidenced a long list of crimes committed against the United States, crimes committed against a (now former) U.S. Administrative Law Judge while acting in the performance of her judicial duties, crimes committed against myself, and committed against other citizens by top ranking officials within the USCG. Evidence that the previously alleged cover-up is further expanded is now finally published in two reports and on paper with Department (DHS) letterhead. The continued cover-up does further aid and abet the perpetrators of crimes already evidenced and alleged. This evidence is irrefutable beyond mere preponderance and is already conclusive beyond any reasonable doubt.

The Evidence

New evidence is contained in two reports recently published by the Office of the Inspector General of the Department of Homeland Security (DHS-OIG). Those reports were published as OIG-10-107 and OIG-10-108. In those reports the DHS-OIG admits to allegations included in both civil and criminal allegations I have previously filed. Many of those identified actions were simply impossible to deny outright, since they were perpetrated and published on paper and cannot now be re-hidden. Instead of alleviating and correcting problems caused by those now admitted alleged acts, the DHS-OIG attempts to divert and redirect attention away from the crimes and violations committed by simply neglecting to label the acts as violations or as criminal acts.

Further, the OIG attempts to offer some individualized reasoning for each identified act as though it were some mitigating factor on the effect each action had on the conspiracy as a whole. The record shows this is untrue. Though addressing a few separate specific acts in some detail, the DHS-OIG simply fails to put the whole effort together – as though each act was an individual act, and as though the perpetrators had no knowledge of, or effort towards a single and devised end. The simple fact is that all of these efforts were each and all directed and committed towards the sole goal and purpose of retaining illegal and unconstitutional powers for the Coast Guard. Each identified act was necessary and pivotal in accomplishing this overall objective.

Attached with this letter is a common-sense brief explanation of the 'inspection' of violations of USCG officials by the DHS-OIG. This exposes that DHS-OIG officials are culpable through their efforts to cover-up USCG officials' crimes by refusing to acknowledge or label those crimes as identified, and instead attempting to rename and re-characterize admitted acts though thoroughly evidenced in departmental documentation. The included brief is six pages entitled: "Indictment of the Office of The Inspector General of the Department of Homeland Security for the Cover-Up of Crimes by U.S. Coast Guard Command and Administrative Law Officials". Said brief addresses the two reports proffered by the Office of the DHS-IG in late 2010 (OIG-10-107 and OIG-10-108), which were published in response to allegations of corruption in the USCG Administrative Law system.

Previous Correspondence

As mentioned, the last correspondence I received from your office was a letter dated June 28, 2010 by Assistant U.S. Attorney James T. McManus. In that Letter, Mr. McManus closes with the following statement, "This office is declining to prosecute this case noting that these allegations would be more appropriately handled in your civil litigation." This previous position held by your office as evidenced by that statement is now clearly insufficient to prevent manifest injustice in light of the new evidence noted herein.

In light of the new evidence, I offer the following response to Mr. McManus' statement just quoted:

- Firstly: If I prevail in the ongoing civil litigation, then only some of the perpetrators of these offences even could be assessed to pay damages for the offenses committed.
- Secondly: The legal relationship between the perpetrators of the criminal acts alleged and the U.S. Government will not change as a necessary result of any conclusion to the civil litigation.
- Thirdly: Not all of the perpetrators even could have been sued in civil court.

To refuse to prosecute this case criminally is inexcusable. To allow such blatant, flagrant, and egregious violations of the U.S. Constitution to remain unpunished by the Government of the United States would be in itself a malfeasant act. The evidence is on public record forever. It will not go away. There have been full and concentrated efforts and public relations campaigns to attempt to justify these acts, but the proof and the truth remain on public record- – -permanently. They cannot usurp the truth. The perpetrators are now cowards to the truth. This will prove to be not conducive to good order and discipline in the Coast Guard and will destroy respect for the chain of command within the Coast Guard over time if not prosecuted and corrected.

These matters cannot be fully corrected in civil action. Corrections to these crimes cannot be rested on an 'if' as any possible outcome of civil suit(s). These acts were and are a breach of the public trust and public corruption. Such disregard and disrespect for the authority of the U.S. Constitution by military and court officers of the United States is intolerable. Those officers are unfit to remain in federal service. Their actions have shown blatant contempt to the courts, to the Congress, to the law, and to justice. If they are not prosecuted it will only confirm their apparent belief that they are 'above the law'. You must send that message and inform them that they are not.

As I was aware that a report by the DHS-OIG was forthcoming, I did not respond to Mr. McManus' letter until now. I expected DHS-OIG report to be published prior to the Appeal to the U.S. Fifth Circuit Court of Appeals in my

civil litigation. As such, I was aware that the expected report would be published just in time for any favorable conclusions in the DHS-OIG report to be included in the appellate briefs of the government – in the government's defense of the perpetrators in concurrent civil litigation. They were. I therefore waited to write this letter until those things that I knew would occur, did occur – and until all briefs had been filed in the appeal of the civil suit.

As yet another in a long and perfectly orchestrated line of governmental "coincidences": The lead author of the DHS-OIG reports is a man named Richard Reback. Mr. Reback once worked for one of the judges on the Fifth Circuit: Judge Thomas Reavley, according to Mr. Reback. Judge Reavely is married to Fifth Circuit Judge Carolyn King, according to sources. Judge King was on the panel of judges in our previous appeal to the Fifth Circuit. Now, I am not alleging any impropriety on the part of Judge King in or with these statements, but such an appearance of yet another such a 'coincidence' in these matters is yet again unsettling to a litigant, to be sure.

The Crimes

It is undeniable and inexcusable that Chief Administrative Law Judge (CALJ) Ingolia attempted to secretly influence presiding ALJ Massey's rulings with his own private interpretations of rules directed towards pending cases. His actions also directly affected the prosecutors' tactics in continual refusing, failing to disclose, and hiding evidences. CALJ Ingolia did clearly obstruct justice: identified in that one act alone.

To reappoint him with that overwhelming evidence on record while the scandal was underway was not showing loyalty to the CALJ, it was showing disloyalty to the nation. To have Ms. Liddington reassigned to write the appeal decision in the case over which both she and the Commandant were both sued was self-incriminating for Coast Guard officials. The mere lack of a prohibition to keep Ms. Liddington away from cases in which she had prior secreted contacts with prosecutors, the same actions in cases for which she was and is being sued, directly makes retired Admiral Thad Allen further culpable in obstruction of justice.

I confronted retired Admiral Allen with just that one question last month during his public 'Keynote Speech' at the 'International Workboat Show' in New Orleans, LA to give him at least one opportunity to directly respond to civil and criminal allegations that have been lodged against him for a number of years now. That question and answer are now posted on the internet. I gave opportunity for him to address the matter directly and clear his name if he so chose. I took the opportunity to ask this question of the admiral directly, only because he is no longer 'under suit'. He was only sued only in his official capacity as Commandant of the Coast Guard, and since his retirement his successor in that office is now a defendant in that capacity. He did, of course, refuse to answer.

