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GCMA REPORT #R-429-J
DATE: July 4, 2007

INVESTIGATIONS: REPORT TO CONGRESS – COAST GUARD ABUSES OF THE ADMINISTRATIVE LAW SYSTEM

By Captain Richard A. Block

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Rot at the Bottom; Corruption at the Top

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 ï a military organization. This report questions 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 ï powers that were hotly contested at the time in public hearings before the U.S. Senate by the nationôs major maritime labor unions.

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. ï a fact that brought them into contact with more and more of our ñlower-levelò mariners who serve on vessels of less than 1,600 gross register tons.

Our Association was founded in 1999, and we speak for ñlower-levelò licensed and unlicensed mariners who serve on vessels of less than 1,600 gross register tons. By 2000, we began to hear of problems that our ñlower-levelò mariners experienced with the Administrative Law System. At first, we heard of ñdrugò cases which we approached very carefully.

Starting with the Periman Case,[(1)] we began to look more closely at the Administrative Law Judge (ALJ) system

by requesting information on internal practices and procedures under the Freedom of Information Act, reviewing a large number of ALJ decisions on appeal to the Commandant and Vice-Commandant, and then by attending hearings where ñlower-levelò mariners were brought before various Administrative Law Judges. Then we began to hear of other types of cases. *[(1)Refer to GCMA Report #R-315-C, Mariner Drug Cases. All reports referenced here are available on our internet website.]*

In April 2007, we learned that Mr. Robert Little, an investigative journalist from the Baltimore Sun was looking into this matter at the ALJ Docketing Center in Baltimore, MD. Although Mr. Little touched many of the same bases we did, his investigative work was completely independent of our work and is done from a different viewpoint. However, we incorporated his article titled ñJustice Capsized? published in the Baltimore Sun on Sunday June 24, 2007 in our report unchanged and in its entirety in recognition of his investigative talents and that a story this significant needs to be exposed to the public in a way that our small association, and even trade publications with limited circulation are not able to do. We commend him for his investigative work.

Congress has the ultimate authority to decide the role played by any government agency including the Coast Guard and the National Transportation Safety Board. Therefore, we offer this information in this report to members of Congress (as well as to our mariners and the public) in the hope that they will use it to improve the administration of justice for our mariners in the interest of improving all aspects of maritime safety and accountability. This report is only one of a number of reports in our #R-429 (series) that deals with ñInvestigations.ò We list other reports in the series at the end of our report.

LOWER-LEVEL MARINERS NEED BASIC ORIENTATION IN APPLICABLE LAWS & REGULATIONS

If You Don't Know the Law, It's Easy to Break it.

The vast majority of credentialed ñlower-levelò entrusted by the Coast Guard to operate the nationôs tugs, towboats, small passenger vessels, and charter boats know very little about the brand of ñjusticeò dispensed by the Coast Guard. The training mandated by the Coast Guard to earn these credentials is clearly deficient in that it does not require an introduction to many regulations that become significant to any mariner working in the maritime industry today. As a maritime educator, I point to these specific but neglected regulatory areas that most mariners only learn about as a result of hard experience:

- 46 CFR Part 4 (Marine Casualties and Investigations),
- 46 CFR Part 5 (Marine Investigation Regulations ï Personnel Action). In addition, 33 CFR Part 20, Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard is a technical set of regulations controlling formal courtroom proceedings.

One of todayôs most serious and dangerous problems in the transportation workplace revolves around drug and alcohol abuse. To administratively combat this problem brings a number of other regulations into play, specifically:

- 49 CFR Part 40 (Procedures for Transportation Workplace Drug and Alcohol Testing Programs.
- 46 CFR Part 16 (Chemical Testing),
- 33 CFR Part 95 (Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug).

Unfortunately, most mariners are allowed to enter these regulatory minefields with only incomplete and misleading information.

Although Congress held the Coast Guard responsible for superintending the U.S. Merchant Marine since World War II, the Coast Guard never included a significant number of questions on these and other regulatory subjects on their license examinations to require mariners to become familiar with these regulations or the laws that serve as their foundation. Nor did they even require that the subjects be taught in ñapproved coursesò for our mariners as listed by the Coast Guardôs National Maritime Center. Furthermore, most vessels, even Coast Guard inspected vessels, are not required to carry copies of these regulations on board for reference, study or review.

Under these circumstances, if you are a mariner and not a lawyer, much of this material is boring, uninteresting, as well as hard to read and comprehend. In short, if the material was readily available, it is not ñcompellingò reading for most of our mariners. Even more significant for our lower-level mariners, the ñreadabilityò scale shows that these, like most government regulations, are written at the 12th grade level ï the highest level on the scale. Consequently, the only way to approach the subject and expect the average person to understand and comply with it is to ñ***teach***ò it.

"Ignorance of the Law is No Excuse"

The Coast Guard ñjusticeò system appears to be firmly rooted on this principle, which has been amazingly successful in thinning the ranks of our lower-level mariners. Coast Guard ñInvestigationsò bring to a screeching halt the careers of thousands of our mariners who find it more convenient to plead guilty to a maritime-related offense and sign a ñsettlement agreementò instead of appearing as a ñrespondentò in a hearing conducted before an Administrative Law Judge (ALJ). Journalist Robert Little, researched these figures that appear in his article; and these numbers should alarm every commercial mariner and alert members of Congressional oversight committees. If the Coast Guard wants to suspend or revoke a marinerôs credential, this action must take place in a ñsettlement agreementò or at a suspension and revocation (S&R) hearing before an Administrative Law Judge. Although ALJs are not experienced mariners, yet they are far more than casual observers. Apparently, the Coast Guard has misused ALJs and ñsettlement agreementsò as ñtoolsò for years as reported in the ñJustice Capsized?ò We have observed these ñtoolsò used against our mariners.

In a ñsettlement agreement,ò a Coast Guard ñinvestigatorò will try to convince a mariner that he or she should plead guilty to an offense that the Coast Guard believes it can prove. It is quick and easy procedure and often appears to be a more appealing alternative than to appearing before an Administrative Law Judge (ALJ) especially when presented with the alternative that the ALJ could hand down a harsher sentence. The ñinvestigatorò who acts as a prosecutor is likely to push for a stiffer sentence if he is forced to spend a great deal of time and effort in developing, polishing, and then presenting his case before an ALJ. This reasoning extends all the way down to encouraging a mariner to accept a ñLetter of Warningò (LOW), the least severe of all administrative punishments ï but one that leaves a mark on a marinerôs permanent record and must reported every five years when applying for a license or MMD renewal. A ñLetter of Warningò is a permanent black mark on a marinerôs ñrecord.ò

The pressure to sign a ñsettlement agreementò can be intense, and any mariner may feel trapped by his unfamiliarity with a system he knows absolutely nothing about. The effect upon most law-abiding mariners is akin to being hit over the head with a brick. Most mariners simply do not believe that something this traumatic could happen to them.

The vast majority of our lower-level mariners do not carry license insurance. License insurance, which costs between $200 and $1,000 per year, guarantees that a licensed mariner will have a lawyer by his side to help protect his interests before the Coast Guard at a ñsettlementò hearing before a Coast Guard Investigating Officer or, if that is not successful and the offense is more serious, before an Administrative Law Judge. Based upon our Associationôs experiences with the Coast Guardôs system of justice, we strongly recommend that every lower-level licensed mariner immediately obtain license insurance[(1)] and that no mariner attempt to defend himself before a Coast Guard Administrative Law Judge without professional legal help. *[(1)Refer to GCMA Report #R-342, Rev. 5, License Defense Insurance; Income Protection Insurance and Civil Legal Defense.]*

License insurance does not guarantee success and it does not support acts that are clearly illegal. That is why it is so important for licensed mariners to know and understand the fundamental laws and regulations that govern the marine industry. However, license insurance can spreads the risk of being financially crippled from unexpected action aimed at his or her license by the Coast Guard. Unfortunately, the alternative, even in a relatively simple hearing before an ALJ, can cost a minimum of $5,000 in legal fees with no guarantee of success

