NMA REPORT #R-429-O

DATE: August 12, 2008

By Richard A. Block

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[Formerly Gulf Coast Mariners Association, Founded in 1999.]

NMA PETITIONS THE COAST GUARD TO CHANGE THE ALJ SYSTEM

Our Original Petition (2001)

On July 16, 2001 The Gulf Coast Mariners Association (GCMA) petitioned the Coast Guard to reconsider the provision in 33 CFR §20.1001 that allows the Coast Guard to appeal an adverse decision made by an Administrative Law Judge (ALJ). This eventually, after a yearôs delay, was filed on the Coast Guardôs Docket Management System as Docket #USCG-2002-12578 where it can still be found at www.regulations.gov.

Our Associationôs Directors had attended a hearing before an Administrative Law Judge in New Orleans where the Respondent, a towing vessel Captain, was brought before an ALJ on two thoroughly bogus charges that the Coast Guard failed to prove. We describe the case in detail in our **Report #R-315-C** as the ñCaptain Kenò case. By the time the case finally was decided following three court appearances, over a year had passed. Shortly thereafter, the Coast Guard Prosecutor, a Lieutenant Commander who was also a lawyer, filed a timely notice of appeal but never bothered to perfect an appeal that was subsequently dismissed.

The additional period between the Notice of Appeal and the date when the notice was vacated (i.e., 78 days) proved to be a period of incalculable mental stress and strain for the Captain as well as for his attorney.

In light of the travesty we witnessed at the ALJ Hearing, the Coast Guard's response that appeared in the interim rule as published in the Federal Register**,** namely "Any detriment to a respondent is offset by improved consistency in the administrative process" provided no comfort, relief or satisfactory redress to the respondent, ñCaptain Kenò or to any other mariner in similar circumstances. After being crushed by an administrative process clearly weighted against him, no mariner could possibly be motivated by "improved consistencyò in the process. Reforming the process, as we suggest, is more in order after exposing its most glaring defect.

The detriment to our mariners can only be corrected by deleting the ability of the Coast Guard to resurrect its own deficient position in a case already judged by an ALJ by ***changing the offending regulation*** to prevent the Coast Guard from ever using this power again to further harass a working mariner. By failing to perfect its notice of appeal, the Coast Guard clearly demonstrated it is willing to allow any junior officer acting as a prosecutor to threaten to use any possible legal device to harass a mariner and beat him to his knees.

In addition, we failed to see where the Equal Access to Justice Act (5 U.S. Code §504) as further explained in 49 CFR Part 6 served as a "...sufficient deterrent to an agency's abuse of its right of appeal" as cited in the preamble. We also failed to see where there ever was sufficient cause to bring ñCaptain Kenôsò case to trial in the first place. Adding another administrative hurdle to clear as detailed in 49 CFR Part 6 did nothing whatsoever to repair Captain Kenôs damaged reputation or help him recover from the incredible stress and strain to which he has been subjected for the past sixteen (16) months and for which he has been under a doctor's care. In the end, Captain Ken failed to recover a dime under the Equal Access to Justice Act and had no funds to pay his legal fees that approached $10,000.

The ñCaptain Kenò case was an example of justice run amuck as a result of overzealous actions of a junior Coast Guard officer who used the power of his office unfairly against a working mariner.

In light of the Coast Guard's clear abuse of 33 CFR §20.1001, our Association requested in our petition that the right of appeal hereafter be restricted to the respondent because ñé the Coast Guard had its chance to prove its case during the original hearing at the ALJ level.[1] *[(1) 64 FR 28060, May 24, 1999, Column 1.]*

Coast Guard Dismisses Our Original Petition (2004)

The Coast Guard eventually dismissed our petition to change the rule at 33 CFR §20.1001 on July 13, 2004. The letter by Captain M. B. Karr, Chief, Office of Investigations and Analysis (G-MOA-1) stated in pertinent part:. ñWe believe your concerns were addressed adequately in the rulemaking process which resulted in the subject regulation being issued in 1999. Similar concerns were raised then and we feel the Coast Guardôs response remains valid (See Federal Register, dated May 24, 1999). Your main concern seems to be with the possibility that the Coast Guard Investigating Officers would use their discretion to appeal cases where the ALJ ruled against the Coast Guard. Our data does not support this claim. Since the regulation was issued, The Coast Guard has appealed 6 cases to the Commandant. Of the 6 cases, 2 were dismissed because the appeal brief was not timely filed, 1 case was remanded to the ALJ, 2 had the ALJôs order amended to be consistent with applicable policy and case law, and 1 is pending before the Commandant.ò

Since that date, our concerns over the impropriety of a number of cases grew beyond the narrow issue previously raised. Abuse of the entire Administrative Law procedure allows the Coast Guard to hold a mariner within its own system until a mariner is forced to submit, leaves the industry, or simply runs out of money to pay an attorney to represent him.