Promoting co-defendant Jordan to ALJ while these matters are officially still in review is a mockery to justice. And to highlight yet another necessity of the obligation for prosecution, ALJ Smith enjoys absolute judicial immunity to civil suit. ALJ Smith's failure to refer LT Spolarich's lying under oath to your office completely neglected adherence to 46 CFR 5.69. Worse still, the ALJ's answering for that same witness opposite of what the witness had just stated was absolutely unbelievable to watch. And that is on the transcript.

ALJ Smith's refusal to acknowledge 46 CFR 5.101(b) and other regulations is inexcusable, most especially through his effort to interpret regulations out of existence in their practical application. Though he clearly violated regulation, and those violations did aid and abet Coast Guard conspirators in their continued effort to cover-up their crimes – Smith, as a presiding judge, simply cannot be sued. He can however be prosecuted. So can the investigators, and their bosses.

Investigators recorded efforts attempting to intimidate me into bearing false witness against other persons, offered as a trade to "settle" a citing those same investigators constructed against me. Their later refusals to produce those same and other recordings although ordered by the court were plainly criminal and contemptuous refusals. They also repeatedly refused to abide by, and attempted to intimidate a presiding judge's rulings on record. That corrupt Coast Guard is not my Coast Guard. It is not our Coast Guard. We demand better.

Resolve

These allegations are not conclusory, as they are based in fact and evidence. The perpetrators of these crimes refused to follow the law though entreated to do so time, and again, and again. The conspiracy was exposed and the cover-up following is unforgivable. These crimes were organized and concerted. The Department of Justice has thus-far wholly failed to protect or secure my rights, my evidence, witnesses, or my person from those committing illicit acts against me with their abuses of power and authority.

On a side of one of the government buildings in New Orleans it reads, "We are a nation of laws and not of men". That statement should ring true. To allow these crimes to be perpetrated using taxpayer dollars and go unpunished is unconscionable. To allow the further cover-up by the Department through repeated denials, tailor-made reports, press releases and all other methods again while using citizens' monies is unscrupulous, inconceivable, and unforgivable.

You have an unenviable task. The punishments listed in the U.S. Code awarded for such misdeeds could possibly mean that some of those persons may very well spend the rest of their natural lives in prison. Given the severity and nature of the crimes committed, such punishments would be appropriate, if so awarded by a jury. This is a begrudging and solemn matter. As a Coast Guard veteran from a Coast Guard family, this was no more desirable to me, and was as uncomfortable for me to suffer and then to have to redress. It is my sincere hope that in the end this will prove to have been a sobering experience for the USCG and DHS.

My job has been to redress my grievances and to perfect those appeals to my government. It is your responsibility to do something about it. I have no delusions about my peculiar and potentially precarious position. I have filed complaints against the head of an entire military service and law enforcement agency and Department of the government of the United States of America. I have assured that my complaints, my evidences, and witnesses will not go away even in the event of my untimely demise, or in the case of any other single conceivable or disastrous event. This

matter will neither end with a certain finish to civil litigations. When that litigation ends, it will only free my pen to tread where it dare not now – solely due to that pending litigation. As will all correspondences from here forward, this letter will be publicly distributed and posted on the internet. I wish you success in this somber and noble endeavor of necessity.

U.S. Coast Guard Crimes
Indictment of the Office of the Inspector General of the Department of Homeland Security for Covering-Up Crimes by U.S. Coast Guard Command and Administrative Law Officials
[By Captain Murray R. Rogers]

Introduction

The Office of the Inspector General (OIG) of the Department of Homeland Security (DHS) published two reports in mid-September 2010 (though dated August 2010) in response to allegations of misconduct of officials within the Coast Guard Administrative Law Program. In the first report (OIG-10-108),[(1)] the authors attempt to offer legal justifications to multiple illegal and criminal acts committed by Coast Guard military and court officers – those acts having been committed while acting in official capacities and bound to the oaths of the federal offices of those same officers. *[(1)Reprinted as NMA Report #R-429-W available on the internet.]*

The second of these two reports (OIG-10-107),[(1)] contains suggestions for improvement of the Coast Guard Administrative Law Program. However, the effectiveness of those suggestions are dependent upon the correctness of conclusions in the first report. The assertions and conclusions in the first report are wrong, both factually and legally. As such, any suggested corrections in the second report are insufficient – and thereby: not solutions at all. Both OIG reports are accessible on the internet. *[(1)Reprinted as part of NMA Report #R-429-V.]*

Instituting visual separations and "policies" without prosecuting and punishing the perpetrators only further damages the honor and integrity of the Coast Guard. It also sends the wrong message: to not get caught cheating, rather than imposing punishment or remedy for having cheated, and for violating the law. The proposed "fixes" are aesthetic. The true problems were not addressed.

Injustice Through Legal Unfairness

It is important to state that the legal process in the United States is based upon the concept of fairness. Fairness is most basically achieved by evenness. Each, or all parties in a legal case have the right to evidence, and the right to present their case before a judge not biased towards, or influenced by any presenting party in the case. Each party is entitled to fair and even access to evidence, and each party has the legal right to compel the other side to disclose evidence in their control or possession that is relevant to the case.

In a nutshell: what is accessible to one side must be equally accessible to the other side as well. The administrative law system Congress constructed has protections in place to ensure this fairness is afforded both parties, but the Coast Guard refused to follow those rules. The significance of those acts is that Coast Guard official's continually violated federal law while engaged in the duty of federal law enforcement. The evidence of those violations is clear even without the testimony of former Coast Guard Administrative Law Judge (ALJ) Massey. Judge Massey's testimony serves to confirm and corroborate irrefutable evidences already on paper.

Violations of Law

Coast Guard officials devised and instituted a system within their Administrative Law Program to refuse the constitutionally protected rights to fairness afforded by due process of the law to those accused by the Coast Guard in that administrative law system. This was accomplished through violations of law and federal statute by Coast Guard officials. The DHS OIG reports specifically neglected to address that was the problem. What actually occurred were attempted coercions, intimidations, disrespect, and attempted illegal influences of a presiding judge by the agency for which the judge worked. Moreover, that entire legal system was improperly manipulated by the very same officials charged with supervising and administrating that system.

Specific Criminal Acts Committed

In United States Code: Title 18-- CRIMES AND CRIMINAL PROCEDURE, Section 1512(c) states:

"Whoever corruptly – (2) ...obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."

In OIG-10-108 the authors declare that the Coast Guard (CG) Chief Administrative Law Judge (CALJ) Joseph Ingolia …...declined to review ALJ's pending cases although his job description authorizes him to do so.", (p.13) and "Further, the Chief ALJ may review and discuss pending cases...", p.17.

In a standard *Webster's Dictionary* the word "***review***" is defined as: *(noun)* "... judicial reexamination" and *(verb)* " …to view or see again; to reexamine judicially; to look back on : to study material again". The word "***pending***" is defined *(adjective) as* " …not yet decided; being in continuance".