The regulations that can suspend or revoke a marinerôs credentials are construed in such a manner that the Coast Guard will probably prevail in most cases that go to trial. As Journalist Robert Little documents in ñJustice Capsized?,ò the Coast Guardôs success rate in prosecuting mariners approaches 97%. Consequently, most uninsured mariners are well advised to simply accept the ñsettlement agreementò as the easiest and cheapest way out. Besides, this helps preserve the myth that the Investigating Officer is really your friend and even will help you to regain your license after it is suspended or revoked. This ñhelpò serves as nothing more than an introduction to the Coast Guardôs own ñAdministrative Clemencyò procedure which is an exercise in unfathomable bureaucracy at the national level.[(1)] Several of our mariners took between five and six years to unravel its mysteries when local Coast Guard became ñunhelpful.ò Unfortunately, the same regulations leave a mariner who loses his credentials little choice but to grovel before the Coast Guard for help or leave the industry. *[(1)Refer to GCMA Report #R-377, Rev.1., Administrative Clemency.]*

Suspending or revoking a credential is the only effective action the Coast Guard can take against a mariner ï but it can be devastating. Fortunately, Congress did not give the Coast Guard the authority to put mariners in jail or levy huge fines, but one or more months out of work can take its toll on an a marinerôs lifestyle and his familyôs economic security. However, Coast Guard administrative procedures have become so simple and routine, that many investigating officers save time and effort simply by cutting corners and applying pressure to our mariners to

make the ñsettlement agreementò they offer always appear as an attractive offer. By offering a ñsettlement agreementò the Coast Guard Investigator becomes the ñgood guy.ò He (or she) wins the case, gets a good job approval rating, saves the government (and himself or herself) the time and effort of preparing a full-fledged case, and then facing the burden of arguing that case before an ALJ. Many ñinvestigatorsò are novices, and presenting a case before an ALJ can be a as traumatic for them as it is for the mariner they are prosecuting. Nevertheless, there are considerable savings to the government who must bring in an Administrative Law Judge at government expense from a distant city hundreds or even thousands of miles away.

In spite of how forcefully the local Coast Guard Investigator may push his ñsettlement agreement,ò some thick-headed mariners simply donôt get their message and insist on their ñrightò to tell their story to the Judge. Unfortunately, most mariners never understand their ñrightsò in the first place. That fact may first dawn upon them when the ALJ, sometimes acting as a benevolent father-figure, takes the time to explain them before the hearing gets underway in the courtroom. This is the wrong time to have to learn the lesson, especially if you did not have the money to hire an attorney to help you apply the lesson you just learned. Also, I have seen attorneys that have fumbled in attempting to find their way through Administrative Law Procedures. Even as a layman, I have watched more than one inexperienced lawyer stumble through an ALJ hearing.

Here are two examples of ñsettlement agreementsò we previously documented in Newsletters distributed to our mariners.

USE OF COAST GUARD "SETTLEMENT AGREEMENTS"

Example: Settlement Agreement #1

[Source: *Misle Activity #2757513, Misle Case #310485, GCMA File #M-658, Mnl#47.Release date Mar. 23, 2007].*

On August 16, 2006, at approximately 2200 local time, the towing vessel KATHRYN WATSON (ñKWò) was pushing two loaded barges when it allided with the barge Kirby 10427 which was moored in the staging area in the San Jacinto River. As a result, the ñKWò broke the lines of other barges in the process of being moored by another vessel, the PAT SALVAGGIO and caused them to break free. There were no injuries or pollution. However, while retrieving the barges, the barge Kirby 30016T sustained $5,000 damage to its port manifold.

ñAccording to the Master of the ñKWò his 54-year old vessel failed to respond to his attempts to shift its engines into reverse. The subsequent Coast Guard investigation revealed that the ñKWò did, in fact, lose its maneuverability because of two mechanical failures. In both cases, the mechanical problems occurred in the engineroom several decks below the pilothouse in an area not readily accessible to the Captain as he tried to maneuver his 110-foot towboat.

The Coast Guard accident report contained no statement from the Captain of the ñKWò detailing his side of what happened to cause the accident or the corrective steps that were taken in the engineroom immediately after the accident. Furthermore, the accident report contained no required accident report form (CG-2692) from the vesselôs operating company.

Like most towing vessels, the ñKWò had no licensed ñengineerò and the deckhand on duty was out on the head of the tow at the time of the accident and unavailable to manually shift gears in the engineroom if called upon to do so in an emergency. Hidden away in the data was the information that both barges that were being pushed were loaded benzene barges. Until the Coast Guard recognizes that training for lower-level engineers is important ï something it consistently refused to do for over 35 years ï accidents of the type described in this report are inevitable. Indeed, it is fortunate that the accident did not lead to a fire, explosion, injury or death considering the volatile nature of the cargo.

Several months after the accident, the Captain of the ñKWò reported to us that he was notified by mail that the Coast Guard investigating officer presented him a ñsettlement agreementò offering him a ñLetter of Warningò in return for his signature. The letter was opened by his grandmother who contacted the Captain on the boat warning him that most of the twenty-days allowed to answer the Coast Guardôs ñcomplaintò already had passed.

When the Captain called the Investigating Officer, he was told his only choice was to sign the letter of warning or, as an alternative, to contest a charge of negligence before an Administrative Law Judge. Since the Captain had no license insurance to provide for a lawyer to defend him at a settlement hearing or before an ALJ, and since he did not really understand the process, he accepted the offer. Case closed ï except for the ñblack markò on his record. This letter could torpedo his eligibility to become a ñDesignated Examinerò and advance in the towing industry in the future. It also caused significant harassment and emotional upset extended over several months.

In reviewing the full record forwarded to Washington (obtained under FOIA), it does not appear that the Coast Guard collected any conclusive evidence that the Captainôs ñnegligenceò under 46 CFR §5.29 caused this accident. By definition, ñ**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.ò In fact, the ñEnforcement Summaryò even contains a factually incorrect statement that the ñKWò collided with the M/V PAT SALVAGGIO ï which it never did.

This accident report serves as an example[(1)] of how an incomplete investigation can adversely affect an individual mariner while it fails to address the root cause that there are significant training, maintenance, and manning issues that affect engineroom equipment operation throughout the towing industry. *[[(1)]Other examples appear in GCMA Report #R-429, GCMA Report to Congress: How Coast Guard Investigations Adversely Affect Lower Level Mariners.]*

Example: Settlement Agreement #2

*[**Source:** GCMA Newsletter #39, April-May 2006. GCMA file# Mnl39.7b]*

While powerful corporations like the American River Transportation Company (ARTCO) rack up millions of dollars of damage to public and private infrastructure along the waterways without the Eighth District even raising a finger, GCMA was brought back to the ñreal worldò on April 12, 2006 in a hearing before an investigative officer at MSU Morgan City.

Captain ■■, who has been on the water all his life and is a native of the local area, was pushing an empty ñsix-packò tow down the Atchafalaya River during daylight hours in full view of the Morgan City Vessel Traffic System (VTS) cameras, radars, and its automatic identification system (AIS). An experienced VTS operator, who reportedly held a towing officerôs license, was on duty at the time.

At the time of the accident, the Atchafalaya River gage read 7.5 feet and is considered ñhigh waterò for the area. Captain ■■ held his tow at Twenty Grand Point where the Intracoastal Waterway joins the Atchafalaya River under the control of the VTS while another southbound tow passed under the three bridges joining Morgan City on the East with Berwick on the west. This is one of the most dangerous sections of the river and is the reason why the VTS was established there thirty years earlier. Two previous accidents in the 1970s damaged spans of the railroad bridge disrupting transcontinental rail service with one hazardous chemical accident threatening the area with a lethal chlorine spill.

The VTS gave Captain ■■ clearance to proceed down the river on a slow bell following the tow that just passed under the bridge. Feeling the force of the winds pushing him toward the nearby bank, Captain ■■ promptly pushed his tow into the river and turned south toward the ñ99-Mile Boardò several miles away.

As Captain ■■ pulled out into the river out from behind the shelter of the trees his empty barges began to feel the effects of the wind pushing him across the channel toward the Berwick shore. The river is wide at that point and presented no real problem except that there were three tows leaving the ñ99-Mile Boardò heading northbound in his direction. This kept him closer to the right descending bank (RDB) on the Berwick side of the river. As he approached the sharp turn at the ñ99-Mile Boardò he was unable to use full power to maneuver because all the northbound tows that had clearance to come out of the ñ99ò had not yet cleared and completed their turn to the north. That held up the tow ahead of Captain ■■. Yet the current continued to carry him south and the wind pushed him toward the bank as he idled ahead.

About this time, the VTS controller realized that Captain ■■ was in trouble and called him on the radio. However, Captain ■■ was fully aware of this and found himself boxed in by the tow ahead of him and the tows coming out from the ñ99.ò He realized that he was being pushed by the wind toward three vessels tied alongside a dock on the Berwick side of the river as the current swept him downriver.