Request to the Vice Commandant to Reinstate Our Petition (2008)

In the Spring of 2007, the scandal over abuses in the Coast Guardôs Administrative Law System broke with an article in the Baltimore Sun by investigative journalist Robert Little that led to a Congressional Hearing before the House Coast Guard and Maritime Transportation Subcommittee on July 31, 2007 chaired by Representative Elijah Cummings. The Hearing is recounted in our Report #R-429-K, Aug. 8, 2007, titled Congressional Subcommittee Hears About Coast Guard Abuse of the Administrative Law System. 52p. Because of ongoing litigation in Federal District Court in New Orleans, the Subcommittee was unable to question Commandant Thad Allen, Chief Administrative Law Judge Joseph Ingolia, or Judge Walter J. Brudzinski.

During the period from 2004 to 2008, our Association continued its policy of attending various ALJ hearings in a number of locations including the ROGERS case that is still being litigated in New Orleans as well as several other involving our mariners. As a consequence, on June 30, 2008 we addressed the following letter to the Vice Commandant, Vice Admiral Vivien S. Crea at U.S. Coast Guard Headquarters where our Association, among other things, asked for our previous petition to be renewed or reinstated.

Subject: **Renewed Petition for Rulemaking on ALJ Decisions Adversely Affecting Our Mariners**
Reference: Docket #USCG-2002-12578
Our File: #GCM-61

Dear Admiral Crea,

Let me start by introducing myself, as we have never met. My name is Richard A. Block, and I am Secretary of the National Mariners Association, formerly the Gulf Coast Mariners Association. We are incorporated as a non-profit membership association and are not a labor union. Most, but not all, members of our Association are ñlower-levelò licensed and unlicensed mariners who sail on commercial vessels of up to 1,600 gross register tons ï primarily in the towing, small passenger vessel, and mineral and oil sectors of the maritime industry. I am a teacher by profession and a boat captain by trade. I have held a ñlower-levelò Coast Guard license for 53 years and do not claim to be either a lawyer or an investigator. In reviewing your official biography on line, I was unable to ascertain whether you hold a law degree although your name is attached to two appeals and ñremandò orders for two of our Associationôs mariners as presented below. Please inform me as to whether you have a law degree and are admitted to the Bar.

One part of my job in dealing with ñlower-levelò mariner issues included attending between 20 and 30 ALJ hearings as an ñobserver,ò reviewing thousands of pages of transcripts, depositions, affidavits, ñdecisions and ordersò and facilitating communications between our mariners and attorneys in cases where mariners can afford to secure their services.

Last summer, I was invited by Chairman Elijah Cummings to testify on ñmarine safetyò issues in a Congressional hearing on Aug. 2, 2007. Although it was an unexpected challenge to attempt to condense thoughts and experiences from 38 years into five minutes of oral testimony, it was easier for me to prepare the written testimony that appeared in our Report #R-350, Rev. 3 **[Enclosure #1].** **"**R-350ò summarizes many of the challenges our mariners face. I would never have found the need to draft this report to the oversight committee had

the Coast Guard effectively supervised our estimated 126,000 ñlower-levelò marinersô and addressed their most pressing issues over the years.

However, and more to the point, my appearance brought me to Washington several days earlier on July 31st where I attended Chairman Cummingsô hearing on problems with the Coast Guardôs Administrative Law Judge (ALJ) program. Congressô position on the ALJ program is summarized in H.R. 2830 that our Association endorses.

As Vice-Commandant, you ***remanded*** two cases brought before you for due-process hearings. I would like to present the following background information that explains in part why our Association staunchly opposes ongoing Coast Guardôs investigative and adjudicative activities that embroil our mariners in legal battles that you and other Coast Guard officials allow to drag on endlessly: Your agency has used taxpayer funds to pursue many cases of dubious importance and, in doing so, wrecked the lives of individual mariners knowing full well that our mariners do not have comparable resources to defend themselves. Enough is enough!

Background: [Enclosure #2]. On July 21, 2001, our Association petitioned the Coast Guard as follows: ñThe Gulf Coast Mariners Association respectfully requests that the right of appeal hereafter be restricted to the Respondent for the reasons cited in the comment from the preamble in order to restore the condition that existed prior to the implementation of the existing interim rule.ò[(1)] Finally, almost a year later, our petition finally was assigned Docket #USCG-2002-12378. On Sept. 3, 2002, Vice-Commandant T.J. Barrett apologized to our Association for not placing our petition and three others into the public docket in a timely manner. After disposing of this procedural issue, two years later, the Coast Guard denied our petition. However, the Coast Guard correctly summarized our position in this statement: ñ***Your main concern seems to be with the possibility that the Coast Guard Investigating Officers would abuse their discretion to appeal cases where the ALJ ruled against the Coast Guard.***" *[(1) 64 FR 28054 – 28075, May 29, 1999, and specifically page 28060, column 1 under Section 20.1001. The entire rulemaking package received only seven comments from the public.]* **[Enclosure #3.]**

