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HOW WESTERN RIVERS MARINERS LOST THEIR ADMINISTRATIVE LAW JUDGE

WHAT IS A "PILOT"

While reading the Coast Guard hearing transcript of bridge allision involving a Western Rivers Pilot (GCMA Report #R-397) 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.

A towboat pilot acts as the second in command on an inland towing vessel. He does not perform the same function as a ship's pilot who is hired by-the-trip to serve as an advisor to the ship's Master. The towboat pilot 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 that was 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 THAT KNEW THE WESTERN RIVERS

In 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 comes from NAME Newsletter #57 and from the Waterways Journal.

THE POWER OF THE "OLD BOY NETWORK"

Last winter⁽¹⁾ we prepared several articles about the Coast Guard's plan to revise 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 are indebted to Captain Alan Spears for his commentary and for alerting us to a situation that could have adversely affected our nation's merchant mariners. [⁽¹⁾N.A.M.E. Newsletter #54, p. 1; N.A.M.E. Newsletter #55, p. 7]

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 government 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 that "it 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 the last TSAC meeting and are in complete agreement with this statement. We can make a copy of this QAT for any member that requests it. You will find it interesting and revealing reading and a sad commentary upon the present state of "justice" rendered to our licensed and documented merchant mariners. [⁽¹⁾Our file #A312B]

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 not made last winter, but 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 have shared copies of that document with a number of important government officials. We trust that the Coast Guard will be forced to deal with Judge Denson in a fair and equitable manner and restore her to the bench.

Merchant mariners can use a person of her background and talent. In the meantime, we can only hope that Judge Denson will continue to fight what, to us, appears to be inequitable treatment and discrimination because she has had the guts to point out inequities in the system and as we at N.A.M.E. have also done on occasion. We hope she will regain her position as an Administrative Law Judge with the Coast Guard based on her outstanding reputation and

background. *[Editorial update from 2003: This was not done but we understand that she took the Coast Guard to court and won a satisfactory settlement although we do not have the details.]*

BUSINESS AS USUAL

[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 ALJs 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 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

From The Waterways Journal, June 17, 1996.

On November 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 money could be saved by closing the St. Louis office, 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.ö 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 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 ó 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⁾ [⁽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 that was opened at our request but has never been acted upon. Refer to file #GCM-61.]

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 ALJ'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.