



Department of Homeland Security Office of Inspector General

Allegations of Misconduct within the Coast Guard Administrative Law Judge Program

(Redacted)



Notice: The Department of Homeland Security, Office of Inspector General has redacted the report for public release. A review under the Federal of Information Act will be conducted upon request.



**Homeland
Security**

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Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the department.

This report addresses certain allegations made against the United States Coast Guard's Administrative Law Judge program, including but not limited to allegations that the program is biased in favor of the Coast Guard and that the Chief Administrative Law Judge either controls or attempts to control the outcome of cases decided by his subordinate judges. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

We trust this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

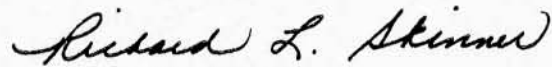

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Abbreviations

ABA	American Bar Association
ALJ	Administrative Law Judge
ALJIPP(s)	Administrative Law Judge Internal Procedure(s) and Practice(s)
APA	Administrative Procedure Act
CDOA(s)	Commandant Decision(s) on Appeal
DEA	Drug Enforcement Agency
DHS	Department of Homeland Security
FERC	Federal Energy Regulatory Commission
FOUO	For Official Use Only
LMI	Office of Maritime and International Law
MSPB	Merit Systems Protection Board
MSU	Marine Safety Unit
NOAA	National Oceanic and Atmospheric Administration
NTSB	National Transportation Safety Board
OIG	Office of Inspector General
OPM	Office of Personnel Management
S&R	Suspension & Revocation

OIG

Department of Homeland Security
Office of Inspector General

Executive Summary

On May 9, 2007, a retired United States Coast Guard (USCG) Administrative Law Judge (ALJ), Jeffie J. Massey, filed an affidavit in support of the plaintiff in *Dresser vs. Ingolia et al.*, Civil Action No. 07-1497 (Eastern District, Louisiana). In her affidavit, and when later testifying before Congress, ALJ Massey made several allegations of bias within the Coast Guard's ALJ program. ALJ Massey said that the Chief ALJ, Joseph N. Ingolia, specifically told her to always rule in the Coast Guard's favor. She also inferred from other alleged remarks made by him and another Coast Guard ALJ that the Chief ALJ had directed that ALJ to rule in favor of the Coast Guard. ALJ Massey also alleged that the Chief ALJ and others engaged in improper conversations regarding pending cases.

The allegations have brought the integrity of the entire ALJ program into question. Congress introduced legislation to transfer suspension and revocation hearings to the National Transportation Safety Board, and respondents appearing before the Coast Guard's ALJs have questioned the independence of its ALJs. At the request of the Vice-Commandant for the Coast Guard, we initiated a review to determine the merits of ALJ Massey's allegations.

We were not able to substantiate ALJ Massey's allegations. We did not determine that the Chief ALJ and others made the alleged remarks, or that the remarks, if made, meant that the Chief ALJ and others engaged in misconduct by directing subordinate ALJs to rule in favor of the Coast Guard. There is no evidence supporting ALJ Massey's claim that the Chief ALJ held improper conversations with other ALJs about desired outcomes in specific cases or otherwise deprived mariners of due process in administrative proceedings. We did determine that the Chief ALJ instructed ALJ Massey to follow regulations because she was not following regulations. ALJ Massey's conduct in disclosing the allegations also reinforced our conclusions and led us to doubt her claims. The Coast Guard declined to provide formal comments in response to our draft report.

Background

History and Formation of the Coast Guard's Administrative Law Judge Program

One of the primary duties of the Coast Guard is to enforce or assist in the enforcement of all federal laws applicable to high seas and waters subject to the jurisdiction of the United States. Another duty is to administer laws and promulgate and enforce regulations for the promotion of safety of life and property on the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department.