In the years following denial of our petition, our Association reviewed a number of alleged ñdrugò cases where overzealous Coast Guard investigators did abuse our mariners. We reported on a number of these cases in our Report #R-315-C, Rev. 1 that appears on our Internet website. **[Enclosure #4].** One case involved Captain Joseph L. Kinneary, PhD., who was unfairly stripped of his license by Coast Guard ALJ Peter Fitzpatrick. Captain Kinneary described his ordeal in a book circulated to Members of Congress and to the Department of Homeland Security. Captain Kinneary subsequently won a significant financial settlement from his employer in a jury trial in Federal District Court. **[Enclosure #5].**

Other cases like DRESSER were reported on by Robert Little in the Baltimore Sun. Your predecessor, VADM Cross, ***remanded*** the DRESSER case for a re-hearing before ALJ Walter J. Brudzinski. The story of how ALJ Brudzinski would not rule in favor of the mariner for fear of losing his job was reported by ALJ Massey and reached Congress. In addition, in the Aug. 2, 2007 Congressional hearing, former ALJ Massey graphically described what an accused mariner faces under the existing ALJ system. **[Enclosure #6]** contains a verbatim transcript of her testimony. Although the DRESSER case is now in the Fifth Circuit Court of Appeals in New Orleans, the fact remains that the Administrative Law system deprived Christopher Dresser of his license and livelihood and trapped him in the Coast Guardôs Administrative Law system for ***ten years*** for extremely tenuous reasons.

On Dec. 27, 2006, you ï as Vice-Commandant ï ***vacated*** an ALJ order dated Feb. 20, 2004 and ***remanded*** the case of Eric SHINE (No. 2661) for a new hearing. It appears that ALJ Parlen McKenna recused himself without a explanation available to the public and that the case was re-assigned to ALJ Walter J. Brudzinski. However, ALJ Brudzinskiôs questionable conduct reported by former ALJ Massey in the DRESSER case remains unresolved.

While both Chairman Elijah Cummings and Ranking Member Steven LaTourette expressed dismay that neither the Commandant nor Chief ALJ Joseph Ingolia were present for the Aug. 2, 2007 hearing, we are dismayed that Eric Shine, one of our mariners, must defend himself before the same ethically-challenged Judge Brudzinski. It appears from several thousand pages of documents I have reviewed that Coast Guard officers[(1)] intentionally inserted themselves into an ongoing labor dispute in violation of regulations[(2)] and precedents[(3)], and entangled Eric Shine in Administrative Law proceedings, left him unable to sail on his license for ***five years,*** bankrupted him, deprived him of his ability to earn a living in his chosen profession, and sabotaged his naval commission. *[(1) e.g., LCDR Tribolet and LCDR Kummerfelt (2) 46 CFR §5.71. (3) Refer to GIACHETTI, CDOA #. 2470.]*

As Vice-Commandant, I can only ***assume*** that your ***remand*** order in SHINE was for a ***fair*** hearing ï a further assumption being that all such Coast Guard hearings should be fair. Unfortunately, although I was unable to attend the hearing in Long Beach, CA, I openly question the fairness of this hearing. The Coast Guard appears to be driven by a ñ***win at any cost***ò mentality that allows your agency to appeal an adverse decision and continue to litigate matters until you financially and emotionally destroy a respondent. This is exactly the change our

Association petitioned for in July 2001 and for exactly this reason ï ñé ***that the Coast Guard Investigating Officers would abuse their discretion to appeal cases where the ALJ ruled against the Coast Guard***.ò

Coast Guard officials, Investigators and Administrative Law Judges have abused their discretion not just once but on many occasions. In doing so, they brought disgrace upon themselves, the Coast Guard, and the Administrative Law system itself as used by the government to resolve administrative issues. Consequently, the stench from the ALJ scandal has now reached the Halls of Congress. Cases like SHINE continue to bring discredit upon everyone it touches including yourself as disclosed in the two following enclosures:

- **[Enclosure #7]** An affidavit from Adam Olabuenaga, an observer, that the first day of the hearing was unfair. I also discussed and anticipate receiving a comparable but more extensive letter from Ms. Janine Sullada, an experienced legal assistant who attended all four days of the hearing.
- **[Enclosure #8]** An electronic transcript of the hearing that I have reviewed in its entirety and that I ask you to review in light of the two foregoing enclosures. I believe these three enclosures reflect very poorly upon Coast Guard ALJ Walter J. Brudzinski and upon Chief ALJ Ingoliaôs decision to assign him to this case.

As Vice-Commandant, you also reversed a decision of ALJ Massey on appeal and ***remanded*** the case of Captain Murray R. Rogers on April 20, 2008 based on a technicality. This case has been pending for four years during which time Captain Rogersô life, reputation, finances, and employment opportunities were irreparably damaged.