One cannot "re-examine" that which is "not yet decided" – that is a "***preview***". While it is agreed that the CALJ has the authority to review cases, nothing in the law does or can fairly allow him to preview pending cases and inject his own secret "policy" interpretations in order to influence pending rulings. That action constituted a federal crime in violation of 18 USC 1512(c)(2) and 18 USC1 503(a).

When the CG CALJ sent a policy letter to CG ALJ Massey without informing the parties of his "interpretations," that action also violated Administrative Procedures Act (APA) provisions requiring agencies to publish policies publicly: 5 USC 552(a)(1)(D) & (a)(2)(B), and 5 USC 554(b)(3). The CALJ's intent was clear: "The intent remains the same (1) limited discovery..." In fact, the CALJ used the words "limited" and "discovery" together six times in the first two pages of the policy letter. As this was all done in secret, it could not be formal or binding policy, but was rather a simple attempt to influence the presiding ALJ's pending ruling on sanctions against the agency for flatly refusing to "honor" a subpoena. This policy was drafted after ALJ Massey ordered sanctions proposed against the agency for the subpoena refusal, and the respondent in the case proposed dismissal as the appropriate sanction.

For respondents,[(1)] no guidance was received on exactly what procedure to employ in order to obtain evidences held by

the agency, and kept secreted away from the court. Those accused and their attorneys knew the Coast Guard had evidence that would help to prove the respondent's cases, but were not made aware of the secret creation of a policy constructed to deny them access and fairness. *[(1)Captain Murray Rogers was the respondent(i.e., the accused") in this case.]*

Though the Coast Guard held evidence that would assist the accused in three separate cases to adequately present their cases before ALJ Massey, the prosecutors never intended to allow for a full disclosure of facts in those cases. The prosecutors in the contested cases held evidence and information they did not want to present to the court of ALJ Massey, because the evidences could be detrimental to their prosecutions of those three cases. This was proved by the actions of the agency in 'Coast Guard vs. Rogers' (CG S&R 04-0537). Consequently, this was the only one of those cases to even eventually make it all the way to final judgment. CALJ Ingolia's actions were pivotal in the concealment of evidence. None of this was a result of the Coast Guard Investigating Officers' inexperience. They had a motive.

Though the DHS OIG repeatedly attempts to offer justifiable reasons for the CG CALJ to inject his opinions and interpretations into cases pending before other ALJ's, there is no legal argument to support those claims. In fact, the OIG's assertions are completely opposite to the Order of U.S. District Court Judge Helen Berrigan who stated in her ruling on November 8, 2007: "...it is not objectively reasonable for one ALJ to influence another." Though she ultimately dismissed the lawsuits against CALJ Ingolia and others on technicalities, she also was publicly quoted as stating from the bench: "I know that I wouldn't dream of doing things that Judge Ingolia seemed to feel was appropriate to do". Though the CALJ pressured ALJ Massey to not dismiss cases on technicalities, the government seems comfortable having lawsuits against the CALJ dismissed on technicalities – as this has been their repeated strategy for the past three straight years.

In Professor Abraham Dash's testimony before the House Subcommittee on Coast Guard and Maritime Transportation,(2) he states in his conclusion: "It is clear that any attempt to pressure an administrative law judge by a superior or the agency to rule favorably for the agency is a violation of the Administrative Procedure Act and the Fifth Amendment." Whether or not the CALJ ever directly instructed ALJ Massey to rule for the agency in any specific cases, or generally in all of her cases (as she testified under oath) – the CALJ's attempt to pressure or influence ALJ Massey's pending rulings remains clear and evidenced. OIG-10-108 authors did not adhere to their own correct declaration on page 3, "An ALJ must be an impartial finder of fact, free from the influence of the Coast Guard or any other person or entity when hearing and deciding Coast Guard cases." *[(1)Emeritus Professor of Law at the University of Maryland School of Law. (2)July 30, 2007.]*

The Secret Meeting Resulted in a Secret Policy:

OIG-10-108, page 19, states: "No prohibited *ex parte* communications took place at the February 24, 2005, meeting because the relevant agency decision maker, i.e., ALJ Massey, was not in attendance." The Appellate attorney for the agency who attended the meeting with, and wherein prosecutors discussed facts in issue of pending cases was then assigned to write the appeal decision for one of those same cases. That assignment was a violation of the Administrative Procedures Act (APA), and upon accepting that assignment without noticing the parties of the prior meeting, the prior secret meeting contact immediately became a violation of the APA as well.(1) These violations extend to include the Appeal Decision as well, written by that same attorney. *[(1)5 USC 554(d) & 5 USC 551(14).]*

The case assigned was the one where ALJ Massey ordered a subpoena to the Coast Guard, and the Coast Guard refused rather than filing a Motion to Quash the subpoena.

How many of ALJ Massey's cases had sanctions ordered proposed against the agency for refusing a subpoena by the date of the secret meeting between prosecutors and appellate staff?: The Answer is "One".

How many cases were then assigned to that same attorney on appeal after being dismissed as sanction for the Coast Guard's refusing to follow a subpoena? The answer is "One" – again.

It is immaterial whether the attendees at the meeting ever discussed any of the three specific contested cases of issue by name. The fact in issue of the case with the subpoena refusal and subsequent dismissal was something, which had never before happened in the CG Administrative Law System. The Appellate attorney specifically assigned to that appeal a mere few months after the meeting recognized it. The OIG then goes on to state on page 20: "However, there is no evidence...that contact between the adjudicative and prosecutorial arms of the Coast Guard influenced the outcome of any case."(OIG-10-108). Again, 18 USC 1512 (cited above) declares it is a federal crime, "Whoever corruptly…. influences...any official proceeding, or attempts to do so...."

The most egregious violation and conflict of interest occurred when the same Coast Guard appellate attorney was reassigned to the appeal after review – once she became a defendant in a lawsuit stemming from her prior secret involvement in that same case. She most certainly recognized the case on appeal for which she was being sued. It is funny how the Coast Guard created some informal and non-binding rules to limit contact between Coast Guard appellate attorneys and prosecutors in May 2008. For, in May 2008, the last appeal of the cases for which the appellate attorney was sued had been written (by her) and was also published. This was the last surviving case of issue from the February 24, 2005 meeting in which CG appellate staff had improper contacts and secret discussions with prosecutors.

Though the actions of Coast Guard officials were not inescapably intertwined with the merits of the case or cases, their violations were certainly relevant to the merits contained within the evidences they illegally conspired to keep out of the official records. Their illegal actions had an effect on the final outcomes of each of the cases involved. This also had a detrimental effect on those same respondents, financially and otherwise.