Captain ■■ made the best choice possible ï which was captured in full color by the VTS camera. He was able, by applying full power, to stop his tow and hold it in the current thereby avoiding the tow ahead of him. He could not have powered out into the river because he would not have been able to clear the passing northbound tows. He immediately sounded the Danger Signal to alert the people on the boats tied alongside the dock. One small crewboat scooted away from the dock to safety. Captain ■■ then straightened his tow and made an eggshell landing against the vessels that were tied alongside the dock. Because he sounded a timely warning, there were no injuries. However, there was approximately $5,000 damage reportedly sustained by one of the aluminum vessels at the dock. This is inevitable when a six-pack tow lands alongside you.

The fact that the small crewboat heard the warning and was able to pull away, gave Captain ■■ the opportunity

to allow his lead barge to touch in at the dock, and pivot on the dock and out into the current and then head into the cut at the ñ99-mile board.ò

According to the Coast Guard, Captain ■■, as the pilot of an underpowered floating object (i.e., his six-barge tow) was guilty of alliding with a fixed object (i.e., moored vessels) in the navigable waters of the United States. The proof of this statement was as plain as the nose on your face in full color, in full motion complete with the sound of the warning issued by the vessel traffic controller in the background.

Captain ■■ received a ñcomplaintò from the Coast Guard and spoke with the investigating officer. The Coast Guard was willing to enter into a ñsettlement agreementò with him in return for a three-month license suspension. Eventually, after Captain ■■ discussed the matter in detail, the offer was reduced to two months in lieu of bringing the matter before an Administrative Law Judge for settlement. The choice of bringing it before an ALJ always remained open. Nevertheless, the proof was on videotape. It was an open and shut case, easy for the Coast Guard to prosecute.

Captain ■■ belongs to our Association. He brought us the story only after he had spoken with the investigating officer. GCMA brought in one of our top river pilots, a native of the Morgan City area, to discuss the matter with Captain ■■. Unfortunately, Captain ■■ had not followed our advice to purchase license insurance and did not have the money to hire a lawyer represent him before an Administrative Law Judge if he decided to follow that route. Although we believed that Captain ■■ had done his utmost to prevent injury and serious damage when faced by the inevitability of a potential disaster, there had been some damage ï and the Coast Guard was unwilling to overlook it in their apparent zeal to prosecute.

GCMA sought and received a hearing for Captain ■■ before the Investigating Officer monitored by the Marine Safety Unitôs Assistant Senior Investigating Officer. Captain ■■ presented a carefully prepared drawing of the accident scene showing the number of tows in the river, the current, and the wind. He was allowed to present and was questioned in detail on everything that took place. He was reminded that he had the right to present everything to an Administrative Law Judge if he chose to do so and was under no obligation to accept any type of ñsettlement.ò GCMA representatives were given free and full opportunity to discuss all aspects of the issue on behalf of Captain ■■.

During the discussion that lasted for approximately an hour and a half, GCMA questioned why the VTS controller had allowed such a large number of tows to operate in the short distance between Twenty-Grand Point and the 99-Mile Board at the same time. Unfortunately, the VTS controller on duty was on leave at the time and was unavailable. We learned that the controller in question had an advanced issue of a towing license and presumably understood and could predict the effect of crowding a large number of tows into a relatively small area during high water and with a brisk wind blowing. The Coast Guard maintained that the wind speed was recorded at 12 mph while Captain ■■ maintained it was closer to 20 or 25 mph. However, a mariner is at a disadvantage in rebutting the wind speed argument if his vessel is not equipped with a working anemometer.

The Coast Guard questioned whether the accident was ñinevitable.ò What would the mariner do if presented with the same set of circumstances a second time. Why did Captain ■■ leave the comparative shelter behind trees that broke the wind at Twenty Grand Point and venture into the river?

Captain ■■ replied that the VTS controller gave him clearance to proceed with a slow bell but admitted that he did not order him out into the river. The vessel remained under the Captainôs command and not the controllerôs command. Nevertheless, Captain ■■ felt obligated to follow the VTS controllerôs directions including the ñslow bellò that kept him from running over the tow ahead yet restricted his ability to maneuver ï a situation that became critical as he approached the 99-Mile Board and hindered his turn to the follow the Intracoastal Waterway to the west.

As a result of the discussion with the Hearing Officer, Captain ■■ was offered the option of presenting his evidence to the Administrative Law Judge or admitting to ñnegligenceò accepting a ***one-month*** suspension of his license. One month was a significant reduction from three or even two months and certainly sweetened the offer. Negligence is defined in 46 CFR §5.29 as ñthe 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.ò

"Negligence" is hard to admit to when you have done everything possible to avoid an accident and it occurs anyway. We pointed out that he made a ñgreat save at the 99ò by not wiping out three boats and another tow by attempting a ñsuicide turnò as some younger and less experienced pilot might attempt to do ï but this was not to be.

Although two GCMA Directors offered to accompany and assist him in presenting the same evidence to an Administrative Law Judge that would be flown in for the occasion, Captain ■■ decided to accept the an admission of negligence and a one month suspension of his license. Consequently, he returned after lunch and ñdepositedò his license with the Investigating Officer. Like any ñsettlement agreementò between a mariner and a Coast Guard

investigating officer this one must be approved by an ALJ who must ñsign-offò on the deal. This, however, is usually just a formality unless the Judge detects an error.

The decision cost Captain ■■ far more than the reported cost of the accident. At his reported gross pay rate of $450 per day for 30 days his personal financial loss amounted to ***$13,500***. That amount is almost 2½ times as much as the entire cost to repair the damage caused by the accident. It far exceeded the cost of basic license insurance that would have provided an experienced Admiralty attorney to argue his case before an ALJ. An experienced Admiralty attorney is knowledgeable in wading through the Coast Guard legalistic quagmire that often baffles lower-level mariners. However, even with legal assistance, there is no guarantee that you will win a specific case ï even if you have confidence in the fairness of the system ï a confidence permanently shaken by recent revelations in ñJustice Capsized?.

Our experienced Director, who also had worked as a Pilot on towboats for the same company, stated that the allision probably would not have occurred if the size of the tow were limited to four barges rather than six barges. The extra 200 feet by 16 to 18 feet (estimated 3,600 sq. ft.) of wind area based on the height of the hull, coaming, and fiberglass covers on the lead barges of this oversize tow made the tow unmanageable under the fresh cross wind that Captain ■■ encountered as he traveled downriver. While the Coast Guard freely issues ñpermitsò for all sorts of oversize tows to operate on the Gulf Intracoastal Waterway, it is up to the licensed officers to operate their tow safely. However, the Coast Guard knows full well that refusing to push extra barges for almost any reason usually is the last step before termination of a towing officerôs employment. Our mariners are ñemployees at will.ò Most do not work under the protection of a union contract that would prevent abuses of this nature!

If the case had gone before an ALJ, Captain ■■ could have called the VTS controller and had him explain his professional judgment in allowing the number of tows he did to traverse the river at the same time. Captain ■■ could have called upon the company to provide a shipyard haul-out report for the same vessel to repair wheel and possible rudder damage that occurred before this incident and may have further restricted the vesselôs maneuverability at the time of the accident. Captain ■■ previously asked the company to provide this information but found his employer was unwilling to do so. By agreeing to accept a charge of ñnegligenceò Captain ■■ avoided these challenges as well as the aggravation of continuing to fight a losing battle for months waiting a hearing date before an ALJ. All that can be chalked up to stress and strain ï something it is best for all of us to avoid.

One of the things difficult for many of our mariners to accept is that many Coast Guard investigating officers have no practical experience within the industry itself ï as was true in this case. Consequently, they ñgo by the bookò against our mariners. However, we notice that the Coast Guard often appears to go by a different book against the same marinerôs employer.

We suggest that towing companies with well maintained equipment and experienced crews invite Coast Guard Investigators to ride on their boats for several days on various routes or while conducting a variety of activities for the purpose of orientation so that they have a better idea of the problems the mariners they employ face on the job and before prosecuting them for things they have no control over. We note that it has been over 30 years since the Coast Guard assigned any of its officers in this part of the country to ñride the boatsò and learn the practical side of regulating the operation of commercial vessels. We believe this contributes to their lack depth of understanding the industry they regulate.

Captain ■■ made it quite clear that he was within several years of retirement and, had it not been a financial necessity, he would leave the industry immediately rather than to endure the stress and strain of dealing with the Coast Guardôs ñjusticeò system.

