

# **WRITTEN TESTIMONY FOR THE HOUSE COMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION**

**JULY 31, 2007 10:00 a.m.**

**Regarding the Review of the Coast Guard's Administrative Law System**

**Submitted by  
Judge Jeffie J. Massey (Retired)**

Thank you for the opportunity to provide you with information concerning my experience as an Administrative Law Judge for the United States Coast Guard, stationed in New Orleans, Louisiana.

## **Educational and Professional Background**

For the committee members to more readily assess my opinions and my credibility (in general but in particular on the subject of what "due process" encompasses), let me recite a brief summary of my education and professional experience. I was raised primarily in San Antonio, Texas, attending public schools. In August 1971 I entered Southern Methodist University in Dallas, Texas. In May 1974 I graduated with a B.A. in Political Science. In August 1974, I entered Southern Methodist University Law School. In January 1977, I received a provisional law license from the State Bar of Texas so that I could begin representing clients (under supervision of a licensed attorney) in the Criminal Clinic.

I graduated from law school in May 1977, passed the bar later that summer, and opened my own law office in November 1977. Over the next twenty (20) years, I was a solo practitioner, an associate of a lawyer who did exclusively state criminal defense work, an associate of an attorney who did exclusively federal white collar criminal defense work, an attorney for the Special Counsel's Office of the United States Department of Energy, Dallas Region (while maintaining an active state and federal appellate practice), an Assistant Criminal District Attorney in Van Zandt County, Texas, and the Public Defender for Colorado County, Texas (while maintaining a civil practice).

When I became an employee of the Chief Administrative Law Judge's office within the United States Coast Guard (USCG) in July 2004, I had been employed as an Administrative Law Judge (ALJ) Since September 1997. My first association was with the Social Security Administration. For that agency, I began as an ALJ for the Miami, Florida, Hearing Office, then transferred as the supervising ALJ for the office located in San Antonio, Texas, where I was the administrative supervisor of fifteen (15) ALJs as well as the supervisor of seventy-plus other employees (attorneys, case technicians, paralegals, and administrative personnel).

In September 2001 I left the Social Security Administration for a position with the Federal Energy Regulatory Commission (FERC) here in Washington, D.C. As an ALJ for FERC, I had the pleasure of working for the longest tenured Chief Administrative Law Judge in the country, the Honorable Curtis Wagner. I sought employment with another agency only because of my strong desire to move closer to my family in Texas. When the posting for the New Orleans office of the USCG was posted in February 2004, I made the difficult decision to leave a position I loved for a chance to be closer to Texas.

### **Interview Process at the Coast Guard**

The interview process for the USCG ALJ position began with an interview in New Orleans, Louisiana sometime near the end of March 2004 where I first met Chief Judge Ingolia, George Jordan, and Ken Wilson. In May 2004, I was invited to meet again with Judge Ingolia at his office in the USCG Headquarters Building in Washington D.C. On that date, I was taken to meet the Commandant for the USCG by Judge Ingolia. The Commandant stressed to me that “The Coast Guard takes care of its own.” At both of our 2004 meetings, Judge Ingolia stressed that the Coast Guard was “one big happy family.”

At the time these comments were made, I thought they were odd, but I rationalized that both men were simply trying to express to me that the USCG valued its employees and would strive to make my employment experience as pleasant as possible. Less than a year later, I would understand the true message they were trying to convey—and it had nothing to do with my happiness as an employee.

### **Position Description for USCG ALJ**

Each agency in the Executive Branch that employs Administrative Law Judges is required to have a specific Position Description for its Judges. All of the ALJ positions I have had called for the ability to independently hear and decide cases as an appointee under the Administrative Procedure Act. (There are “Administrative Judges” in some departments/agencies of the Executive Branch that are not appointed pursuant to the Administrative Procedure Act, and thus are not charged with the responsibility of holding “due process” hearings.) Here are some excerpts from the Position Description for the position of an ALJ at the USCG:

Incumbent holds, presides at, and regulates the course of hearings held by the Coast Guard in connection with its statutory responsibility in maritime matters. . . . The incumbent’s independent and responsible charge of all steps necessary in the progress of the hearing includes, but is not limited to, (a) the issuance of subpoenas, (b) ruling upon petitions to revoke subpoenas, (c) ruling upon proposed amendments or supplements to pleading, (d) disposing of procedural requests, (e) ruling upon motions, (f) ruling on the admissibility of testimony, (g) determining questions on the credibility of witnesses, (h) ruling upon offers of proof and admitting competent evidence, (i) fixing the time for filing or serving briefs and extensions thereof, and (j) entering an

order and appropriate remedy to effectuate the statute being administered or enforced.