Concealing Evidence

The OIG espouses the same extravagant and disingenuous arguments that the Coast Guard used to previously refuse a subpoena. It stated that because the respondent did not title the subpoena request as a "Motion," then the whole process following is without authority. 46 CFR 5.301 states: "(c) After charges have been served upon the respondent the Administrative Law Judge may, either on the Administrative

Law Judge's own motion or the motion of the investigating officer or respondent, issue subpoenas..." The ALJ so moved in this case. These subpoenas are issued with the same authority as a U.S. District Court. In denying the ALJ's authority, what the Coast Guard created was a multi-phase process of hurdles to get through to in order to acquire even the "smoking gun evidence" they held which may implicate another person and/or exonerate the respondent they were prosecuting.

Apparently a respondent must formally "Move" to request; then the government must reply; then the subpoena can be issued; the government can move to "Quash." At that point, the judge must decide. Then the subpoena goes to Washington where the agency may refuse to follow the order anyway.

To find out if this is the Coast Guard's honest interpretation, put the shoe on the other foot. Do Coast Guard Investigating Officers have to file a "Motion" to subpoena evidence from a respondent? Must they then allow 10 days for the respondent to respond, and only then issue the Order and give the respondent a second try to "Quash" the order? That would be evenness, and fairness. To find that out, just look at the Coast Guard's record.

The fact is, as a respondent, you do not have a chance to acquire that evidence, even if the Coast Guards own Judge orders that they produce it. That is certainly not what Congress intended in drafting the Administrative Procedures Act.

Both the Coast Guard and the OIG repeatedly state that the ALJ did not follow regulation at 33 CFR 20.601(d)(e). It only takes a brief look at those regulations to understand that an ALJ can determine within mere moments that the specifications in those regulations are, or are not met. There is not even an inference in the regulation that the ALJ must spell out each item in some long-handed form or fashion. To state that the regulation was not followed because ALJ Massey did not lead the Coast Guard along by the hand and spell out just how each point was met is a juvenile argument, without some proof that one or more points were specifically not met.

The fact is that the Coast Guard does not want evenness, fairness, or honest due process in their adjudicative system. They only want it to ***appear*** that they do. Their hyper-specifications of how rules must be hyper-interpreted in the agency's favor to be valid, proves that. This is also evidenced by their complete disregard of regulations when and where the regulations do not fit any instant agency argument.

For example: 33 CFR 20.103(c) states: "Absent a specific provision in this part, the Federal Rules of Civil Procedure control." Control it says. The Coast Guard interprets this as: "Coast Guard S&R hearings are governed by the Administrative Procedures Act and the provisions of 33 CFR Part 20, not the Federal Rules of Civil Procedure, although those rules may be used to supplement gaps in the applicable Regulations.", p.19, Decision of the Vice Commandant On Appeal No. 2679, dated April 2, 2008. While the regulation says the Federal Rules of Civil Procedure ***control***, the Coast Guard interprets that to mean that they may be used. Even a child could decipher this was no mere error. There was a motive.

Conclusions

The OIG, in both of their recent reports, repeatedly states how ALJ's must follow policy. Apparently, this is to include "***secre***t" policies of which the public is unaware. In OIG-10-107, the authors state that the CALJ's authority is to issue policy, "to ensure that the penalties that ALJ's impose are generally consistent...", p.8.

One only needs to look at the Department of Commerce (DOC) OIG report on NOAA- National Marine Fisheries Service (NMFS), Fisheries Enforcement Programs (OIG-19887) to reasonably conclude that was not the CALJ's purpose in issuing policy. In that report the Department of Commerce's Inspector General concludes that NOAA's "penalties are disproportionate" and "enforcement processes are arbitrary and lack transparency". NMFS uses Coast Guard ALJ's to adjudicate their cases. If you still think the Coast Guard's Administrative Law program is fair? Just ask any commercial fisherman. It was further concluded that NMFS misused forfeiture proceeds to take trips overseas and for other inappropriate uses.

So where does all of this leave U.S. mariners? The OIG admitted that the Coast Guard did discuss the "issues" of cases in a secret meeting between prosecutorial and adjudicatory staff. What if those roles were again reversed? What if respondents had secret meetings with deciders and the supervisors of a judge they felt cheated or belittled them? How would the government then react?

Better yet, what did the Coast Guard do when their secret meetings, discussions, policies, attempted influences, and concealment were made public? They reappointed the Chief ALJ. They appointed one of his co-conspirators to become a new Administrative Law Judge.. They then wrote some rules to limit interaction of appellate staff with prosecutors – but only after the appellate attorney, whose violable involvement and conflict of interest in writing one of those appeals completed writing that very same appeal. They left the prosecutors who had refused court orders in their jobs. They "took care of their own." Then the Coast Guard opened a new office, and dubbed it a "Center of Expertise."

Meanwhile, the testimony came out by the only two female Coast Guard ALJ's (both ***former***-judges by the time they testified before Congress), that the agency inappropriately pushed them out of their jobs. The government can publish all the rules and policy they want; they can train ALJ's and investigators they want. But, realize that all of them already know the drill. There is nothing that prevents them from disobeying the rules, regulations, or even the Constitution without punishment for doing so. Coast Guard officials can choose not to follow the rules because there has been no punishment. This is true from investigating officers in local units all the way up to the office of the Commandant and the Chief ALJ of the Coast Guard.

Solutions

The gravity and severity of the Coast Guard's Administrative Law System is that decisions are made by that system to determine the causes and responsibilities for major and serious accidents that often-involving loss of life, and major impacts on commerce and the environment. Often the Coast Guard conducts the only pertinent accident investigation. If the Coast Guard is allowed to continue to deny a mariner the right to a full and open proceeding and to determine all of the relevant evidence, the wrong cause or person may well be declared responsible for an accident. This can happen for a number of reasons including malicious prosecutorial intent, to provide continuity of policy, or

simply by ineptness or laziness. This cannot be allowed and Coast Guard officials must beheld accountable.

The persons involved in deciding and reviewing these actions all knew or should have known that the Coast Guards' actions were violations and malfeasant because they are lawyers and trained as officers of the court. The Coast Guard officers and investigators, even if not officers of the court, know how follow rules because they are in the military. Unfortunately, the Coast Guard has not shown it has the temperance or maturity as a military service to engage in law enforcement, to conduct prosecutions, and also adjudicate fairly. Meanwhile, their acts continue to destroy lives and careers. This whole affair has been a violation of 18 USC 241 as a conspiracy against rights, regardless of its intention. In efforts to cover it up, Coast Guard officials also violated 18 USC 1001. The drafters of the DHS OIG reports also make themselves culpable as accessories in those violations (18 USC 3).

It is clear that Congress must remove adjudicatory functions from the Coast Guard.

CHAPTER 13 – THE DRUG TEST AND COAST GUARD ABUSE OF POWER
By Captain Joseph J. Kinneary, Ph.D.