The entire ALJ administrative process established by the Coast Guard is far too complex, sophisticated, and biased for our mariners who are incapable of dealing with it. From the outset, the Coast Guard investigators refused Murray Rogersô repeated requests first to speak with not just one but with two successive Commanding Officers of the Marine Safety Office in Morgan City to resolve the problem amicably.[(1)] Although he asked several times, and we offered to accompany him, the Investigating Officers blocked the way. Out of pure frustration, Rogers escalated his complaint up through the chain of command to the District Commander and finally to U.S. Senator David Vitterôs office. With each escalation, the Coast Guard, in an unconcealed attempt to ***intimidate*** the respondent, increased its proposed penalty from a ñLetter of Warningò to outright license revocation. I attended the ALJ hearings and understand why Judge Massey dismissed the case. *[(1)Eric Shine reports similar treatment by Coast Guard officers at Los Angeles/Long Beach after asking to speak to the Commanding Officer.]*

The Coast Guard abused its right of appeal through regulatory changes it initiated in 1999. This was the change in regulations we petitioned against in 2001 and tangled a number of respondents in interminable litigation. Eventually, the ROGERS case was bundled with the DRESSER case by Federal Judge Helen G. Berrigan when it was taken into Federal District Court in New Orleans. I attended a hearing in New Orleans where LCDR Kramek, son of a former Coast Guard Commandant, appeared on behalf of the Coast Guard. The ñ***win at any cost***ò mentality of the Coast Guard is plainly evident here. Although this has become a ñhigh stakesò case for the Coast Guard, they continue to crank out the same brand of ñjusticeò for mariners like Eric Shine. The ROGERS case further escalated into the Fifth Circuit Court of Appeals in New Orleans along with the DRESSER case at tremendous cost to mariners in attorney fees, lost wages, and lost wages, job and career advancement opportunities.

There is also the matter of expenses that must be borne by our taxpayers to support these patently disgraceful activities on the part of the Coast Guard. Our Association recently submitted extensive material to the Government Accountability Office in respect to their announced audit of the existing ALJ program.

Admiral Crea, I am certain that you recall these words from page 8 of the ***remand*** order you signed on the ROGERS case on April 30, 2008 that you directed at your agencyôs investigators:

> ñWith respect to the first matter, the Coast Guardôs action in unilaterally determining LCDR Patrick would not comply with the subpoena rather than filing a motion to quash or modify the subpoena was ***not proper*** under the rules governing these proceedings. The IOôs ñSubpoena Responseò simply announcing the Coast Guardôs unilateral refusal to comply with the subpoena, rather than following the rules of procedure for challenging the subpoena as provided for in 33 CFR §20.609 is ***inexcusable***. There is a right way and a wrong way to challenge a subpoena; the IO and his supervisor in this case inexplicably chose the wrong way. That choice complicated the proceedings unnecessarily and ***ultimately led to the ALJ's dismissal of the case with prejudice***. It is my ***hope*** that I will not see such conduct emulated by Coast Guard I.O.ôs or their supervisors in the future. ***[our emphasis]***

Although you aimed these harsh words at Coast Guard Investigators and their conduct, do you believe this compares with the financial and emotional harm that your agency inflicted and continues to inflict upon our mariner Murray Rogers? Your ***remand*** ordered him to be dragged through ***another hearing*** at some future date at least a year and a half after Judge Massey decided his case? We point out that the Judges and Investigators were your tools, on your payroll, representing all the trappings of the Federal government, assembled against our mariner(s) who in most cases do not have funds to engage an attorney who is willing or able to contend with a system that is stacked against them.

Our Association contends that the Coast Guard consistently abused the entire appeal process in 33 CFR §20.1001 by allowing "any party"– specifically the Coast Guard – to file an appeal after they fail to prove their case. This is the very same conduct our Association petitioned to change in July 2001 following the ñCaptain Kenò case reported in our Report #R-315-C. Captain M.B. Karr, then Chief of the Investigations and Analysis Branch (G-MOA) at Coast Guard Headquarters ***denied our petition*** on July 13, 2004 after the Marine Safety Council mishandled it. The Marine Safety Council purposely steered our petition and three other petitions into a docket that they knew would never emerge to see the light of day. These were four bad decisions, and your turkeys have come home to roost.

For over a year after ALJ Jeffie J. Massey, an experienced Judge, received her appointment as a Coast Guard ALJ, the record shows almost continuous warfare between Investigating Officers in the Eighth District and the new ALJ. As an ñobserver,ò I attended a number of hearings with Judge Massey on the bench. I also requested and received copies of Decisions and Orders for most of the trials I attended and followed them closely.

I would like to direct your attention to an especially notable hearing in Lafayette, LA on Aug. 26, 2005 ï U.S. Coast Guard vs. Roy Paul Boudreaux. **[Enclosure #9].** I did not know the respondent personally but I understood that the Coast Guard had spent considerable time, effort, and detective work investigating two fatalities in a case involving a towing vessel Captain and his employer represented by a well-known Admiralty attorney. My wife and I drove 100 miles to Lafayette to be in the courtroom.