\* \* \*

The incumbent is subject to administrative supervision by the Chief Administrative Law Judge . . . . No technical guidance is provided, as the incumbent is an expert in his field and is responsible only to the Commandant of the Coast Guard for his actions, decisions, judgments and logic exercised. The Chief Administrative Law Judge acts for the Commandant in issuing policy guidance to the incumbent and assuring penalties imposed are generally consistent.

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Under the provisions of Section 5(c) of the Administrative Procedure Act, the incumbent is exempt from supervision or guidance in adjudicating cases (5 USC 554).

### **Training at the USCG**

Different agencies provide their new ALJs with different levels of training. At the Social Security Administration, all new ALJs undergo six (6) weeks of intensive training on medical, vocational, and regulatory materials relevant to the hearings that will be conducted. At FERC, I was given a copy of all relevant regulatory materials, a mentor ALJ, and encouraged to attend other ALJs' hearings and Commission meetings as often as I wanted (during my initial weeks at FERC). Later, I was sent to a two week course attended by a wide range of professionals in the energy industry. In addition, every year, the ALJs were encouraged to attend the annual meeting/seminars of the Energy Bar Association.

At the USCG, before I actually became an employee, I attended an already planned conference of USCG ALJs held in Baltimore in June 2004. This was described to me as a yearly event, although the conference planned for 2005 was repeatedly cancelled, and never took place. At this conference, the ALJs received presentations by various agency representatives (at the time, the USCG ALJs were hearing cases for the National Oceanic and Atmospheric Administration, the Bureau of Industrial Sciences, and the Transportation Security Administration), by attorneys who worked for the Chief Judge's Office in Baltimore, by an expert in the field of drug testing, and by the Chief ALJ. We were also required to attend a dinner where the guest speaker was a man who is the current Commandant of the USCG.

### **Hearings at the USCG**

The first hearings I had responsibility for were originally scheduled to be heard by Judge Parlen McKenna in August 2004, in Morgan City, Louisiana. For reasons not explained to me, I was asked to take over responsibility for these hearings a short time before they were

scheduled. Despite the fact that I had not received any additional training or mentoring (which had been promised to me by Judge Ingolia and George Jordan), I agreed to take over the hearings. Judge McKenna had already secured the presence of one of the staff attorneys from Baltimore, Shawn Steele (This was the one and only time I was provided with attorney assistance at a USCG hearing, despite requests for that assistance in a few cases in the coming months.). The first of the hearings, scheduled to take place in the Marine Safety Office (MSO) at Morgan City, took place as scheduled, but the next day the Mariner did not show up for his hearing.

I had been told by the Chief Judge at my initial interview and by Ken Wilson during my training at Baltimore that the Investigating Officers and the Senior Investigating Officer (a civilian) at the Morgan City MSO were problematic. I had been told that sometimes the Investigating Officers (IOs) were not very experienced and/or not properly prepared for hearing. I was told that none of them were attorneys, and I should not expect them to act like attorneys.

Even making these allowances, I found that the attitude of the USCG representatives was one of “we are here, we are going to present some evidence, and we expect you to do the rest for us.” Ignoring their attitude, I did my job—which was to hold a fair and balanced hearing, developing the record as fully as I could, seeking to discover testimony that supported both the USCG’s contention and the Respondent’s defense.

Without anyone actually verbalizing it, I knew immediately that I had not “performed” as the USCG expected me to or wanted me to. What I did not know was the extent that USCG personnel, and later members of the Chief Judge’s office and the Chief Judge himself, would go to stop me from holding genuine “due process” hearings and rendering impartial decisions.

By December 2004, it was made clear to me that the field personnel had organized an effort to intimidate me into changing to their way of thinking—i.e., holding hearings that did not require them to do any more work than they wanted to do and rendering decisions in their favor, even if the facts and/or the law did not support it.

By February 2005, the field personnel’s efforts culminated in a meeting in New Orleans, Louisiana, ostensibly to discuss their complaints about my courtroom demeanor (they didn’t like the way I looked at USCG personnel, etc.). Members of Judge Ingolia’s senior staff attended the meeting (George Jordan, Ken Wilson, and Megan Allison) and Ken Wilson later told me that USCG field personnel appeared as well as a representative from the Commandant’s appellate division (the division that wrote the decisions that he issued when he reviewed one of my decisions).

The series of events that took place between November 2004 and August 2005 are all documented in the contemporaneous records I have submitted to Chairman Cummings’ office. Taken together, they create a very clear picture of an administration that was (1) not interested in the administration of due process in USCG hearings; (2) not interested in transparency (as required by their own regulations) when setting “policy.” By phone, by

email, by memorandum, attempts were made to coerce me into making rulings favorable to the USCG, especially on issues of discovery.