*[About the author. **Joseph J. Kinneary** is a High School science teacher and an adjunct assistant professor at the State University of New York, Farmingdale. A long-standing member of the Council of American Master Mariners, his article is drawn from an address given at their spring2006 meeting and from his recent book The Good Lord Hates A Coward. His book is available from JK Marine, P.O. Box 502, Northport, NY 11731 (631) 858-1886.]*

I walked up the gangway of my first ship as a midshipman at the U.S. Merchant Marine Academy in 1973 -- it was a break-bulker on the Australian run. And down the gangway of what now appears to be my last ship as Captain of a New York City-owned sludge tanker, 30 or so years later. The interval in between turned out to be a grand adventure in which I developed a genuine respect for the sea-going life and those who excelled at it. It impressed me as being one of the few occupations in which one is judged solely by actions and not words – you can't talk your way out of a gale on the North Atlantic or into a 410 ft berth with a 400 ft oil barge.

I have a sea story with a bit of a twist for you today. It's a convoluted story that wound up involving doctors, lawyers, a Congressman, the *New York Times*, a university sociologist, a former student who became a Coast Guard investigator, three sets of Misconduct charges, one charge of Incompetency, a suspension, and attempt at revocation of my Master Mariner license – and it ain't over yet.

Perhaps the story is best introduced by reading a letter I sent to the Coast Guard dated 5 Jan. 2002:

Lt. Commander Post
USCG Merchant Marine Drug Testing
212 Coast Guard Drive
Staten Island, NY 10305

I am writing to relate a series of events, which from my perspective are unfortunate, concerning federally mandated drug testing for merchant mariners. Some background information may be useful. Upon graduation from the U.S. Merchant Marine Academy (1975), I embarked upon what has turned out to be a unique and interesting seagoing career, one which has taken me to all corners of the globe. Along the way, I've made good use of the extended periods ashore which are inherent to the shipping industry – obtaining a Ph.D. in biology from Rutgers University. For the past 13 years I have been employed with the New York City Department of Environmental Protection (NYC-DEP) as a captain of their sludge tankers. This position has afforded me the luxury of being close to home to watch my children grow and also to work as a part-time biology professor at Kingsborough Community College.

Crossing the North Atlantic in the winter, guiding a light gasoline barge on a short hawser through a narrow swing bridge, piloting a loaded oil tanker through a congested harbor in zero visibility, months away from home and family, union strikes, company bankruptcies; throughout my maritime career I have met every challenge that has come my way – save one. I have had difficulty producing the urine sample necessary for drug testing. I don't know why. I suspect it is psychological stress which stimulates the sympathetic component of my autonomic nervous system, shutting down the excretory system – but it's just a guess. My private physician has diagnosed it as "shy bladder," a chronic syndrome.

At any rate, I was about to embark on my vessel the *M/V Newtown Creek*, on the morning of December 27th, when I was informed by shore personnel that my number had come up for the random drug test, a dreaded event. I would have rather tackled a 50 knot gale, which I had managed to weather, not without much difficulty, on three or four previous occasions.

After three hours, three quarts of water, folded arms and much foot tapping by the collection agent, still no sample. Phone calls were made, another captain located – it isn't always pretty, but transporting sludge is a vital service, the ship had to move. I was whisked off in a DEP vehicle with senior management escorting me to what at the time was an unidentified location.

Upon arrival approximately one hour later, at 44 Beaver Street, apparently the downtown headquarters for NYC drug testing, I informed the attending nurse that my bladder felt as if it could burst, and I would likely be able to provide the necessary sample. She stated that I would have to wait to see the staff physician, who when I finally got to see him proved to be very helpful. He told me there was a good chance that I would lose my "fucking job". About this time I was informed that a urine sample would no longer be accepted. I don't (know) who made that decision. I offered to give a blood sample, but this too was in vain. During this time, a representative from NEDPC, the drug testing company was on hand. Throughout my experiences with this company, I have found their people to be arrogant and condescending – I believe due to SPWLPS (Small People with Large Power Syndrome).

On January 3, I submitted my physician's statement (attached) to the Medical Review Officer, who refused to meet with me. The following day I was officially charged with Misconduct for Refusal to Take a Drug Test by my immediate employer, the NYCDEP. I have been placed on "Leave Without Pay" and benefits until further notice.

As everyone in the Marine Department is now aware of my state, the jokes and innuendoes are flying – no big deal. I would, however, very much appreciate your advice as to how best to proceed, as I am getting a bit old to change careers. While I applaud the battle against drug use, if given the opportunity I urge you to support the development of more benign testing procedures, perhaps sparing a future mariner my dilemma.

Sincerely,
Captain Joseph J. Kinneary, Ph.D.

I received a response to my letter approximately one and a half months later. It was another set of Misconduct charges, instigated by a Coast Guard Chief Warrant Officer seeking suspension of my license for Refusing to Submit to a Random Drug Test. Over the next two years -- NYC

suspended me -- reinstated me -- fired me – rehired and reinstated me to my Captain's position -- and fired me again approximately two years ago in March of 2004 about two weeks after an article mentioning my situation went out over the Associated Press wire.

On the Coast Guard front, I went outside the box and, instead of hiring an admiralty attorney, hired an expert civil rights attorney. The case had by now been bumped up to a Coast Guard Lieutenant, who, by chance was a former student of mine in an oceanography course I taught as an adjunct professor at the USMMA – but that's another story. He offered a six month suspension settlement, which I turned down.

The Hearing was eventually held in a Criminal Court (by design or coincidence?) room 346 on Broadway in Manhattan. It was intimidating. I will never forget my daughter stating to my wife, Nancy, as we walked up the court house steps, **"Mommy, this building says criminal court."**

My heart sank as we walked in and saw the Coast Guard had arrived with six uniformed personnel. I remarked to my wife, "I hope they left someone back to hold down the fort."

My attorney stated, "I hope they realize this is not a murder case." He rose to the occasion and turned the court room upside down. [As an aside--the Coast Guard later went after him and he wound up self-destructing before my case was finished – I told you it was a convoluted story]

During the hearing the Coast Guard eventually admitted that I had passed alternative drug tests and was not a substance abuser. Their key witnesses, a MRO and a VP of the drug testing company (NEDPC) contradicted themselves and flat-out lied under oath.

It didn't make any difference to the Coast Guard Administrative Law Judge. He ruled against me and, in his decision, insinuated I failed to provide a urine sample out of a desire to hide illegal activity.

I turned in my Captain's License for a one year suspension on Mar. 18, 2003 and didn't get it back until this past summer – two years, four months, and four days later. No one has been able to satisfactorily explain to me where the missing time went. Six months can be accounted for by a temporary license I obtained during this period. I was also served with an additional set of Misconduct charges seeking complete revocation of my Master Mariner License (for operating a publicly owned, non-inspected vessel without a license) by this same Coast Guard Lieutenant – whom I would venture to say if he found himself alone on the bridge of a merchant vessel, would be hard pressed to figure which end went through the water first – and I'm not kidding. These charges were dropped in the 11th hour before the scheduled Hearing when I refused their unilateral settlement offer.

So, what do we make of all this? I've chronicled the details in a book entitled *The Good Lord Hates A Coward* -- you can draw your own conclusions.

