



**U.S. House of Representatives
Committee on Transportation and Infrastructure**

Washington, DC 20515

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July 27, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure
FROM: Subcommittee on Coast Guard and Maritime Transportation
SUBJECT: Hearing on Reviewing the Coast Guard's Administrative Law System

PURPOSE OF HEARING

The Subcommittee on Coast Guard and Maritime Transportation will meet on Tuesday, July 31 at 10:00 a.m. to receive testimony on the Coast Guard's administrative law system. The hearing has been called to consider whether the policies and procedures currently governing the adjudications conducted under the system are fair to all who appear before it.

BACKGROUND

Overview of Administrative Law

Administrative agencies of the executive branch of the United States federal government are assigned by Congress to conduct rulemakings and to enforce their agency regulations. The body of law that pertains to these activities is called administrative law. The judges who conduct trial type hearings in the rulemaking and adjudicatory processes are called administrative law judges (ALJ). These hearings are generally conducted in enforcement cases, entitlement cases, regulatory cases, and contract cases.

The rules governing evidentiary hearings in the administrative process are separate from the judicial processes followed by judges in the judicial branch and are governed by the Administrative Procedure Act (APA), which was enacted in 1946. Separately, those federal agencies which maintain administrative law systems have generally set forth their own unique procedural rules and regulations within the Code of Federal Regulations. While these rules and regulations can vary widely among executive agencies, all agency procedural rules and regulations must comport with the APA and provide all of the protections required in the APA. These protections include the right to receive notice of proceedings and of the issues

to be considered in proceedings, the right to be represented by counsel, and the right to confront and cross-examine witnesses.

Administrative adjudications are overseen by ALJs. Administrative adjudications do not involve juries – and therefore an ALJ is responsible both for making determinations of fact and for rendering legal decisions.

The appointment of ALJs is also governed by the APA. Unlike all other judges in the United States, ALJs are appointed solely on a merit basis through an assessment process conducted by the Office of Personnel Management. Under revised regulations that took effect on April 19, 2007, applicants for ALJ positions must be attorneys with a minimum of seven years of trial experience and/or administrative law experience involving formal administrative adjudicatory procedures. Based on assessments of experience and other qualifications, applicants are given a ranking and placed on a roster of individuals found to be qualified for ALJ positions. Agencies seeking to appoint an ALJ must then draw from the roster in an order specified by the OPM or seek applications from sitting ALJs working for other federal agencies.

Because ALJs are employees of the agencies on whose cases they rule, specific procedures and policies have been established by the APA to ensure that ALJs remain separate from the influence of other agency personnel. For example, ALJs may not be subjected to performance evaluations and they may not be supervised by any agency personnel involved in investigating or prosecuting the cases that come before the administrative law system. If misconduct is alleged against an ALJ, that charge must be considered by the Merit Systems Protection Board (MSPB).

Decisions rendered by an ALJ may be appealed. The first level of appeal is made to a board or authority within the agency that originated the case. Subsequent appeals may be made through the federal court system.

According to the OPM, as of January 9, 2006, there were approximately 1,400 individuals working as ALJs at 29 separate federal agencies. The single largest ALJ system exists within the Social Security Administration.

Operations of the Coast Guard's Administrative Law System

There are currently seven Coast Guard ALJs – including the Chief ALJ. They hear cases in Baltimore, MD; New Orleans, Louisiana; New York, New York; Norfolk, Virginia; Houston, Texas; Alameda, California; and Seattle, Washington.

The Chief ALJ reports directly to the Commandant of the Coast Guard and advises the Commandant on the administrative law system. According to job descriptions provided by the Coast Guard, the mission of the position is to “administer and coordinate all matters concerning suspension and revocation proceedings against the licenses and documents of seamen and motorboat operators in fulfillment of the Coast Guard’s statutory mandate to promote, foster, and maintain public safety of life and property, in the interest of passengers, crews, cargoes, shipowners and the general public.”

To that end, the Chief ALJ is responsible for the supervision and administration of the ALJ program. The Chief ALJ is also responsible for providing leadership in developing, implementing, and reviewing hearing program processes and procedures to monitor the overall effectiveness, efficiency, and productivity of the program; he/she also ensures that ALJs are provided with copies of laws, regulations, agency policy statements, and rules of practice that apply to the conduct of their hearing proceedings. The Chief ALJ's leadership responsibilities include reviewing the written decisions and orders of each ALJ to ensure their general compliance with agency rules and procedures and with the APA. The Chief ALJ also has the authority to investigate allegations of improper conduct on the part of administrative law system employees – including ALJs – who are suspected of violating laws, regulations, and agency operating regulations and procedures. Finally, the Chief ALJ also assigns cases and resolves differences among individual judges or other officials concerning the conduct of hearing program operations.