To fully appreciate the events (and to decide on the merits of the subsequent Coast Guard ñappealò you may or may not have already acted upon), you ***must read the court transcript*** from this hearing. It will be short and will be interesting reading! My wife and I were there and recall and can attest to the way that ALJ Massey was abused. If the Coast Guard has no respect for the Administrative Law system, how can mariners and members of the public respect it? Unfortunately, although I was there, I do not have a copy of the transcript. However, the information in the enclosure will allow you to fully understand why Judge Massey finally came forward and exposed the treatment she received at the hands of Coast Guard officials. ***I respectfully request a copy of your Decision and Order on the appeal of this case.***[(1)] *[(1) Docket #CG S&R 05-0016; CG Case #2078998]*

Former ALJ Rosemary Denson received similar treatment from the Administrative Law system in 1996 that ALJ Massey would receive a decade later. In 1996, I spoke with Judge Denson at length and read with great interest a wealth of material that she sent to me after the Chief ALJ terminated her. Judge Denson blew the whistle on a host of unsavory practices that plagued the ALJ system for a number of years. Unfortunately, hers was a voice in the wilderness. Subsequently, I wrote about the ñPower of the Old Boy Networkò for the National Association of Maritime Educators and later issued Report #R-396 **[Enclosure #10]** as a consequence of the problems our mariners continued to encounter with the ALJ system. Judge Densonôs testimony at the July 31, 2007 Congressional hearing contained many reasonable suggestions. I opine that if she, rather than Judge Joseph Ingolia had been appointed as Chief ALJ, the Coast Guardôs ALJ system would have fared far better than it has. It is now crystal clear that control over Coast Guard ALJs must be transferred from your agency as a result of the rampant abuse of powers by both ALJs and Investigating Officers that adversely affected working mariners every day.

Our Association supports the findings of the recent audit[(1)] performed by the Department of Homeland Security, Office of the Inspector General on the Coast Guardôs Marine Casualty Investigations program. In fact, we addressed a report to Congress[(2)] earlier on this subject. **[Enclosure #11]** We support the remarks of NTSB Board Member Kathryn Higgins at a recent Congressional hearing that reviewed the audit report. Ms. Higgins asked the Transportation and Infrastructure Committee to give the NTSB the final say in which marine casualty investigations it chooses to lead. An existing Memorandum of Understanding leaves most investigations involving fewer than six (6) fatalities to the Coast Guard. Since the Coast Guard ñdumpedò a reported 3,848 investigations, and since many vessels our ñlower-levelò mariners serve on have fewer than 6 crewmembers, we do not believe their interests are properly protected by the way the Coast Guard handled many investigations. *[(1) Audit #OIG-08-51 reprinted as our Report #R-429-M. (2) Refer to our Report #R-429, How Coast Guard "Investigations" Adversely Affect Lower-Level Mariners]*

Casualty and other ñinvestigationsò are closely related to the Administrative Law Judge program and to the larger Marine Safety Program. DHSOIG auditors visited our Association over a year ago, after which we furnished information pertinent to their Congressional mandate. References posted on our website[(1)] clearly show that the Coast Guard had as much as 14 years warning to correct deficiencies in their ñInvestigationsò program but failed to do so. *[(1) Refer to our Reports #R-429-A, Rev 1 and #R-429-B on our website.]*

As Vice-Commandant, you could be next in line for Commandant. If H.R. 2830 becomes law, you are in line for a fourth star and all that entails. Therefore, I want you to understand that of the nationôs 208,000 mariners, our 126,000 ñlower-levelò mariners expect either to see a whole new attitude from the Coast Guard accompanied by much greater concern for our unique issues, and a much greater respect for our mariners ï or, as an alternative, to watch Congress dismember your agency limb by limb in its role of ñsupervisionò over the merchant marine. Specifically, we mean paying significantly greater attention to those issues we presented to Congress last year in our Report #R-350, Rev. 1.

Our mariners are civilian transport workers. We have had our fill of inept and uncaring ñleadershipò by military officers who have little first hand knowledge of the industry where our ñlower-levelò mariners work and equally little interest in dealing with our mariners.

At one time, the Coast Guard ran a good inspection program that current Coast Guard leadership allowed to deteriorate. This was accurately reported by former Vice-Commandant Card. However, all the Kingôs horses and all the Kingôs men under Admiral Allen will not be able to put ñMarine Safetyò together again. Our mariners and the public have lost confidence in Coast Guard leadership following revelations of the vast waste, fraud, abuse discovered by Congress, the DHS Inspector General, and the Government Accountability Office.

We see inept and unnecessary Coast Guard programs driving hundreds of trained, experienced and capable ñlower-levelò mariners off the water by repressive personnel policies such as the new ñMedical NVICò hatched by employees and ñcontractorsò at the National Maritime Center. This document with its goal of controlling every marinerôs medical records will insure that few trained mariners will be able to remain in the marine industry until retirement age. Your agencyôs actions leave the maritime industry as a poor career choice for any potential mariner.