Maybe it's my own fault – after 48 years of nothing but accolades and awards from the establishment – maybe I didn't respond properly to adverse circumstances, or maybe I have some idiosyncratic aversion to these urine only drug tests. But then how do you explain:

- Seventeen and a half million Americans are estimated to have shy bladder syndrome officially known as Paruresis, or…
- Michael Capparo, a marine engineer for the Staten Island Ferry reporting in a Feb. 22, 2004 newspaper *(Staten Island Advance).* that he has resorted to self-catheterization to get him through the urine only random drug test. I've spoken to Mike. It's a true story….or,
- Kevin McHugh, Captain of a large container ship for Maersk-Sealand reporting that his assistant engineer, who for whatever reason could not provide a urine sample for an early morning random drug test. With the three hour limit fast approaching he became more and more nervous, fearing all the implications of a "refusal to test." Finally, in desperation, and at the urging of fellow crewmembers he went and sat in the ship's food storage cold room while continuing to consume water. He was able to provide the sample with just minutes to spare, …or
- The phone call I received on March 13, 2006 from Captain Dan Morrison, a San Francisco tugboat captain with about 25 years experience. His call sounded like a 911 emergency recording. Apparently involved in a case similar to mine – he didn't come up with a urine sample in the allotted three hour period and was fired almost immediately by his employer Crowley Maritime. Charges have been filed by the Coast Guard seeking suspension and he may have to sell his home. This, in spite of the fact that he has proven himself to be drug free with a more accurate hair test.

There are other similar stories – it goes beyond our industry.

But let's leave drug testing and expand our view point. There was a recent cover story, So, Would You Go To Sea? in *Fairplay,* the International Maritime journal published in the UK. It documents the denial of shore leave and the disconcerting trend by maritime nations towards the criminalization of marine accidents. The article lists the top five reasons to keep your feet dry as:

- Tedium and monotony
- Hostile authorities.
- Crushing bureaucracy.
- Separation from family.
- Low pay.

The bottom line is this. If you treat seafarers like criminals and drug addicts, it will become a self-fulfilling prophecy – that is the way they will behave, and that is to whom we will have to entrust modern ships, which because of their size and nature of cargoes have the capability of inflicting tremendous damage and destruction.

I received a recent letter from an old shipmate, Captain Harry Boyce, dated 9 Jan. 2006. Captain Boyce is about my age. He was a deckhand on the *M/T Poling Bros* # 7, a small coastal oil tanker, when I broke in almost 30 years ago. He went on to become a New York Harbor tugboat captain and is one of the finest gentlemen you would ever hope to meet. He writes in part:

"I left the industry in September of 2003. I'm now a credit manager for a construction company in nearby Massachusetts. Although there are some things I miss about the boats it was time for me to get out. Just a few months short of thirty years, I was increasingly weary of the never-ending responsibilities of a tugboat captain. Some of the changes in the marine transportation industry have the best intentions, but they are treating the symptom and not the disease. The caliber of new hires, the expectations of market-sensitive owners (i.e., greedy) and the consequences of an oil spill overshadow all the things that I enjoyed about my job afloat for many years."

A man like this, with the kind of experience he has had,

should be worth his weight in gold to a boat owner, yet he has been driven right out of the business.

So what is going on here? I think there are a couple of messages:

First is a very practical one. If you are a Captain of a commercial vessel or for that matter a Chief Engineer, your major concern today is not a steering gear failure, fire in the engine room, dense fog, or heavy weather -- its getting tangled up in the quagmire of inhumane regulations, regulators, and investigators, many of whom are incompetent and unreasonable boarding on abusive. *A New York Times article* of Mar. 26, 2006 quotes a Homeland Security expert from the University of Maryland as calling the Coast Guard "vastly understaffed and under-resourced." I suggest that is an overly kind and generous description of their performance in regulating and licensing the Merchant Marine***. If you do find yourself in an adverse situation with them WATCH OUT. They are also very powerful and you are likely to find yourself alone, deserted by Company officials and administrators***. But what else is new for a Captain of a merchant vessel?

Second is a subtle, but perhaps more important message. In case you have not noticed we have entered into a brave new world. Words like terrorism, surveillance, and fear permeate our thoughts and conversations. Where fear is present power is usually not too far behind, and where there is power there is abuse of power. There always has been and always will be.

We all know what is instigating and driving this crushing and at times overtly hostile regulation of the transportation industry. It is fear of another environmental catastrophe and the events of 9/11. I strongly suspect as we move forward in this new and at times frightening world we are going to need a corps of men and women who do not let fear dictate their actions or bend so deeply and unquestioningly to power. When you stop and think about it, that's exactly the type of people who made this country. We are going to need men and women who can think clearly, act decisively and maintain their composure in extreme situations.

I can think of no better environment that fosters this independent thought and self-reliant action then the bridge or engine room of a merchant vessel. Organizations like the Council of American Master Mariners that defend the integrity of what's left of this noble profession are performing a service on a scale even greater than they realize.

Coast Guard's Performance Is a Paradox

***[Source:** By Jack R. Simpson, Contributing Editor (Editorials), Waterways Journal, Aug. 21, 2006. **Vocabulary: Paradox** = a self-contradictory and false proposition.]*

We have on numerous occasions written kind words about the performance of the U.S. Coast Guard, major player in the homeland security game, and protector of mariners at sea. But the agency's involvement in the licensing of seamen, both blue water and brown, turns it into a paradox.

There is no denying that Coast Guard personnel performed masterfully during hurricane recovery efforts and that many Katrina victims owe their lives to the agency's rescue efforts. But there is also no denying that the agency is causing one very big headache for the towing industry and efforts to man its boats. It is not the first time we have broached the subject. Talk to the grass-roots crewmen, talk to the industry leaders, talk to almost anyone, and you'll find that the Coast Guard puts far too many stumbling blocks in the path of mariners seeking to renew their licenses and new potential mariners seeking their first jobs.

Why is that? Seriously now, why is that? We all know that water transportation is vital to the economic well-being of the nation. We wonder why, when it is so important, the Coast Guard feels compelled to make things so tough. It is so unfairly tough that many trained rivermen with decades of experience are just plain fed up and are leaving the industry.

Believe it or not, the Coast Guard is also guilty of getting rid of blue- and brown-water mariners who have committed no crime – people who are guilty of no infraction whatsoever.

A case in point is that of **Capt. Joseph J. Kinneary, Ph.D.**, who had managed to obtain an unlimited master's license and 15 pilotage endorsements for New York Harbor. Capt. Kinneary has both brown-water and blue-water experience, including piloting loaded oil tankers through a congested harbor in zero visibility. The captain's story is fully documented in The Good Lord Hates A Coward, "An Account of Life as a Merchant Seaman," including a journal of a random drug test. It was written by the captain and published by JK Marine. The tale is almost unbelievable, except that it is so well-documented that we believe it.

On Oct. 16, 2002, in Criminal Court Room 453 in New York City, Judge Peter A. Fitzpatrick requested and received Capt. Kinneary's master's license No. 035508. The matter involved an action brought by the Coast Guard against Capt. Kinneary, who was charged with misconduct. The Coast Guard sought revocation or suspension of his license. That sets the scene.