Under the supervision of the Chief ALJ, ALJs are responsible for conducting formal hearings and supervising the disposition of cases as assigned. In addition to hearing cases brought by the Coast Guard under Coast Guard administrative law, Coast Guard ALJs also hear cases from the National Oceanic and Atmospheric Administration (NOAA), the Bureau of Industry and Security (BIS), and the Transportation Security Administration (TSA). Coast Guard ALJs will handle appeals related to applications for the Transportation Worker Identification Credential following that program's roll-out by TSA later this year.

According to data provided by the Coast Guard, since 1999, a total of 659 cases have been filed by NOAA under NOAA administrative law proceedings with the Coast Guard's docketing center, of which 570 were settled prior to the conduct of a hearing. Of the remaining cases, 3 were eventually withdrawn, 5 received summary decisions, orders denying hearing requests were issued in 3 cases, decisions were issued in 40 cases, and 38 cases are pending.

Similarly, according to data provided by the Coast Guard, since TSA was established, that agency has filed 409 cases in the Coast Guard's docketing center. Orders granting motions for decision (which are used in summary decisions or default cases) were issued in 55 cases, orders dismissing hearing requests were issued in 4 cases, and 200 cases did not proceed to a hearing either because TSA and the respondent reached a settlement or because the respondent requested an informal conference with TSA counsel rather than a hearing before an ALJ. Decisions and orders have been issued in 26 cases. A total of 124 cases remain pending.

Coast Guard Administrative Law Procedures

The Coast Guard brings two types of cases against mariners that are adjudicated by ALJs: suspension and revocation (S & R) cases and Class II civil offenses. S & R cases are those cases in which the Coast Guard alleges mariner misconduct or negligence and seeks either the temporary suspension or the permanent revocation of a mariner's professional credential. Class II civil offenses are those offenses for which civil penalties exceeding \$25,000 may be assessed; according to Coast Guard records, only 8 Class II civil offense cases have been heard by Coast Guard ALJs since 1994.

The cases are investigated and prosecuted by investigating officers (IOs) under Coast Guard administrative law regulations. IOs are generally junior officers or warrant officers in the marine safety program but they are generally not lawyers. IOs may receive assistance from Coast Guard legal personnel if they are investigating or presenting a particularly complicated case.

The rules and regulations governing the Coast Guard's administrative law system are provided in 33 CFR Chapter 1 Part 20. The rules currently in force took effect in 1999 and made important modifications to the rules in effect prior to 1999. Prior to 1999, the procedures of Coast Guard administrative adjudications mirrored the Uniform Code of Military Justice and strongly echoed criminal proceedings. In 1999, the procedures were altered to more closely echo civil proceedings.

Among other changes, the 1999 rules set forth pre-hearing discovery rules when previously none were provided; altered the allegation from being known as a "charge sheet" to being identified as a "complaint;" required the respondent to file a written answer to the complaint within 20 days of the issuance of the complaint rather than requiring the ALJ to convene a hearing to receive the mariner's answer to what was then known as a charge; and required that a default motion be filed if a respondent failed to appear at a hearing rather than requiring the conduct of a hearing *in absentia*.

Further, the 1999 rule changes gave the Coast Guard the right to appeal decisions; previously, that right had been reserved for respondents. Appeals of decisions rendered by Coast Guard ALJs made either by the respondent or by the Coast Guard go first to the Commandant of the Coast Guard for consideration. Either party may then appeal the Commandant's decision to the National Transportation Safety Board (NTSB). Subsequent appeals are lodged with the United States circuit court.

Figures on Administrative Law Cases Brought by the Coast Guard

Provided below are figures on the total number of cases brought before the Coast Guard's administrative law system and on case dispositions since the enactment of the new rules governing the service's administrative law system in 1999. Additional figures are provided on appeals made to the Commandant, the NTSB, and the federal court system. All of these figures are based on data provided by the Coast Guard.

Total Number of Allegations Filed Against Mariners

Between July 1999 and February 2007, the Coast Guard opened 5,684 dockets covering 6,321 allegations charged against mariners. A single docket may include more than one allegation.

Except where otherwise noted, all subsequent figures are based on the number of allegations filed rather than dockets opened. Table 1 below details the total number of allegations filed before the Coast Guard's administrative law system in each year between July 1999 and February 2007.