GCMA representatives suggested that the Coast Guard consider issuing him a ñLetter of Warningò since this was a small accident and he had successfully avoided a major accident by taking prudent action ñin extremis.ò All experienced towing vessel officers, considering the hours they work and the routes they cover, have occasional ñfender bendersò from time to time. To allow such a ñfender benderò to cost a working mariner $13,500 out of his pocket is more than our mariners are willing to accept. However, a ñLetter of Warningò in this case could not be put on the table because he had received a previous ñLOWò in another Captain of the Port Zone for an unintended grounding. Consequently, the Investigating Officer said she was not allowed to offer a LOW in this case. Even though we could not locate the chapter and verse, the ñbookò prevailed and common sense went down the drain.

It is far from certain that any business enterprise, and this refers to the entire towing industry with its unattractive working conditions and poor reputation, can succeed when its employees are subjected to an arbitrary penalty for a minor accident while other mariners working for large and powerful corporations in the same Coast Guard District continue to have major allisions and never even receive a reprimand from a Coast Guard investigator.

INJUSTICE FOR MARINERS AT THE NATIONAL LEVEL

Our First Drug Case

Shortly after the Gulf Coast Mariners Association was formed in April 1999, we began to hear about drug cases. The first case was a tugboat Captain who was arrested by the local Sheriffôs department when they found a marijuana cigarette in the pilothouse. The fact that a deckhand admitted to owning and smoking it and that the Captain tested negative in a test taken sixteen hours after the arrest did not deter the Coast Guard from taking the Captainôs license and making him go through drug rehabilitation. Our Association even hired Attorney J. Mac Morgan to prepare a defense for mariner. After studying the case, we were told that the mariner would not have a chance of prevailing before an Administrative Law Judge even though he had been cleared of the charge in court in Terrebonne Parish. We were both surprised and shocked because, by all appearances, the mariner did not appear to be guilty and the Coast Guard was not impressed that he offered a negative drug test by a reputable medical clinic within 16-hours after his arrest.

The Coast Guardôs approach to the use of illicit drugs is well summarized by Commandant Merlin OôNeill in a decision rendered on September 18, 1951:[(1)] ñWhether the offense was committed while (the) Appellant was physically present aboard the ship on which he was serving at the time is of no significance in a case involving any association with narcotics. No clemency, based on individual hardship to the seaman or his family can be granted because of the great danger which his presence aboard American merchant vessels would impose upon many other seamen as well as the property of ship owners.ò *[(1) Commandant Decision on Appeal 521 (ALIBANG)]*

This ñhard-lineò approach has not withstood the test of time. 46 U.S. Code 7704(b)(c) now provides a little wiggle room short of revocation if the holder of a license or merchant marinerôs document provides satisfactory proof of cure. There are administrative avenues to clemency, but the path is lengthy and extremely difficult to navigate for the average mariner. In more than one case we are familiar with, Coast Guard bureaucracy turns the path to regaining a license into an administrative quagmire.

GCMA's First "National" Drug Case

Our ñlocalò misgivings about drug regulation enforcement were soon followed by a drug case at the ñnationalò level. Based on our previous experience with the ñlocalò case and the knowledge, expertise, and maritime background of the competent attorney who had worked on this case with us, J. Mac Morgan, Esq., we recommended that Captain Greg Periman retain his professional legal services.

The ñPeriman Caseò was a very unique case and consumed a tremendous amount of our time, effort, and focus. We described this case in sufficient detail in GCMA Report #R315-C and identified it as Case #4. In this case while working with Captain Periman, we encountered and identified every possible obstacle and roadblock that the Coast Guard could possibly throw at this mariner from every level from the investigating officer in MSO St. Louis up to the Vice Commandant. The Coast Guard completely mishandled this case ï and they are poor losers!

A mariner deprived of his license is like a fish out of water. Left out of water, a fish is deprived of air and will soon die. The longer he is left without a source of revenue, a mariner and his family are also vulnerable likely to perish. In this nasty affair that lasted over three years, Captain Periman lost everything he owned after serving as the Master of towing vessels for over twenty years ï his house, his car, and his dignity as a human being. Fortunately, his family stood by him throughout this ordeal and GCMA took up his cause only after he proved to our satisfaction that he was not guilty of the offenses he was charged with.

During this ordeal that extended over three years and reached all the way to the doorstep of former Coast Guard Commandant Thomas H. Collins, Captain Periman maintained his innocence while our Association started to lose confidence in the entire Coast Guard ñjusticeò system.

The Periman Case also brought to the surface another, apparently unrelated matter that was dormant since 1997. In 1997, I served as Editor of the National Association of Maritime Educators (NAME) Newsletter, a publication that reached most of the individuals responsible for training lower-level mariners. My full time job was preparing and editing textbooks for lower-level mariners including Masters, Mates, Towing Vessel Operators, Able Seamen, Tankermen and Engineers. In June 1997, I wrote an article in NAME Newsletter #57 based on a conversation with Administrative Law Judge Rosemary Denson titled, The Power of the "Old Boy" network. Business as usual; St. Louis ALJ Challenges Reasons for Closing Office.

That article and the supporting documentation led me to suggest that Captain Periman contact Judge Denson and discuss with her the problems he encountered with the ñflackò he experienced in dealing with Coast Guard

officers and civilian bureaucrats. Armed with these documents, Captain Periman and his father Dr. Val Periman, approached Judge Denson and discussed his appeal with her. Eventually, Captain Periman was able to prevail and the Coast Guard very grudgingly returned his license to him. The fact that taking his license in the first place had prevented him from earning a living for three years was conveniently forgotten.

However, the Coast Guard actively thwarted his attempt to recover his attorney fees under provisions of the Equal Access to Justice Act as provided for under Department of Transportation Regulations in 49 CFR Part 6. These fees were considerable because Captain Periman had to file a lawsuit against the Coast Guard in Federal District Court in Washington, DC ï proving that even if a mariner is right, it takes a great deal of money and, in this case, a team of three Attorneys to prevail. Even after Commandant Collins returned Captain Perimanôs license, there was never a hint of an apology for the Coast Guardôs egregious conduct.

EVEN MORE INJUSTICE FOR MARINERS AT THE LOCAL LEVEL

GCMA's First Trial Before an Administrative Law Judge

While the Periman Case was in progress, another towboat Captain who we will identify as ñCaptain Ken,ò was under attack by an investigator from the Marine Safety Office in New Orleans on ñdrugò charges that had been trumped up by his employer.

Through the efforts of GCMA, Captain Robert Lansden, Esq., a deep-sea unlimited Master and attorney eventually represented ñCaptain Kenò. 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 occasions and left him a nervous and broken wreck.

Captain Kenôs case dragged on for almost a year. It was this case, more than anything else, that convinced our Association that <u>some Coast Guard officers will go to any length to win their case</u>. It was the abysmal quality of the ñinvestigationò that led to these charges that led us to so vigorously question the Coast Guardôs entire investigation process in GCMA Report # R-429, <u>GCMA Report to Congress: How Coast Guard Investigations Adversely Affect Lower Level Mariners</u>.

It became evident to us that Coast Guard prosecution of mariners <u>has little to do with justice and all to do with winning</u>. A Coast Guard 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 ñsettlement agreement.ò This case is also detailed in GCMA Report #R-315-C as Case #3, the Captain Ken Case.ò In this case, although Captain Ken clearly prevailed, he was left with $10,000 in legal fees that his attorney was not able to recoup under the Equal Access to Justice 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.

The problem lies in the basic system of ñinvestigationsò and the Coast Guardôs 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[(1)] GCMA posted on our internet website. We expect that these reports will be supplemented later this year by a report currently in preparation by the Inspector General of the Department of Homeland Security at the request of Congress later this year. *[(1) GCMA Report #R-429-A, Rev 1 and GCMA Report #R-429-B, Rev. 1.]*

More Trials Before Other Administrative Law Judges

After attending this trial in the company of another GCMA Director, GCMA determined to learn more about Coast Guard procedures used in the administration of ñjusticeò to our mariners. Consequently, we sought information about attending ALJ trials conducted at the local Marine Safety Office in Morgan City. At first, our Association was discouraged in our request for advance notification of ALJ trials. However, when Jim Wilson a retired Coast Guard officer and attorney came on the staff at the MSO Morgan City, there was improved ñtransparencyò and even invitations to attend. Thereafter, we reported on these ALJ hearings to our mariners in our Newsletter that is also posted on the Internet. We tried to report on each case based on its own merits.