## **UNPUBLISHED POLICIES OF CHIEF JUDGE INGOLIA**

I cannot recall when I actually saw a copy of the “policy” memorandum on hemp oil defenses, but I do specifically remember that this issue was discussed at some length at the June 2004 ALJ conference I attended in Baltimore. I thought at the time that it was odd that the Chief Judge would be telling ALJs that they should never accept the use of hemp oil as a valid defense for a positive drug test. Normally, when a defense is excluded, it is a matter of law (regulatory or statutory) or legal precedence. Nonetheless, I told myself there was probably something I was missing, and I would sort it out later after I had more experience with the agency.

This directive to never accept a hemp oil defense was similar in its nature to the directive from the Chief Judge that if the USCG filed a complaint that was invalid on its face (as a matter of law), we—the ALJs should not dismiss the complaint as invalid. Instead, we must tell the USCG—usually during the telephonic pre-hearing conferences that were often held in these cases—that their complaint was defective, and give them an opportunity to re-file the case or amend the complaint. (I certainly had never encountered this “courtesy” in any other jurisdiction I had presided over as a judge or practiced in while an attorney.)

In fact, so far as I know, neither one of these directives were in the USCG statutes, USCG regulations, nor were they delineated in valid precedent. Instead, I learned during my tenure at the USCG that these were examples of Judge Ingolia’s tendency to give directives on how cases should be adjudicated, contrary to the Position Description of a USCG ALJ and the Administrative Procedure Act.

In my professional opinion, both of the above directives were inconsistent with the application of due process by an impartial fact finder. By far, however, the most egregious attempt at derailing the successful application of due process to USCG proceedings was in the area of discovery.

In 1999, there were massive amendments to the regulations which governed Suspension & Revocation (S&R) hearings—those hearings where the USCG was seeking to suspend or revoke a Mariner’s license. (No license meant no work for that Mariner.) These amendments (1) called for numerous administrative changes affecting the way the files on these cases were handled and cases were assigned; (2) required Mariners to file a formal response to the complaint; (3) applied the APA rules of evidence as the standard for evidence brought in S&R cases; and, (4) changed the discovery rules in all proceedings. See 63 FR 16731, April 5, 1998, for all the amendments.

The APA contains the following language concerning evidence (See 5 USC §556(d)):

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

There were three USCG cases that involved contentious discovery issues—contentious only because the USCG obstructed the process in every conceivable way. In one case they flat out refused to respond to a subpoena I issued. In another case they refused to comply with filing deadlines, and, then when they did make a filing, it contained no substantive responses to discovery requests. In the third case, they refused to call any witnesses at a hearing because I exercised my discretion to require a witness to appear in person (rather than allowing telephone testimony). I have been instructed not to identify these cases by name on this record, but the record in each of those proceedings reveal the specifics of the extent to which USCG represents went to disrespect my attempts to conduct proceedings consistent with due process.

Referring back to the February 24, 2005 meeting attended by USCG personnel from all ranks and members of the Chief Judge’s senior staff, the meeting that was supposed to be an airing of grievances about my courtroom demeanor, according to Ken Wilson’s synopsis of the meeting (as told to me on February 28), the paramount issue of discussion at that meeting turned out to be my rulings on discovery issues. The USCG personnel complained bitterly about the fact that I even allowed discovery past the bare minimum required by the regulations. They threatened to seek an amendment of the regulations which would take away an ALJs discretion in these matters.

On March 7, 2005, a “Guideline Memorandum” (also referred to as a “policy letter”) was issued by Judge Ingolia to all USCG ALJs. The content and even the grammar contained in this memorandum was very similar to the pleadings filed in the three cases I mentioned above. I find it beyond belief that the Chief Judge, all on his own, came up with the exact same interpretations of the discovery regulations that the USCG presented in these cases. In my opinion, there was interaction between the USCG personnel in the field and the Chief Judge’s office about what the memorandum would say. On every point, Judge Ingolia’s interpretation of discovery regulations was in opposition to the rulings I had made in these three cases.

On March 31, 2005, I wrote a detailed memorandum to Chief Ingolia, presenting a point by point critique of his March 7 directive as well as an accusation that the timing of the memorandum was a further attempt to influence my rulings in pending cases. By this time, Judge Ingolia had instructed me to travel to Baltimore for a meeting with him on April 8, 2005.