We ask why Congress funds the U.S. Merchant Marine Academy and state ñschool shipsò only to have their trained merchant marine officers shunted aside by Coast Guard officers who fill industry regulatory positions. The nation squanders its talent of trained merchant marine officers who are stifled by an increasingly impenetrable Coast Guard bureaucracy that cannot even manage its own rulemaking in a timely manner. The current shortage of inspectors and investigators need to be filled not with young Coast Guard officers bucking for assignments in other areas that appeal to their interests but with trained civilian surveyors, trained accident investigators, and marine engineers who are no longer subject to the constant rotation of a military service so they have an opportunity to take root provide continuity to their programs.

Our disillusionment with the recent Coast Guard leadership we have seen reaches all the way to the top. As regards the ALJ program, it is apparent that the Coast Guard can no longer keep its own house in order. Why is an ALJ like Walter J. Brudzinski allowed continuing to deal with merchant mariner issues after the allegations by former ALJ Massey? Our Association forwarded a confidential list to Congress of mariners whose lives and careers were ruined by overzealous Coast Guard apparatchiks. In many cases, these mariners truly deserve ñequal access to justiceò in its fullest sense. Primarily, these mariners need to be made whole; secondarily, their tormentors and overzealous civilian and military employees need to be punished. We believe all this needs to be done swiftly and thoroughly if your agency is to retain any credibility. We respectfully ask, Admiral Crea, are you up to the task.

Very truly yours,
s/Richard A. Block
Master #1186377, Issue #9
Secretary, National Mariners Association

Cc: Secretary Michael Chertoff, Department of Homeland Security
Chairman, House Transportation and Infrastructure Committee.
Chairman, Subcommittee on Coast Guard and Maritime Transportation Subcommittee
Chairman, Senate Commerce, Science and Transportation Committee
Selected media

Enclosures: Availability ofé
Enclosures #1, 4, 10 and 11 are available on our Internet website www.nationalmariners.org under ñResearch Reportsò
Enclosure #8, approximately 919 pages is available by e-mail from www.richardblock@nationalmariners.org

Coast Guard Response for Vice Admiral Crea
By the Coast Guard Acting Chief Advocate General

[Emphasis Added]

Aug. 1, 2008

Mr. Richard A. Block, Secretary
National Mariners Association
P.O. Box 3589
Houma, Louisiana 70361-3589

Dear Mr. Block:

I am responding to your letter of June 30, 2008, on behalf of the Vice Commandant, in which you raise a number of issues, the most prominent being concerns regarding the fairness of the procedures for the suspension and revocation of merchant mariner credentials. You assert that the Coast Guard's suspension and revocation process (both initially when cases arc at the administrative law judge level and, thereafter, when matters are on appeal to the Commandant) is, and has been, fundamentally flawed. In so doing, you point to allegations of bias and undue influence raised by former Coast Guard administrative law judge Jeffie Massey, a number of individual suspension and revocation cases, press reporting, and recent litigation involving several mariner appeals.

The Coast Guard recognizes that mariners spend a great deal of time and effort to receive and to maintain the credentials necessary to support their livelihood. We recognize that they have both significant property and liberty interests in continuing to hold those credentials. Whenever a decision is made to seek suspension or revocation of a merchant mariner document, the Coast Guard has a system to ensure that sufficient due process is afforded to mariners by providing administrative hearings, ***the right to be represented by counsel***, and a ***multi-layered appeal process***, including the ability to appeal to an independent agency, and, ultimately, to federal court.

[NMA Comment: "*The right to be represented by counsel*." from a practical standpoint, that right costs our mariners at least $5,000 in initial attorney fees. Our mariners find it increasingly difficult to convince any attorney to participate in a Suspension and Revocation (S&R) hearing only to lose his case or to face having it drag on forever. The ROGERS case, for example, is one of pure vindictiveness on the part of Coast Guard officers and has gone on for five years. The "*multi-layered appeal process*" increases the costs to individual mariners exponentially.]

One of the most basic responsibilities of the U.S. Government is to protect the lives and safety of its citizens. The Coast Guard is charged by law to ensure that over 200,000 licensed merchant mariners are competent and their conduct promotes marine safety, security and protection of the marine environment. Congress has authorized the Coast Guard to suspend or revoke mariner licenses and credentials where necessary to achieve these goals. This federal authority to revoke merchant mariner credentials has been in place since the *Act of' February 28, 1871* created the Steamboat Inspection Service. Nearly 50 years ago, the Coast Guard stated "...Suspension or Revocation proceedings are intended to aid and assist the Coast Guard in performing its statutory duty to promote safety of life and property at sea. These proceedings are to protect the integrity of licenses, certificates, and documents issued by the Coast Guard rather than proceedings seeking to discipline or penalize the holders of such licenses, certificates, or documents." The purpose of our suspension and revocation proceedings has not changed. We continue to believe that the proceedings are remedial and not penal in nature.