Now we fade to the cause of the action. Capt. Kinneary was unfortunate enough to have a psychological disorder known as shy bladder syndrome, which prevented urination during random drug tests. When his attempts to comply failed time after time, he was not allowed to substitute results from blood or saliva tests, which are permissible under the Coast Guard regulations. The only infraction we can discover is that during one of the many test attempts, when the subject could not produce the full amount of specimen required, he simply weakened and added warm tap water to the container.

We note here that Capt. Kinneary sought and made use of legal counsel. He had also the testimony of physicians and shipmates. For whatever reason, some of those in the chain of Coast Guard misfits who hounded him couldn't accept the fact that he had never taken drugs in his life. He simply had no desire to.

Despite the captain's efforts over and over again to comply with the random drug test, he was ultimately found guilty of not complying. If this charade weren't so serious it would be funny. The testimony brought to light that the company handling the urine test had let the watered specimen pass through unchallenged for quite some time. It was serious enough to relieve the company of its contract.

During his lengthy ordeal, Capt. Kinneary was unable to work much of the time. Ultimately, he lost his license and was unable to work at all. Also during his ordeal, he came to believe that the Coast Guard investigators were suffering with some sort of disorder he called Small People With Large Power Syndrome (SPWLPS).

Well, we have run across SPWLPS before, almost in every walk of life – particularly at various levels of local,

state and federal government. And, unfortunately, we have run into it in the Coast Guard. But isn't it sad? Isn't it sad that a captain with years of experience, a captain who used his spare time to gain a doctorate, a captain who has exactly the kind of experience the marine industry needs, is ousted because some Coast Guard "bureaucrats" with SPWLPS needed to show him who was boss?

This case is fully documented. It has been written up in newspapers. We invite the Coast Guard to explain why this captain was treated as he was. If the charges in his book are inaccurate, we'd like to know about it. We'd like to know because there are hundreds of rivermen who are trying to decide whether working on the river is worth the effort and whether they, too, can be given the bum's rush. There are hundreds of rivermen who feel just as Capt. Kinneary feels.

In Congress there is currently an effort to produce a Water Resources Development Act that will satisfy the desires of the U.S. Senate and House of Representatives. It is safe to say that over a period of several years, the cost to bring the issue to this point has been in the millions of dollars. But of what use will waterways be if we can't man the boats that are supposed to ply them?

The Coast Guard needs to wake up. This is not a homeland security issue. It's a matter of SPWLPS.

CHAPTER 14 – THE TRAHAN CASE: MISGUIDED POLICY DESTROYS A MARINER'S CAREER, FAMILY, AND LIVELIHOOD

***[Source:** Court papers cited in this article were prepared by Douglas H. Greenburg, Esq., former District Attorney, Terrebonne Parish, LA appealing to the Louisiana Circuit Court of Appeal on behalf of defendant Captain Tracey Trahan. Captain Trahan is an experienced Master of Towing Vessels and a member of our Association. **Emphasis is ours.**]*

Statement of Jurisdiction

This is a criminal felony case on direct appeal from the 32nd Judicial District Court, Terrebonne Parish, and State of Louisiana. Jurisdiction of this Court is vested in Article 5, Section 10 of the Constitution of the State of Louisiana and Article 912 of the Louisiana Code of Civil Procedure.

Statement of the Case [(1)]

The defendants/appellants, Shawn David Verdin (hereinafter, "Shawn" or "Verdin") and Tracy Lee Trahan (hereinafter, "Tracy" or "Trahan"), were charged in this case by bill of information with the offense of possession of over 400 grams of cocaine. The defendants were ***not*** charged with possession with intent to distribute, nor was any evidence adduced at trial that would have tended to establish such intent. The defendants waived trial by jury, and the case was tried before Honorable David Arceneaux, District Judge, Division "D" Following the bench trial, the trial judge convicted the defendants of attempted possession of over 400 grams of cocaine. Thereafter, the trial court sentenced each of the defendants to serve a term of eight (8) years imprisonment at hard labor, but suspended the sentence, subject to the defendants' serving five (5) years of supervised probation, which was conditioned upon them completing one (1) year of imprisonment with credit for time served.

Tracy Trahan and Shawn Verdin are both commercial fishermen, who fish for shrimp in the coastal waters off Terrebonne Parish. Tracy Trahan also has a masters' license with the United States Coast Guard (earned at the age of nineteen (19), and [1]As used in this brief, "R" denotes page numbers of the record; "L" denotes line numbers captained a tugboat during the shrimping off-season. [R.644, L. 1-5] engaged in the shrimping business throughout their adult lives, and were extremely familiar with the Parish waters and waterways. Both are now in their early 30's. Neither has a high school education, Tracy having gone to 10th grade and Shawn having gone to the 7th are family men who support their families through their fishing business. They grew up in the same community and are lifelong friends.

Each of the men owned boats. They did not always work together, but did so frequently. Generally, they were wholesale fishermen; selling their catch at the local docks. At times, they would fish to fill small, private retail orders Neither had any felony record prior to being charged with this offense. ***There was no evidence adduced at trial suggesting that either had ever in any way been involved in the business of smuggling or distributing drugs, nor was there any evidence even suggesting that either of the two had ever even used illegal drugs***.

On the date in question, June 9, 2004, the two defendants went out early in the afternoon to fill a small retail order for Mr. A. J. Naquin, who had called Tracy to make the order earlier. [R. 653, L. 5-7.] On that day, they were using Shawn's Carolina skiff, a white boat bearing the Louisiana registration number of LA-3667-FA.

The manner in which the boat was rigged and operated became an issue at trial, the law enforcement officers having drawn several negative inferences relative thereto, all of which were shown to be factually incorrect.

The skiff was equipped with butterfly frames commonly used in the area. The nets, or webbing, and frames were not raised when they left the dock, it being difficult and dangerous to travel with the net frames and nets raised when not actually skimming for shrimp. Prior to beginning their actual fishing, the two fishermen would raise the frames and webbing using a system of pulleys located on the boat. On the day in question, the webbing was still in the "picking box", the box used to sort the shrimp and any fish caught with them. The "scrapers" used in the sorting process were underneath the nets. Though Tracy had an ice machine, they did not bring any ice with them, as they planned to return the same afternoon, after filling the order. This was a routine practice.

The two men left from Dulac, went south through the Houma Navigational Canal and headed for Pelican Lake, where they'd had success in the past, with the intent of going further south if the Lake was too rough, where the barrier islands would provide protection from the wind. On their way out, they passed a water patrol vessel being operated by Lt. Danny Theriot, whom both of them knew on sight. Tracy waved to the lieutenant. [R. 658, L. 5-8.]

Once they got to Pelican Lake, they found it to be too rough for fishing and proceeded further south as planned. At that point, fate and circumstances embarked the defendants on a course of events, which led to their arrest and conviction, in a truly classic case of ignorance and "being at the wrong place at the wrong time."