Table 1: Allegations Filed in the Coast Guard Administrative Law System
(July 1999 through February 2007)

Year	Total Number of Allegations	Alleged Use of Dangerous Drugs	Convictions for Drugs/DUI/other offenses in other courts	Alleged Incompetence, Misconduct, or Negligence	Alleged Violation of Marine Safety Law
1999	496	319	6	136	35
2000	954	539	21	289	105
2001	926	530	22	270	104
2002	862	521	15	226	100
2003	796	444	19	257	76
2004	765	382	35	248	100
2005	744	336	87	238	83
2006	688	328	47	240	73
2007	90	42	5	32	11
TOTAL	6,321	3,441	257	1,936	687

Disposition of Allegations Filed Against Mariners

There are a number of possible dispositions for the allegations filed in the docketing center.

- **Withdrawn by Coast Guard:** If allegations are withdrawn by the agency, they are classified as withdrawals. If an allegation is withdrawn before answers are filed or if all parties agree to the withdrawal, an ALJ order is not required to affirm the withdrawal. If, however, the case is withdrawn after the respondent has filed a response, an ALJ must issue an order and the order will state whether the case is withdrawn with or without prejudice. Importantly, the majority of withdrawals arise when the respondent enters into a voluntary surrender or voluntary deposit agreement.
- **Administrative Withdrawal:** If an allegation cannot be served on a mariner (because he or she cannot be located), the case may be withdrawn on administrative grounds. These cases may be re-filed if the mariner is later found. Cases that are withdrawn on administrative grounds are never assigned to an ALJ.
- **Default:** If an allegation is served on a mariner but the mariner never files a response, the case is assigned as a default. Cases in default are assigned to ALJs, who must then issue the requested order if the allegation is found to be valid and the allegation was properly served.
- **Settlement:** If the agency and the respondent (mariner) enter a settlement agreement before the mariner enters a pleading, the ALJ reviews the agreement and will issue a consent order if he/she approves the settlement.

- **Admissions:** If the respondent admits to the allegations filed against him/her, the case is classified as an admission. If the ALJ finds the complaint to be valid and the sanction to be appropriate, the ALJ is required to issue an order.
- **Contested:** If the respondent denies an allegation or objects to the proposed sanction, a docket is assigned as a contested case. The disposition of contested cases is discussed in more detail below.

Information on the disposition of the 6,321 allegations identified in Table 1 above is provided in Table 2. Importantly, the dispositions shown in the table below are not one-to-one dispositions for the cases identified in each year in Table 1. Rather, the dispositions recorded in Table 2 are the dispositions achieved in each of the years shown – but they may be resolutions of cases that originated in prior years.

Table 2: Disposition of Allegations Filed in the Coast Guard Administrative Law System

YEAR	Withdrawals	Administrative Withdrawals	Defaults	Settlements	Admissions	Contested Cases	TOTAL
1999	39	53	98	171	49	81	491
2000	77	57	135	403	108	159	939
2001	60	77	131	457	77	119	921
2002	68	59	129	422	58	118	854
2003	46	54	120	374	77	116	787
2004	59	51	92	343	72	141	758
2005	45	81	101	337	58	108	730
2006	26	1	95	290	84	109	605
2007	2	0	0	44	12	6	64
TOTAL	422	433	901	2,841	595	957	6,149

In addition to the dispositions shown in Table 2, 119 allegations are pending an initial answer and are therefore not counted in the Table. Further, 53 allegations docketed by the Coast Guard from 1999 until 2007 involved the temporary suspension of a mariner's license. Such suspensions last for 45 days and do not involve an ALJ.

Regarding the withdrawn cases, the 422 allegations cited above were contained in 382 total dockets. Of those 382 dockets, according to the Coast Guard, 353 were withdrawn without an ALJ order – meaning that they were withdrawn before the mariner filed a response.

Disposition of Contested Cases

The 957 allegations that were contested were contained in 740 dockets. The disposition of these contested cases is detailed in Table 3 below.

Table 3: Disposition of Contested Cases

Action	Total Number of Dockets	Total Number of Allegations
Hearing was held and orders were issued	152	218
Case was settled	326	423
Case was dismissed	131	146
Case defaulted for failure of respondent to appear at hearing	24	26
Respondent admitted allegation prior to the completion of a hearing	11	11
Case still in progress	96	133
TOTAL	740	957

Among the 152 dockets regarding which a hearing was fully completed and an order was issued, the allegations were proven in 93 cases while only some charges on a docket were proven or contested sanctions were reduced in 31 cases. The allegations were not proven in 18 cases. Three cases were dismissed and other dispositions (including the remanding of cases) were reached in 7 cases.

Among the 131 dockets that were dismissed by the ALJ, 45 were dismissed after the mariner voluntarily surrendered his/her credential, 39 were dismissed due to issues with evidence, 13 were dismissed after the mariner accepted a letter of warning, 7 were dismissed because the respondent had no valid credential, and 4 were dismissed on procedural grounds. Other grounds for dismissal were cited in the remaining cases (including settlement agreements or death of the respondent etc.).