We soon learned that part of Mr. Wilsonôs job was to train officers, warrant officers, and enlisted ñinvestigatorsò how to prepare a case for a hearing before an Administrative Law Judge. This type of training is extremely demanding because an Administrative Law Judge who is a legal professional runs the courtroom. The courtroom is

a formal and dignified setting. It may be a ñhearing roomò such as is found at a Coast Guard Marine Safety Office or it may be a ñborrowedò Federal courtroom such as those used in Houma, Lafayette, or even Joliet, Illinois. In such a setting, the Administrative Law Judge expects to encounter well-established, knowledgeable attorneys who are defending their clients and equally prepared prosecutors. Although some Coast Guard officers and civilians (like Mr. Wilson and Commander Norris) also hold law degrees, many Coast Guard Investigators do not. Such individuals are trained to prevail in the courtroom. Unfortunately, their career in the Coast Guard may depend upon their success in prosecuting mariners. It is in this formal setting where an unfortunate mariner charged with an offense is expected to appear ï and the Coast Guard is ready and waiting to pounce upon him the moment his hearing begins. The process is described in detail in the book The Good Lord Hates a Coward by Captain Joseph J. Kinneary, Ph.D. ï suggested reading for every member of a Coast Guard Congressional oversight committee.

A mariner who does not accept a proffered ñsettlement agreementò must appear in this setting. Although a hearing before an ALJ is open to the public, it is a very formal setting. A mariner can bring his wife and friends, but they will have no role to play unless called witnesses. However, the Coast Guard always manages to provide a few off-duty spectators, noted by Captain Kinneary as their ñcheering section.ò At one there were at least ten Coast Guard personnel at one hearing in Houma, LA, which caused me to wonder what other duties they had shunted aside and for what reason. If it was for training purposes, which would be understandable, why not videotape it for posterity complete with commentary. Such a large, chummy, uniformed ñcheering sectionò certainly must be disconcerting for any mariner coming before an ALJ who hopes to defend his career and reputation.

Most lower-level mariners never take the time to attend these types of administrative hearings before an Administrative Law Judge. However, I attended a number of hearings because our Association must be in a position to offer advice to our mariners. To date, our advice is simple:

- If you are a licensed officer, buy license insurance to protect that license.
- If you cannot afford to buy basic license insurance, do not go to sea.
- If you do go to sea, have another job or profession you can follow to put food on your table because a career at the ñlower levelò of the merchant marine is not a career you can depend on.
- Buy license insurance to protect your interests in a lawsuit because your interests and your employerôs interests may not be the same. Never count on your employer to defend your credentials because these are your responsibility.
- Do not sign any ñsettlement agreementò unless you understand exactly what you are signing.
- If the Coast Guard rescues you at sea, respect and honor them for the risks they take in doing so. Never place them at risk through your poor seamanship, violating regulations, or failure to follow ordinary safety precautions or exercising common sense. However, remember that they are professionals who freely chose to live by a military lifestyle while remaining government employees whose salaries you pay. Never mistake, by their actions taken in the line of duty, that they are ñyour friend.ò

OUR MARINERS' HEARINGS BEFORE ADMINISTRATIVE LAW JUDGES – A MIXED RECORD

If you count on presenting your view of your innocence to an Administrative Law Judge, think again. Even if you think you are innocent, think again. Going to trial is a real crap shoot. There are all sorts of surprises.

Refusal to Bend to the Will of Your Employer

An Offshore Supply Vessel Captain was brought before an Administrative Law Judge in Morgan City for his refusal to take a drug test. The mariner in question was completing the last day of a month-long tour of duty in the Gulf of Mexico. He had already served 12-hours on duty that day when he arrived at the dock. His relief was due in at 07:00 the next morning. The boat was at the dock to stay, his licensed Mate was left in charge, and his relief was on the way to the boat. The Captain left after dark to go home ï less than 45 minutes away.

Drugs never entered the picture. However, when he arrived home he and his wife had ña few glasses of wine.ò Afterwards, he retired to bed with his wife after having spent a month at sea. Shortly thereafter, his employer called his home to announce a random drug and alcohol test. He did not return to the boat and was charged by his employer with ñrefusal to test.ò

His employer pushed the issue. Drugs werenôt the problem. At the end of the trial, the Administrative Law Judge, Judge Peter Fitzpartick, cleverly ambushed the Captain with the hypothesis that the Captain somehow ñdesertedò his vessel by showing that he was at home in bed with his wife when he was supposed to be on board the

boat. However, the Captain had already put in a twelve-hour watch aboard the vessel and had been offshore with the boat for a month. Furthermore, the boat wasnôt going anywhere and, in fact, did not move from the dock for three days thereafter. Not only did the Captain lose his job, but he also lost his license.

To connect the dots, this was the same ALJ that had presided in the Periman case. The offshore supply vessel Captain was represented by Captain Robert Lansden who was absolutely appalled at the verdict ï as were we who watched it go down. As a result, our Association permanently ñbrown-listedò the employer for his role in this travesty and prepared a summary as Case #2 in GCMA Report #R-315-C. If any mariner believes his license is secure from this brand of Coast Guard ñjustice,ò we suggest that you think again!

Trials That Cover Coast Guard Regulatory Shortcomings

In another case, [(1)] the Coast Guard Marine Safety Office in Chicago attempted to cover up its own failure to impose reasonable restrictions on oversize tows on the heavily traveled Illinois Waterway by jumping on a towboat Captain for an accident that was not his fault. To date, the Coast Guard has failed to impose reasonable restrictions in this area leaving the public as well as licensed merchant marine officers at risk. The public in this case was deprived to the use of a major urban drawbridge for more than six months. We closely followed this case for almost a year. The case almost destroyed the career of an experienced senior towboat pilot. Fortunately, in this case, the employer chose to defend its employee because its corporate interests and the marinerôs interests happened to coincide. *[[(1)] GCMA Report #R-399, Danger on the Illinois Waterway: Towboat Pilot Loses License After he Accepts High Risk Assignment.]*

"Good" Trials that "Throw Out the Trash"

In other ALJ trials GCMA attended, the Coast Guard did perform a real service by removing mariners who engaged in illegal conduct from continuing their licensed service afloat. We reported on a case where a mariner on the fifth issue of a 100-ton near-coastal Masterôs license ran his crewboat aground on a marshy island near Port Fourchon, LA, at full speed, in broad daylight, and in clear weather. A harbor police patrol boat rescued the Master, who was the only person on the boat, and took him to his company dispatcherôs office. The Captain then ñborrowedò the dispatcherôs truck to go to the store ï reportedly a three-minute drive, never returned, and never returned the vehicle. The Sheriff later arrested the Captain and recovered the stolen truck with drug paraphernalia found inside. The Coast Guard retrieved the Captainôs license, but had to bring in Judge Fitzpatrick from Norfolk, Virginia, who struggled mightily with complex legal issues before doing what the situation obviously called for. A hearing before a knowledgeable Merchant Marine officer could have achieved the same results without all of the pomp and been far more credible. *[[(1)]GCMA Newsletter #43.]*

GCMA REPORTS ON INVESTIGATIONS

The Gulf Coast Mariners Association has been looking into the issues of ñInvestigationò and whether these efforts serve to bring ñjusticeò to our lower-level mariners. We are not a union, and most of our mariners are not represented by a labor union. In 1999, the Gulf Coast Mariners Association was formed by the AFL-CIO and four maritime labor unions to be the ñvoice for mariners.ò We remain an independent the voice for ñlower-levelò licensed and unlicensed mariners although without retaining any formal affiliation to or funding from organized labor. Unions look after their own members ï a very important part of the services that union members pay for, and an important tradition we try to carry out for our mariners.

Early on, our Association began to have serious doubts about the quality of the Coast Guard investigations we saw or studied. One of the first documents we were introduced to was one that we obtained from the Federal government and reprinted as part as GCMA Report # R-429-A, Rev 1 cited below. This eye-opening report from 1994 showed that all was not well within the ranks of Coast Guard investigators throughout their investigative system. In this report, outside contractors viewed and commented upon what the Coast Guard was trying to accomplish with its investigations.

Several years later, the Coast Guard prepared its own report that we reprinted as GCMA Report #R-429-B, Rev. 1, (Series). In many ways this report is even more revealing of how the Coast Guard operates its investigative system. This, of course, refers to civil cases involving marinersô licenses as well as fines and civil penalties. The service has its own Coast Guard Investigative Service, a separate and secretive outfit that deals with criminal wrongdoing. Their activities extend beyond the scope of this report. A further report, GCMA Report #R-429-C, is

the result of a FOIA request that contains a Coast Guard Policy Letter describing different levels of investigative effort that the Coast Guard applies to its inquiries and helps to better explain many of the over 700 accident reports GCMA has collected in its files over the years ï many as the result of a direct request of our mariners. The Headquarters staff office responsible for this maintaining control of Coast Guard investigative activity and casualty statistics is the Office of Investigations and Analysis.