As they proceeded south, Tracy noticed a floating bag in their wake. It looked suspicious, and they turned the boat around to take a closer look. [R. 658, 659; L. 28-32, 1-6.] They discovered a large black garbage bag. The men had seen garbage bags, thrown off by offshore vessels, before, but this one looked different. It sat low in the water and did not have much buoyancy. [R. 659, L. 21-28.]

Shawn was driving the boat. Tracy picked up the bag. It seemed intact. There were no holes in it and it was not leaking water. It was tied in a knot at the top. [R. 660, L. 3-16.]. They feared that something bad was in the bag, perhaps drugs or even body parts. They agreed to take it back to the dock and show it to Mr. Jimmy Trosclair, the dock operator and an older man whom they trusted as a father figure, to assist them in getting the bag to law enforcement officials. The testimony would clearly show, and the trial court would conclude, that Shawn Verdin never touched the bag and Tracy was the only one who handled it. More importantly, neither ever opened the bag to see what it contained.

The men were guided in their thinking that the proper

thing to do was take the bag into law enforcement by a childhood experience. Both were well-acquainted with an incident in which neighbors and friends, Ms. Lolita Neil, Mr. Shelby Bordelon and Mrs. Janice Bordelon, had found a large amount of cocaine at Last Island while fishing, worth approximately three million dollars. After opening the container and seeing that it was drugs, and after keeping it in their possession over the weekend, these people turned the drugs over to law enforcement and were heralded as heroes in the local press. The young men had it impressed on them that turning in the drugs was the right and proper thing to do.

Having picked up the bag, the two men dropped their fishing plans and headed back for the dock. On their way back, their paths would again cross with that of Lt. Theriot and also with Off. Richard "Dickie" Liner of the Sheriffs water patrol, and with dire consequences.

At 1:30 p.m. that day, Officer Liner received a telephone call at home from his supervisor, Major Odom, to go pick up his boat and take it out to search for a boat possibly carrying some drugs. He went home, got his boat and launched at a local dock, "T-Irv's". He proceeded to the area of Bayou Grand Caillou and the Navigational Canal, also known as the "Ship Channel", where he remained awaiting further orders. [R. 171, L. 1-4.] After approximately two hours, he received a call from his partner, Lt. Theriot, telling him to meet Theriot at the intersection of Bayou Plott with Grand Caillou Bayou. The two officers rendezvoused and remained at the rendezvous point until approximately 4:00 p.m. when they saw the defendants' white Carolina skiff go by.

The officers had earlier received a call to be on the look-out for a white Carolina skiff with three subjects onboard. [FR. 176, L. 26-27.] Though only two occupants were visible on the defendant's skiff (because that's all there was), Liner took off after the vessel, with Theriot right behind him. At this time, the defendants were traveling at what Liner described as "very high speed", but not at full speed. [R. 178, L. 5-9.] The defendants testified that they were traveling about forty miles per hour; about three-quarters of throttle speed for the boat. Liner stated that he pursued them at a speed of forty to forty-five miles per hour. At some point, the officer turned on his blue lights, but he never activated the siren. He also saw one of the two individuals turn and look at him at some point; Shawn admitted that he did turn around and see the pursuing boats once, but their blue lights were not on at the time. Tracy denied ever turning around at all. In any event, there is no dispute that, soon after the pursuit began, the defendants became fearful and were aware they were being pursued. The two were afraid that if caught with the bag in the boat and if it did contain drugs, the officers would draw a wrong conclusion and they would find themselves in trouble. Their fear was well-justified. Officer Liner testified at trial that, if he had found the bag in their boat, they would have been arrested on the spot, no questions asked and without concern for any possible explanations. [R. 216, 217; L. 26-32, 1-6.]

The defendants made a right turn into a small bay, and, as they did, Tracy dropped the bag overboard. Officer Liner saw the splash, but did not stop to look for its cause, continuing on to follow the defendants into the bay. While the officer described the bay as a "dead-end" with no way out but the way they came in, other evidence at trial showed this was not the case, and the defendants could have continued to evade the officers if they chose to. However, the bag gone, they came to a stop and waited for the officers. Liner was the first to catch up with them. Theriot came up. Soon after, Liner boarded the boat and noted the absence of ice and the webbing in the box. He did not lift the webbing up to check for contraband, so he did not see the scrapers located underneath. Officer Liner acknowledged on cross-examination that neither appeared to be under the influence of drugs, that he saw no large amounts of cash, and that there was no means of communication, such as a CB radio or cell phone on board. Nor did he observe any firearms on board.

The search conducted by the officers revealed nothing but the failure of the defendants to have the boat registration papers on board. They reprimanded the defendants, but did not issue a citation.

According to the defendants, the officers told them to go straight home and get the papers, so after the officers had gotten off their boat and they were allowed to leave, they headed back for home. However, Lt. Theriot, whose larger boat had gotten stuck in the shallow water, indicated that he instructed the defendants to leave the shallow bay and wait for the officers in deeper water, though he acknowledged that the defendants left calmly. The trial court rejected Lt. Theriot's contention, finding as a matter of fact that "I don't think the police, frankly, were that concerned about detaining them at that point." [Oral Reasons for Judgment, R. 760, L. 8-10.] "I think they were allowed to leave". IR. 763; L. 25-29]

However, the defendants, as they later admitted, did tell one lie during this encounter. Still fearful that the officers would misconstrue their having possession of the bag and its dubious contents, they told the officers that they had not thrown anything overboard. Fearful of the consequences, they denied any knowledge of the bag. Both of the defendants testified at trial and both acknowledged the truth: that they had taken possession of the bag with the intent to bring it to Mr. Trosclair and alert law enforcement, if necessary. They became scared and dumped the bag when the water patrol officers pursued them, then lied in an effort to cover up their knowledge of the bag.

When the officers left the scene, they passed by the point where the splash had taken place. Officer Liner found the garbage bag, still tied, and put it on his boat. [R. 245; L. 9-1 1.] Once opened, it could he seen that the package was "double-bagged", one black bag placed inside the other. Once the contents were removed from the garbage bags, the officers had to cut through several layers of packaging in order to determine what was inside. The first layer was a white plastic burlap-type material. Underneath that was a type of yellow rubber coating called "heat shrink" or "shrink wrap". Only after the rubber coating was cut did the yellow bricks inside become visible. [R. 245; L. 16-21; 1Z. 247, L. 1-6.]

There were fifteen bricks in the bag. Although only five were tested, the trial court concluded that all of them were cocaine; the court reasonably concluded that the bag contained about seventy-five pounds of cocaine in all. [Reasons for Judgment, R. 764, 765, L. 21 et seq.] No effort was made at any time to see if the defendants' fingerprints were on the outer black garbage bag, or, more importantly, on any of the internal packaging.

The following night, on June 10th and during the early morning hours of June 11, the defendants were taken in for questioning. Agent Calvin Rodrigue, a member of the Terrebonne Parish Sheriffs Office Narcotics division, went