[NMA Comment: The proceedings are "*remedial and not penal in nature*." This is not always the case. We have seen the Coast Guard suspend a "lower-level" Masters license for one month at a cost to the mariners of $13,000 in lost wages for an unavoidable accident whose the total damages were only $5,000. It is rare, in figures we have published, where towing companies pay "civil penalties" that high.]

In addition to the value of lives saved, suspension and revocation actions minimize damage to property, the environment, and the U.S. economy by ensuring that those mariners that demonstrably do not possess the necessary skills, experience, and character to safely operate in the increasingly complex marine transportation system do not endanger themselves and that system unless and until they can demonstrate rehabilitation. Over the years,

Congress has recognized the value of the Coast Guard's suspension and revocation process and has expanded our suspension and revocation authority.

[NMA Comment: We appreciate the fact that the House of Representatives voted overwhelmingly (i.e. 395 to 7) in April 2008 to transfer a significant amount of the Coast Guard's authority to the National Transportation Safety Board in Title X of The Coast Guard Authorization Act of 2007 (H.R.-2830).]

After the EXXON VALDEZ oil spill, the *Oil Pollution Act of 1990* expanded our authority to initiate suspension and revocation proceedings after mariners are convicted of operating a motor vehicle while under the influence of, or while impaired by, alcohol or dangerous drugs. After the terrorist attacks on September 11, 2001, the *Coast Guard and Maritime Transportation Act* granted the Coast Guard the authority to suspend or revoke merchant mariner credentials for individuals deemed to be a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

The administrative law judge program underwent significant changes in the mid-1990's to include, among other things, creating a centralized docketing center and revamping the procedural rules to remove the quasi-criminal aspects of the suspension and revocation hearing process and align our proceedings with the best practices in administrative law. These changes have allowed the administrative law judge program to make significant positive strides and the program is currently managing a large caseload with fairness, efficiency, and productivity.

Coast Guard investigating officers serve complaints that can result in suspension or revocation of a merchant mariner's credential when there is credible and sufficient evidence of negligence, incompetence, misconduct, a threat to maritime security, violations of laws or regulations intended to promote marine safety, dangerous drug use, dangerous drug law convictions or other convictions that affect maritime safety. Administrative law judges preside in over 600 suspension and revocation adjudications annually. These proceedings provide mariners with, among other rights, the rights to be represented by counsel, ***to call and cross-examine witnesses***, and to enter evidence to respond to the charges against his license or document. Coast Guard administrative law judges also adjudicate cases on behalf of other federal agencies.

[NMA Comment: In both the PERIMAN case (see our Report #R-315-C) and the SHINE cases, for example, these mariners were not given the opportunity to call and cross-examine witnesses.]

If the administrative law judge issues a decision and order that is adverse to the mariner, the mariner has a right to appeal the decision to the Commandant of the Coast Guard. Mariners may also appeal the Commandant's decision on appeal, if adverse, to the National Transportation Safety Board. A mariner may further appeal the National Transportation Safety Board's final decision, if adverse, directly to a federal Court of Appeals.

[NMA Comment: Where is a mariner expected to conjure up the money to undertake these legal gymnastics? We want to point out that these "guarantees" are virtually meaningless.]

Concerning the role of the Commandant in the appeals process and the delegated role of the Vice Commandant, you specifically asked if the Vice Commandant is an attorney. While she is not, she is ably assisted by the Judge Advocate General of the Coast Guard and his staff of judge advocates and civilian counsel. This type of legal counsel arrangement is fully consistent with agency administrative practice and efficient use of government resources.

[NMA Comment: This vast array of legal talent is arrayed against the individual mariner.]

The Coast Guard has taken all allegations, including those you have cited, regarding the suspension and revocation appeal process seriously. Based on the information we are aware of, the Coast Guard categorically denies the allegations of bias and undue influence contained in former administrative law judge Massey's affidavit. Because litigation is still pending, it is improper for the Coast Guard to comment further on this matter.

While I cannot comment on individual suspension and revocation cases, I understand the concerns you and members of the marine community have raised regarding the administrative law judge program and the suspension and revocation process. While I believe that the record shows we have a fair and impartial administrative judiciary and that many of the allegations are unfounded, the Coast Guard is committed to aggressively addressing any

shortcomings and correcting any misperceptions.

In response to concerns raised at the July 31, 2007, Coast Guard and Marine Transportation Subcommittee hearing on the Coast Guard's Administrative Law Judge program, the Commandant directed a comprehensive review and assessment of the program with the express intent of ensuring not only that bias, but also the ***appearance of bias*** is removed from Coast Guard suspension and revocation actions and system integrity is ensured. We chartered a Work Group with specific direction to identify areas where action could be taken to enhance our ability to carry out this mission and to insure that mariners can trust the system designed to protect their due process and property rights while also insuring public safety.