In July 2004 and again in January 2005 GCMA asked the Coast Guard to collect and provide statistics on reports of towing vessel sinkings, flooding, capsizing. We cited the loss of four mariners on the towboat ELIZABETH M in the Ohio River below Pittsburgh on January 11, 2005 and the loss of another mariner in a towboat sinking in the New Orleans area shortly thereafter to expedite our request.

Congress picked up this particular issue in a letter by Congressman James Oberstar to the Commandant in March 2005 citing the horrific numbers of sinkings, flooding, capsizings, fires, and explosions on towing vessels. Although the Office of Investigations and Analysis collected this raw data, they never bothered to analyze these figures. These figures remain to this day as raw data.

On December 16, 2005 the House Committee on Transportation and Infrastructure requested the Inspector General of the Department of Homeland Security to ñé conduct a study of the Coast Guardôs marine casualty investigations program and to report to these Committees the findings and recommendations of that study not later than June 30, 2007.

ñThe Committee expect that the study and report shall examine the extent to which marine casualty investigations and reports result in information and recommendations that prevent similar casualties; minimize the effect of similar casualties, given that it has occurred; and maximize lives saved in similar casualties, given that the vessel has become uninhabitable.

ñThe Committees also suggest that the study include the following to promote the safety of all who work on or travel by water and to protect the marine environment:

- the adequacy of resources devoted to marine casualty investigations considering caseload, and duty assignment practices;
- training and experience of marine casualty investigators;
- investigation standards and methods, including a comparison of the formal and informal investigative processes;
- use of the best investigative practices considering transportation investigation practices used by other Federal agencies and foreign governments, including British Marine Accident Investigation Branch programs;
- usefulness of the marine casualty database for marine casualty prevention programs;
- the extent to which marine casualty data and information have been used to improve the survivability and habitability of vessels involved in marine casualties;
- any changes to current statutes that would clarify Coast Guard responsibilities for marine casualty investigations and report, and
- the extent to which the Coast Guard has reduced the frequency of formal investigations, or changed the types of incidents for which it has carried out a formal investigation process, in the past five years.

Our Association plans to publish the report that results from this inquiry when it is released to the public.

IS IT A QUESTION OF RESOURCES OR OF EFFORT?

The Coast Guard traditionally presents itself to Congress as a ñcan doò outfit that can do just about any job imaginable at less expense because of its military organization. Congress, when presented with selective History tempered with astute public relations, traditionally responded well to this approach. Events, like the Coast Guardôs ñcan doò response to Hurricane Katrina, especially warmed hearts and loosened purse strings. The fact that Admiral Thad Allen was personally superbly trained and qualified for his task and was able to utilize the military organization of available forces in the emergency, in contrast to FEMA Director Brown, helped the Administration salvage its otherwise abysmal performance.

However, there are many growing questions surfacing around other ñtraditionalò Coast Guard missions. GCMA, in a recent report to Congress, illustrated that the Coast Guard mismanaged merchant marine personnel, licensing and training.[1] In fact, we went so far as to suggest that the Coast Guard be relieved of **all** its duties related to merchant marine personnel. *We reiterate that belief in this report. [[1]GCMA Report #R-428-D.]*

Like its involvement with Merchant Marine Personnel, it is clear that the Coast Guard placed relatively few resources into ñInvestigations.ò Quite stupidly on their part, the Coast Guard never encouraged mariners or their

employers to keep accurate or organized records such as logbooks that could provide an investigator with clues, if not the answer, to the cause of many of the accidents that befall small vessels such as tugs, towboats, and small passenger vessels. In fact, the Coast Guard consistently did their best to kill our Associationôs initiatives to encourage accurate recordkeeping as recorded in one GCMA report.[1] *[[1]GCMA Report # R-429-G (Series), Rev.1.],*

Most deplorable of all is the Coast Guardôs abject failure to protect the lives and health of our mariners in following up on personal accidents and injuries that befall our mariners. We explain this in detail in another GCMA Report.[1] *[[1] GCMA Report #R-429-I.]*

All of the foregoing led us to release GCMA Report #R-429, GCMA Report to Congress: How Coast Guard Investigations Adversely Affect Lower Level Mariners on August 29, 2006 to over 100 U.S. Senators and Congressmen and to the media and GCMA Directors subsequent efforts to explain our position to Department of Homeland Security auditors.

A FORMER ALJ 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 ñJustice Capsized?ò 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 Guardôs ALJ system.

I have been an observer in Judge Masseyôs 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. ï 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 in 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 Ingoliaôs 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 ñIf I ruled that way, the Chief Judge would have my job.ò He was not saying that in a kidding way. He was serious. ALJ Brudzinski then repeated, while shaking his head, ñIf 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 ï Signature.

JUSTICE CAPSIZED?
By Robert Little, Baltimore Sun Reporter, June 24, 2007.
[Contact Robert Little directly by e-mail at robert.little@baltsun.com. Emphasis 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 ï 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 -ï a charge later thrown out when Periman proved that a laboratory official had lied under oath ï 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 Ingolia's attempts ï 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 ï the first blemish, he said, on a 31-year record of sailing as an able seaman on ocean-going cargo ships ï 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 ï three weeks after Turbeville filed notice of his defense ï 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.

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 ï and to do so without telling the parties involved ï 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 & 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, ñHe 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, ñThe 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.ò

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 ï Ingolia's predecessor ï 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 ï 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 Guards 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 ï viewed by The Sun ï 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 ñis not an appropriate wayò 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 were 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 ï 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."

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 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.

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 Representativesô 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."

GCMA RESPONDS TO COAST GUARD PRESS RELEASE ON "JUSTICE CAPSIZED"

On June 27, 2007, Rear Admiral Mary E. Landry, the Coast Guardôs Director of Governmental and Public Affairs issued a press release critical of the ñJustice Capsized?ò article and an editorial titled ñA Listing Courtò in the Baltimore Sun. Our Association independently responded to the press release making the following points citing paragraph numbers and quoting from the document:

¶1- While ñé pending litigation prevents me from addressing other allegations in the article and editorialé ò
GCMA 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 Guardôs administrative law system is conducted with fairness or impartiality. If the Coast Guard was 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 marinersô careers were interrupted or destroyed when they were denied ñdue process.ò
- 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 ñmanagementò involved in secret meetings and ex parte communications that will be exposed by these and subsequent lawsuits?

Perhaps, the overarching question should be: Should Congress still allow the Coast Guard to superintend the U.S. Merchant Marine or should they assign his task to another agency?

I suggest that you address these questions in future press releases to more fully inform the public.

¶2- ñ(F)ew violations are serious enough to reach administrative law judges.ò
GCMA 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. If I am incorrect, please correct me. If you are incorrect, please correct your press release.

¶3. **GCMA 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 Sunôs 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- ñThe vast majority of mariners charged with drug and alcohol offenses take advantage of rehabilitation

programs we have established.ò

GCMA 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. If I am incorrect, please correct me. If you are incorrect, please correct your press release.

Our Association tried to work with the Coast Guard for the past seven years. We are NOT ñsoftò on drugs or drug use anywhere in the transportation industry. I invite you to read, study and review GCMA Report #R-315-C 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 marinersô credentials, you simply throw our people to the wolves by telling them to find some state, county, or private rehabilitation program. It is your bureaucracyôs 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.

Mariners, after satisfying investigators, must then run the gauntlet at a Coast Guard Regional Exam Center. If you would take the time to read GCMA Report #R-428-D on the internet, you will understand that the RECs are not doing their jobs very credibly.