Appeals to the Commandant

Since 1999, the Coast Guard has appealed 6 cases to the Commandant following the issuance of an ALJ's ruling. In two cases, the original decisions rendered by the ALJs were affirmed. In one case, the ALJ's decision was affirmed but modified. In three cases, the original decisions of the ALJs were overruled and the cases were remanded back to the administrative law system for further consideration.

Mariners have appealed 37 cases to the Commandant, of which 28 (or 75.6%) were affirmed without modification. One was affirmed but later remanded to the NTSB. Five cases were remanded back to the Coast Guard's administrative law system for further consideration. In one case, the order of the ALJ was affirmed but the sanction was modified. In one case, part of the order was affirmed and part was dismissed. One case was dismissed entirely.

These appeals included 7 cases in which mariners appealed the decision of an ALJ alleging misconduct on the part of the ALJ. Regarding these allegations of misconduct, in one case, the Commandant found that the mariner party did not provide sufficient evidence

to establish bias or pre-judgment of the case on the basis of an alleged *ex parte* communication; the NTSB subsequently reversed the Commandant's decision and remanded the case, finding that even the appearance of bias was sufficient to require re-assignment of the case. In four cases, the Commandant rejected the appeals either because the mariners' arguments were unpersuasive or because ALJ findings were determined by the Commandant to be proper. Two cases were remanded for further consideration on the basis of other procedural grounds (and bias allegations were not considered). Aside from the one case noted previously, the NTSB has never overturned a Commandant's decision in any appeal alleging ALJ misconduct.

Appeals to the NTSB

A total of 32 cases have been appealed to the NTSB (including appeals initiated by either the mariner party or the Coast Guard) since that agency was created in 1967. All of these appeals were originated by mariners; no appeals have ever been originated by the Coast Guard. The NTSB affirmed the decisions of the Commandant in 21 of the cases, affirmed the Commandant's decisions but modified the sanctions imposed against mariners in two cases, reversed the Commandant's decision in one case, remanded one case for further consideration, and dismissed 6 appeals either because the appeals were not filed in a timely fashion or because the NTSB felt it did not have jurisdiction over the matter being appealed. One appeal filed with the NTSB was subsequently withdrawn before the NTSB could act on the matter.

Appeals to the Federal Court System

Since 1999, a total of 7 cases have been appealed to federal court (including District Court and the Court of Appeals). One case was reversed and remanded back to the NTSB, which subsequently affirmed the Commandant's decision on the matter. Four cases were dismissed because the federal courts in which the appeals were filed determined that they lacked jurisdiction in the matters. In one case, the court denied the petition for review because the court found substantial evidence to support the ALJ's decision. In one case, while the appeal was pending, the Coast Guard and the mariner party reached a settlement encouraged by the court. The settlement included the return of the mariner's license. Part of the settlement also included an agreement that both parties would ask the federal judge to withdraw her decision finding that the federal court did have jurisdiction over the matter – but the judge refused to withdraw the opinion despite the request. The Coast Guard also provided \$10,000 to the respondent in attorney's fees but the decision issued by the ALJ and confirmed by the Commandant was never vacated.

Issues to be Considered During the Hearing

This hearing will examine whether the policies and procedures that govern the Coast Guard's administrative law system comport with the requirements of the APA and ensure that all mariners accused in suspension and revocation cases receive fair hearings. The Subcommittee is aware of allegations of impropriety in the management of the administrative law system, including accusations of improper contact between members of the administrative law system and other Coast Guard personnel, accusations that the Chief ALJ pressured judges to rule in favor of the Coast Guard, and accusations that judges may

have been subjected to hostile work conditions. Additionally, the Subcommittee will examine the application of CFR Part 20, Section 601 pre-hearing discovery regulations during the conduct of administrative adjudications and will examine the impact that the changes in procedural rules made in 1999 have had on the conduct of adjudications.

PREVIOUS COMMITTEE ACTION

The Subcommittee on Coast Guard and Maritime Transportation has never previously convened a hearing on the Coast Guard's administrative law system.

WITNESSES

Rear Admiral Brian Salerno
Director of Inspection and Compliance
United States Coast Guard
Washington, DC

Captain Thomas Sparks
Commanding Officer, Marine Safety Unit
United States Coast Guard
Port Arthur, Texas

Judge Peter A. Fitzpatrick
Former Coast Guard ALJ

Judge Rosemary Denson
Former Coast Guard ALJ

Judge Jeffie Massey
Former Coast Guard ALJ

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