While the core processes, authorities and practices used in the Coast Guard adjudication system are sound and consistent with the Administrative Procedure Act which forms the basis for administrative adjudication in the United States, we have identified areas where meaningful improvements can, and will be made. While we firmly believe that we have a fair and effective system, we have taken steps to improve this system. The cornerstone of our improvement plan is a strategy with specific actions to:

- Åimprove the transparency and accountability of the adjudication system;
- Åenhance the responsiveness and effectiveness of the administrative law judge program and our suspension and revocation process;
- Åbuild and sustain critical capacity; and
- Årestore the confidence and faith of mariners and the marine legal community in the independence and neutrality of the administrative decision-makers.

We have communicated our plan to Congress and will be providing updates on the progress we are making in implementing these improvements.

[NMA Comment: …And Congress transmitted its plan to the Coast Guard in H.R.-2830. Testimony of former ALJs Jeffie Massey and Rosemary Denson leave little doubt that the system needs considerably more oversight from Congress than it received in the past 20 years!]]

While the Coast Guard acknowledges that the independence and impartiality of administrative law judges is vital to adjudicatory processes, ***the Coast Guard opposes legislation passed by the House concerning the suspension and revocation process due*** to the adverse impact it would have on mariners and the Coast Guardð in terms of judicial effectiveness, efficiencies, safety at sea and costs. In the Coast Guard's view, the proposed legislation could, among other negative effects:

- Å**Impose Substantial Travel Burdens for Mariners:** The Coast Guard currently has six geographically-dispersed administrative law judges, in addition to the Chief Judge. Further, the existing Coast Guard administrative law judges are stationed near mariner population centers and travel to additional cities to decide suspension and revocation cases, to further attempt to accommodate the mariner. The National Transportation Safety Board (NTSB) administrative law judge system only has administrative law judges in Washington, D.C., Denver, Colorado, and Arlington, Texas. While the NTSB administrative law judges travel, the reduced numbers and decreased dispersion could result in a system, under the draft legislation, where many mariners would be compelled to travel farther for adjudication of their appeal, thus imposing a substantially increased financial and inconvenience burden.
- Å**Impose Increased Litigation Costs on the Mariner:** The draft legislation adopts the Federal Aviation Administration (FAA) model of adjudication; more importantly, it adopts more sweeping discovery rules. This change could effectively compel legal representation to effectively pursue an appeal. In turn, the cost of adjudication would increase considerably for mariners who might otherwise choose to represent themselves or have non-lawyer representatives before a Coast Guard administrative law judge.
- Å**Reduce Procedural Protections for Mariners:** Under the existing suspension and revocation process, all cases, even those where a settlement is reached, are reviewed by the administrative law judge. Under the draft legislation, the Coast Guard could enter into a settlement as final agency action without administrative law judge review.

[NMA Comment: We have had numerous complaints of investigating officers strong-arming mariners to sign "settlement agreements" with threats that they will seek higher penalties if they have to go through the trouble of preparing a case and presenting it before an Administrative Law Judge. A recent report by the Department of Homeland Security's Inspector General's Office points out gross neglect and deficiencies in

the Coast Guard's qualifications of Investigating Officers. See our Report #R-429-M, May 9, 2008. United States Coast Guard's Management of the Marine Casualty Investigations Program. [Reprint of Department of Homeland Security Report #OIG-08-51. 48p.]

Further, since the NTSB routinely deals with private pilots, who are readily available, as opposed to commercial mariners, who are frequently unavailable for extended periods due to service at sea, significant procedural protections, in terms of response timelines and matters would have to be added to the NTSB administrative law judge process, such as currently exist in the Coast Guard suspension and revocation process.

Overall, it is our view that the proposed legislation would undermine the leadership authority of the Commandant and Secretary with regard to merchant mariner licensing functions and would dilute their responsibility and accountability for safety at sea, a foundational Coast Guard mission.

[NMA Comment: The Coast Guard has performed its licensing function abysmally. Refer to our Report # R-428-D, Feb. 13, 2007. Report to the 110th Congress: Substandard Coast Guard Merchant Marine Personnel Services. 55p.]

The Coast Guard has, and will continue to take the issue of improving the suspension and revocation process very seriously. We have heard Congress, mariners and the industry and are committed to executing our aggressive plan to ensure needed enhancements are made. We agree with you on the need to make the suspension and revocation process even more transparent and efficient.

You should note that ***we have processed your petition for rulemaking*** in accordance with 33 Code of Federal Regulations, Section 1.05-20. As such, the Coast Guard assigned it docket number USCG-2008-0802 and placed your petition along with this response in the docket. You may access the docket at www.regulations.gov.

Thank you for expressing your comments and concerns and for your continued interest in the proper functioning of the Coast Guard. I look forward to garnering your support for the important improvements we are implementing that will better serve and honor mariners and the public.

Sincerely,
C. M. LEDERER
Acting Judge Advocate General U.S. Coast Guard