Our mariners, who are punished by a court of record, must then undergo an additional ñassessment periodò imposed by the Regional Exam Center where their paperwork is stalled, lost, or forgotten. These ñAssessment periods,ò in the words of GCMA Attorney Les. A. Martin, Esq., ñare a misnomer. While originally designed to keep the `bad guysô from obtaining licenses, in effect they prevent both the `bad guysô as well as those who have turned their lives around and are starting to follow the `straight and narrowô path from advancing in the merchant marine. Assessment Periods do NOT `assess,ô rather they delay and deter. In effect, an `Assessment Periodô punishes a mariner a second time for the same crime ï often years after the original offense occurred. It actively discourages and in many cases, prevents mariners with experience and interest from returning to duty. It deprives industry of human resources and places the Coast Guardôs administrative regulations above, beyond, and in addition to sentences handed out by other courts of record.ò

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 Guardôs 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. In cases like those recorded in GCMA Report #R-315-C, aggressive Coast Guard behavior goes much farther than that ï and that, in our eyes is absolutely inexcusable. Your Administrative Clemency program established at Headquarters, although its intentions appear honorable, is simply another ñblack holeò of bureaucratic avoidance and is not ñuser friendly.ò Once our mariners lose their credentials, they lose their jobs. Most employers treat them as ñemployees at will,ò 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 Whiteheadôs 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- ñAs a result, few cases are contested and fully adjudicated by administrative law judges.ò

GCMA Comment: It costs a minimum of $5,000 for the average mariner to secure legal representation. Most experienced maritime attorneys knew that the Coast Guardôs policy was to win at any cost long before Judge Masseyôs 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 clientôs hard-earned money if he cannot possibly win?

If you take the time to examine GCMA Report #R-342, Rev. 2 on our website, you will understand why we urge all mariners to purchase license insurance. However, even that path is rendered useless when YOUR 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 ï or, as an alternative, he needs to consider recommending a successor.

The Commandant, when urging Congress to grant it permanent control over the merchant marine,[(1)] stated in part: ñShould 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 behalfé .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.ò[(2)] After gaining control over the merchant marine in 1946, the Coast Guard forgot most of these obligations to protect our merchant mariners. Leninôs comment that ñPromises are piecrusts, made to be brokenò 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.]*

¶6- ñCoast Guard administrative law judges are bound to fairly and impartially adjudicate cases.ò
GCMA Comment: Evidence appears to show that that was not done.

¶7.- This is a new issue apparently overlooked by both the Baltimore Sun and the press release ï 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 Guardôs ñold boyò network. I believe that this issue needs to be thoroughly evaluated and not pushed politely under the carpet.

MUST THE COAST GUARD CONTINUE TO REGULATE MERCHANT MARINERS?

Although it started out with an Executive Order as a temporary wartime measure in 1942, on July 16, 1946 the Bureau of Marine Inspection and Navigation was permanently transferred to the Coast Guard. After over six decades, however, our mariners believe it is time to make History. We have endured enough. After sending sixteen (16) separate reports to Congress over the past several years, we urge Congress to cut the Coast Guard loose from the merchant marine and to set a new course for personnel management, safety, training, casualty and personal injury investigation and merchant vessel inspection. Our mariners are transportation workers not recruits in a military organization.

Years of legitimate complaints from our mariners fell on deaf ears and blind eyes in the Coast Guard hierarchy. The time has come to cut trim the agency of hundreds of useless, incompetent, inattentive officers, and insensitive bureaucrats and put the U.S. Merchant Marine in the hands of capable and competent maritime professionals.

"The whole fish is rotten from head to tail"

We were certain that the time was ripe for change after we thoroughly reviewed copies the three lawsuits[(1)] filed in the Federal District Court for the Eastern District of Louisiana on March 30, April 4, and May 16, 2007 *[(1)U.S. District Court, Eastern District of Louisiana, Civil Actions #07-1536, #07-1497 & #07-2896.]*

In reading any lawsuit, you always must presume the Defendants are innocent until proven guilty. Justice, if it really exists, will come as a result of a trial that lies at some date far in the future. Of course, that is the same assumption that our mariners should be able to expect in their treatment from any agency of our government including the Coast Guard.

Surprisingly, I learned of the existence of the first of the three lawsuits from one of the defendants in mid-April in a meeting at the Marine Safety Unit in Morgan City while in pursuit of ñjusticeò accompanied by one of our mariners at that office. That visit piqued my interest, and I gained further insight about the underlying case in the following weeks. The defendants in the lawsuits include the Commandant and the Vice Commandant of the Coast Guard in their official capacities as well as the Chief Administrative Law Judge individually and in his official capacity along with the Chief of the Administrative Law Judge Docketing Center in Baltimore and four other lesser Coast Guard officials including officials at Coast Guard Headquarters in Washington.

Is This Just Another National Scandal?

As discussed in previous GCMA Newsletters, the Coast Guard now has another and extremely serious problem

on its hands that demonstrates how just far this agency has drifted off course in recent years. It comes as a terrible disappointment to members of the public who were led to believe the Coast Guard as a public agency, always tries to be even-handed and above board in its dealings with the public. These are the guys who wear the ñwhite hatsò with the ñwhite shipsò that come to the rescue in Hollywood feature films. Is this really how they treat well over 200,000 merchant mariners Congress entrusts them to superintend? For our mariners, this disappointment is tempered by the cold reality of the condescending treatment they received at the hands of Coast Guard officials for many years. This particular scandal directly affects many of our merchant mariners who were unfairly harassed or driven out of the merchant marine.

Some of the Coast Guardôs other and recently exposed shortcomings aired on a national CBS ñ60-Minutesò television broadcast by Steve Kroft on Sunday May 20th and include:

- The new National Security Cutter is $250,000,000 wildly over budget and its entire ñDeepwaterò Program in tatters and in complete disarray. It is clear that this fiasco did not happen overnight and involved the incompetence of high ranking Coast Guard officers who ignored the advice of junior officers! This single loss overwhelmed any false savings gained by shortchanging lower-level merchant mariners in training and adequate occupational safety and health enforcement for decades.
- The Inspector General exposed the failed scheme to lengthen eight battered and badly wasted 110-foot patrol boats to 123 feet. This turned into an engineering fiasco and wasted another $64,000,000. It resulted in scrapping of eight of the old but already-lengthened patrol boats but ended plans to lengthen an additional 41 of these junkers. Congressional leaders reasonably demand their money back from the shipyards that the Coast Guard authorized to make these inadequate repairs that put their own service members lives in jeopardy.
- Another $38,000,000 of taxpayer money was wasted in an attempt to develop a ñfast response cutterò using unproven composite hull materials.
- The failed merchant marine personnel programs at the National Maritime Center and the 17 Regional Exam Centers. These programs succeeded in driving thousands of mariners out of the industry that we previously pointed out in GCMA Report R-428-D. This report should be ñrequired readingò for Congressional oversight committees.
- The problems in ñInvestigationsò including the problems uncovered and probed in three recent lawsuits. We reported these problems to Congress in GCMA Report #R-429 in August 2006.

Why Must the Coast Guard Win at Any Cost?

The ñcostò in opposing the Coast Guard is borne by <u>any mariner</u> who is unfortunate enough to have a problem that possibly could lead to suspension or revocation of his/her credentials. The prospect of facing a ñno holds barredò prosecution is likely to end a marinerôs career in the merchant marine. This includes strong-arm tactics Investigating Officers use to ensure a ñsettlement agreementò in lieu of a formal hearing. I believe the Coast Guardôs **<u>unwritten policy</u>** to ñwin at any costò unfairly enhanced the Coast Guardôs ñwinò record against **<u>all</u>** mariners at all investigative levels.

There is no telling how long this ñ**unwritten policy**ò has been in effect and how long it has been carried out by the Chief ALJôs docile subordinate judges, but Chief ALJ Ingolia has been on the bench for sixteen years! Unfortunately, for the Coast Guard and fortunately for our mariners, Judge Massey proved she was not willing to play his game and courageously came forward and exposed some of the major players.

Regrettably, corruption at this level apparently is endemic in the Coast Guard and was in place even before Chief ALJ Ingolia came to office. Former Chief ALJ Chatterton was allowed to ñretireò after travel fund abuses were revealed by former Administrative Law Judge Rosemary Denson. Judge Denson spoke with me at length and provided documentation of that incident when I was editor of the National Association of Maritime Educatorôs Newsletter. Her story appeared in NAME Newsletter #57, June 1996. It was ignored, and Judge Denson was driven from the bench ten years ago by the ñold boyò network. Her story also appears on the internet in GCMA Report #R-396 ï again ignored for years by the Coast Guard although posted in plain public view.