One of the things that occurred at the April 8 meeting was my telling Judge Ingolia that I challenged his authority to issue any policy directive to me (an ALJ in the field) unless he did so in the form of an “ALJIPP.” An ALJIPP is an Administrative Law Judges’ Internal Practices and Procedures Series. By law (44 CFR 1.01-25), the Chief ALJ is required to publish “statements of policy, clarification of points of procedure, and general administrative

instructions” as an ALJIPP, and to “maintain a complete file of these publications for reading purposes during normal working hours.”

I maintained that while he was my supervisor for administrative purposes, he could not tell me how to interpret a regulation unless he did so in the form of an ALJIPP. I also pointed out that his issuance of a policy directive that was not made available to the public was in contradiction of the application of due process. He disagreed with me, although he could not cite to any authority that supported his argument. He said that his staff would research it, but as of August 17, 2005 (my last email communication with his office on this subject before Hurricane Katrina forced the closure of offices in New Orleans), the only response I had received was from George Jordan. Mr. Jordan said he could do what he did, because he could do what he did . . . . basically *ipse dixit*.

### **CULTURE OF IGNORING DUE PROCESS**

Prior to the April 8, 2005 meeting between myself and Judge Ingolia (also present were George Jordan, Ken Wilson, and Megan Allison) I had also written him a memorandum specifically alleging the pressure he and his staff were exerting on me concerning my rulings, coupled with the actions of the USCG field personnel, resulted in a hostile work environment for me. I thought that this was going to be the primary topic of discussion at our April 8 meeting.

Instead, the meeting was (1) a forum for Mr. Jordan to vent his indignation at my prior suggestion that he was collaborating with field personnel in pressuring me to rule in ways that favored the USCG; and (2) a forum for Judge Ingolia to berate me for being the “problem” that was disrupting his “big happy family.” Specifically, he told me:

- Discovery is not necessary in S&R cases
- Don’t follow what the regulations say if the USCG does not agree with it
- Use my discretion in making rulings unless it means that I am going to make a decision that the USCG doesn’t like
- Even though the regulations say the time and place of the hearing is determined by the ALJ, I must hold the hearings at the MSO office if that is what the USCG wants
- Appearance of impropriety is not an issue—unless someone raises it
- I have no obligation to avoid the appearance of impropriety
- Never ask the USCG to do one minute’s more work than they choose to do
- I’m not really a judge—I am a tool for the USCG to use to impose sanctions against Mariners they KNOW are correct, whether they can really prove the allegations justifying the sanctions or not
- Even though he did not know the specifics of any case I had heard, nor had he read a single transcript of a single hearing, he believed all of the complaints the USCG had made about my conduct in the courtroom

## **ENSURING DUE PROCESS AT USCG HEARINGS**

The plain language of 33 CFR §20.608(a) provides that any party may request the ALJ to issue a subpoena “for . . . the production of books, papers documents or any other relevant evidence during discovery or for any hearing.” Per the provisions of 33 CFR §20.202, it is within the power of the undersigned to issue subpoenas, order discovery, hold hearings, and regulate the course of hearings, to name just a few of the powers enumerated there. In fact, the powers of a presiding ALJ at an USCG hearing are virtually a mirror image of those contained in 5 USC §556(c), which lists powers authorized for “employees presiding at [due process] hearings.” I insert the words “due process” here because that is what judges appointed pursuant to the APA do—they hold due process hearings and they NEVER hold hearings where due process is not in effect.

The right of the government to deprive a person of life, liberty, or property is subject to the general restrictions contained in both the Fifth and Fourteenth Amendments to the United States Constitution. Even when exercising a legitimate government interest—such as the monitoring of USCG issued Mariner’s credentials—the extent of the government’s powers are not without limit.

Between July 2004 and August 2005, I came to know first hand that the administration of due process in S&R hearings at the USCG was not a priority and NEVER to be a concern if its preservation would result in a ruling adverse to a position of the USCG. In thirty years of experience, I have not come close to experiencing the level of arrogance and disrespect for due process that I experienced at the USCG in the administration of its hearings. From Judge Ingolia all the way down to the newest IO, the environment was saturated with a total disregard for Mariner’s rights. My attempts to hold fair and balanced hearings were so foreign to the USCG personnel that they resorted to personal attacks on my courtroom demeanor and repeatedly alleged I was generally biased in the favor of Mariners.

My only bias is towards upholding due process.

In my opinion, this Committee should take all necessary steps to stop the abuses of power that are ongoing within the USCG—abuses that permeate the USCG at all levels. I know of no power other than the oversight power invested in Congress that is strong enough to reorganize, reconstruct, and provide the relief that all Mariners are entitled to under the law as it is written—not as it is applied or practiced in the current S&R hearing program at the USCG.

Respectfully Submitted,

Jeffie J. Massey