The Coast Guard was able to maintain an aura of respectability because of outstanding work performed by many of its officers and enlisted men in areas like search and rescue and drug interdiction far removed from ñinvestigations.ò However, the Coast Guard also has a dark side that has been hidden from the public view for far too long and, **<u>it involves a hidden gender issue as both of the Administrative Law Judges persecuted by the Coast Guard were women!</u>**

"Power tends to corrupt; absolute power corrupts absolutely." – (Lord Acton, 1887)

Unfortunately, granting the Coast Guardós Administrative Law System such absolute power over the lives of our mariners appears to have led to absolute corruption within the system. Our Association can only pose pertinent questions as we did in our own newsletter and in the letter to Admiral Landry (above) and wait for answers that may never come:

If even some of the facts alleged in the three initial lawsuits are true, it means that Coast Guard management has become fouled with self-aggrandizing corruption ï and that has gone on for some time! It may mean that every proceeding before a Coast Guard Administrative Law Judge for years may be tainted and have to be thrown out, reviewed, and thoroughly reinvestigated by an independent third party. This can also extend to ñsettlement agreementsò wrung from indigent mariners who could not afford a maritime attorney to protect their maritime credentials and ultimately their means of making a living. Does this level of corruption rise to such a level as to disqualify the Coast Guard from its role in ñé superintendence over the merchant marine of the United States and of merchant marine personnelé ò as required by 46 U.S. Code 2103? We believe it does.

We can only trust that Congress will promptly attend to necessary changes because we seriously doubt that it would be appropriate for the Coast Guard to attempt to remedy this situation on its own without immediately seeking Congressional guidance.

It is clear is that this situation must not be allowed to continue without an immediate official investigation! On May 31, **2005** Judge Jeffie J. Massey asked for an ñindependent investigationò of the entire affair.[(1)] That request, although purposely ignored and successfully sidetracked by her superiors in the Coast Guard ALJ Docketing Center and Coast Guard Headquarters for two whole years, is long overdue, and should be provided with close Congressional oversight. *[(1)Dresser vs. Ingolia et al., transcript, p. 78 (exhibit 8)].*

EXPAND THE ROLE OF THE CIVILIAN NTSB IN PROFESSIONAL MARITIME INVESTIGATIONS

The year 2007 marks the ten-year anniversary of the Coast Guardôs prosecution of First Assistant Engineer Christopher P. Dresser. Mr. Dresser filed the first lawsuit against the Coast Guardôs Chief Administrative Law Judge, Joseph N. Ingolia. During most of this ten-year period, Mr. Dresser was deprived of his Coast Guard license and the ability to earn his livelihood at sea. His seeks a multi-million dollar judgment for compensatory damages and punitive damages plus legal expenses. Two other mariners filed separate lawsuits involving similar plus additional issues with each plaintiff pointing to unethical practices within the Coast Guard legal system.

The Dresser case worked through the Coast Guardôs Administrative Law system from 1997 until Feb. 19, 2001. Along the way, Mr. Dresserôs attorney appealed each adverse decision all the way to the Vice Commandant. As permitted by law, his attorney took a final appeal taken to the National Transportation Safety Board (NTSB).

The Coast Guard allowed the appeal process to become a shadow of what it once was. This is the result of a number of factors, not least of which is the Coast Guard military rank and file system wherein everyone within the chain of command supports both those above and those below.

However, the National Transportation Safety Board (NTSB) is ***not*** a military organization. When the NTSB took a fresh look at the case, it determined that ñthe Vice Commandantôs decision did not apply the appropriate legal standard in reviewing the appellantôs contention that the law judge should have recused (i.e., removed) himself following an ex parte communication.ò Consequently, the NTSB reversed the Vice Commandantôs decision and remanded the proceeding for a new hearing before a different law judge.ò

The Coast Guard failed to schedule the hearing ordered by the NTSB ***until 3½ years later*** on Dec. 7, 2004 ï leaving Mr. Dresser out of work. At the time the hearing finally took place, as the affidavit of ALJ Jeffie J. Massey (previously cited) indicated, the decision rendered by the new ALJ against Dresser was seriously tainted. This revelation subsequently led to serious allegations against Chief Administrative Law Judge Ingolia, the Commandant, Vice Commandant and a number of other Coast Guard employees. As mariners, we ask: Where was the NTSB, and why was Mr. Dresserôs case allowed to be left unresolved for 3½ years? As a small but respected independent agency, it has been overshadowed and bullied by the Coast Guard on a number of occasions we commented upon in the past. We believe the time has come for Congress also to free this agency from Coast Guard arrogance and increasing domination.

While hearing occasional appeals from decisions of the Coast Guard Commandant or Vice-Commandant is serious business, the NTSB is most widely known for the professional quality of its accident investigations. Although most of its

investigative effort is directed toward investigating ***all*** aircraft accidents, the NTSB also investigates ***some*** maritime accidents. Three recent examples of accidents affecting ñlower-levelò mariners investigated by the NTSB are the towboat accidents at Bayou Canot (1993) and Webbers Falls (2002),[1] and the Lady D pontoon boat accident in Baltimore Harbor (2004).[2] *[[1] GCMA Report #R-370-A [2]GCMA Report #R-432.]*

To avoid stepping on each othersô toes, the two agencies signed a ñMemorandum of Understandingò (MOU) on Sept. 12, 2002 that clearly outline the duties of the ñleadò agency. Many of our ñlower-levelò mariners found the MOU particularly troubling and offensive because the ñcivilianò NTSB gave up authority over too many cases to the ñmilitaryò Coast Guard. Our mariners no longer are confident that the Coast Guard acts fairly and in our best interest. For example, with some notable exceptions, NTSB will only take the lead in investigating the loss of mechanically propelled vessels of 100 or more gross tons and in accidents with the loss of six or more lives.

These huge gaps could leave the investigation of ***most*** accidents involving over 6,000 small passenger vessels, 20,000 uninspected passenger vessels, 5,200 tugs and towboats, mostly with crews of six or less to the Coast Guard. Over the years, and substantiated by our ñInvestigationò series of reports listed below, we lack confidence in the quality of Coast Guard investigations of maritime casualties and, in particular the timely and accurate documentation of personal injuries.[1] *[[1]Refer to GCMA Report #R-429-I]*

Also, we are concerned with the relationship between the Coast Guard and the NTSB. We look with dismay at how the Coast Guard ignores, downgrades, and marginalizes many significant NTSB recommendations [1] while it overreacts to others.[2] We firmly believe that merchant marine accidents should be investigated by professional merchant marine officers with long years of practical experience afloat, in inspections, and in shipyards, and who study the causes of accidents so they can generate meaningful recommendations that will be universally respected. Instead, we see an increasing flow to well paying and convenient ñretirementò jobs at NTSB of former military personnel from Coast Guard Headquarters with limited seagoing merchant marine experience.

Perhaps, the NTSB should investigate ***all*** accidents involving commercial and public vessels just as they investigate ***all*** airplane accidents and build up a file that contains more than just statistics that are often left without adequate analysis. This would be an investment in safety.

OTHER REPORTS IN THE #R-429 SERIES

R-429 (Series) Investigations.

- GCMA Report #R-429, Aug. 29, 2006. GCMA Report to Congress: How Coast Guard Investigations Adversely Affect Lower Level Mariners.
- GCMA Report #R-429-A, Rev 1. (Series) Mar. 20, 2007. U.S. Coast Guard Marine Casualty Investigations and Reporting: Analysis and Recommendations for Improvement By James G. Byers, Susan G. Hill, & Anita Rothblum. Interim Report, August 1994. *[Reprint of the 1994 Coast Guard R&D Report.]*
- GCMA Report #R-429-B, Rev. 1. (Series) Report of the USCG Quality Action Team on Marine Safety Investigations (July 26, 1996).
- GCMA Report #R-429-C. (Series) July 17, 2005. Coast Guard Marine Casualty Investigations.
- GCMA Report #R-429-D. (Series) Oct. 8, 2006. Coast Guard Investigations: Buzzardôs Bay Tank Barge Grounding and Oil Spill, April 27, 2003 *[Re-numbered as #R-374.].*
- GCMA Report #R-429-F. (Series) July 26, 1996. Report of the Coast Guard-AWO Quality Action Team on Towing Vessel Crew Fatalities.
- GCMA Report #R-429-G. Rev. 2. Feb. 24, 2007. (Series). Report To Congress: Sharpening Accident Investigation Tools By Establishing Logbook Standards for Lower-Level Mariners. *(Replaces GCMA Report #R-291, Rev. 1)*
- GCMA Report #R-429-H. Mar. 5, 2007. GCMA-Requested Local Marine Investigation of BJ Services Company. ï (In Progress)
- GCMA Report #R-429-I. March 24, 2007. Investigations: Enforcement of Existing Personal Injury Reporting Requirements. *(Replaces #R-292, Rev. 1)*
- GCMA Report #R-429-J. July, 1, 2007. Investigations: Report to Congress ï Coast Guard Abuses of the Administrative Law System.