The Administrative Procedure Act (APA) (5 U.S.C. § 551 *et seq.*), enacted in 1946 to create uniformity among the various federal agencies, created comprehensive statutes for rulemaking and administrative adjudications. With respect to adjudications, the APA requires that an impartial and independent fact finder, such as an ALJ, presides over certain hearings. To ensure parties receive fair hearings, the APA prohibits an ALJ from being “responsible to or subject to the supervision or direction of an employee. . . engaged in the performance of investigative or prosecuting functions for an agency.”¹ The APA prohibits “[a]n employee engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review”²

Typically, Coast Guard administrative proceedings focus on two regulatory schemes to maintain safety in maritime operations: (1) suspension and revocation (S&R) of merchant mariners' credentials (46 U.S.C. Chapter 77); and (2) assessment of class II civil penalties (CII) in accordance with provisions of the Federal Water Pollution Control Act (33 U.S.C. § 1321(b)(6)) and the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9609(b)). The S&R regulations are intended to be straightforward and easy to understand so that neither the Coast Guard nor the respondent needs legal representation in order to successfully resolve the dispute. The S&R proceedings are also intended to achieve a remedial, not a punitive result, of maintaining the safety of waterways. They are not necessarily to discipline errant mariners. Historically, S&R and class II civil penalty hearings represent only a very small portion of the Coast Guard's mission-related activities.

¹ 5 U.S.C. § 554(d)(2)

² 5 U.S.C. § 554(d)

Pursuant to the APA and Coast Guard regulations, the Chief ALJ assigns ALJs to preside over administrative proceedings. An ALJ must be an impartial finder of fact, free from the influence of the Coast Guard or any other person or entity when hearing and deciding Coast Guard cases. The respondent must be given notice of the charges against him or her and the opportunity to rebut those charges in a hearing before an impartial ALJ. When the administrative proceeding is concluded, the ALJ renders a decision that becomes the decision of the agency unless the decision is appealed to, or upon motion of, the agency. Either party may appeal the ALJ's decision by filing a notice of appeal with the ALJ program within 30 days after the issuance of the decision and subsequently filing an appellate brief with the Coast Guard's Commandant within 60 days of the issuance of the decision.

The Coast Guard's Office of Maritime and International Law (LMI) handles the appeals of an ALJ's initial decision to the Commandant. Its staff reviews the record of the proceedings and the appellate briefs and drafts the Commandant's Decision on Appeal (CDOA) for review and signature by the Vice Commandant. The Vice Commandant signs CDOAs on the Commandant's behalf.

Even when an ALJ's decision has not been appealed by the respondent, the Commandant can review it when there is a finding that the charge was proved. When the respondent disagrees with the Commandant's decision, he or she may appeal the Commandant's decision to the National Transportation Safety Board (NTSB). The respondent may appeal the NTSB's decision to an appropriate federal court of appeal.

ALJs have a unique status because they remain independent of their associated agency. Specifically, an ALJ's income is not subject to the agency's performance evaluation, and an ALJ is not subject to managerial controls by the agency. In addition to hearing Coast Guard administrative cases, Coast Guard ALJs preside over cases from the Department of Commerce's Bureau of Industry and Security and the National Oceanic and Atmospheric Administration (NOAA). They are also responsible for administrative cases arising from the Department of Homeland Security's (DHS) Transportation Security Administration.

Organization of the Program

The Coast Guard became a component of DHS in 2003. The Coast Guard Commandant reports directly to the Secretary of DHS. The Commandant leads the Coast Guard and is responsible for its policy and administration. However, the Commandant has delegated to the Vice Commandant the

authority to take final agency action in S&R proceedings, except for petitions or appeals in a case where an ALJ ordered revocation of a merchant mariner's credentials.

The Commandant appoints the Chief ALJ. The Chief ALJ serves as the head of the ALJ program and is responsible for overseeing the ALJ program as well as hiring, supervising, and managing the ALJ program staff. Among other things, the Chief ALJ is responsible for the training of new ALJs assigned to conduct S&R hearings.

Because ALJs are independent fact finders, they do not report to any particular individual or have a traditional chain of command. However, the Chief ALJ assigns ALJs to preside over particular administrative proceedings upon receipt of a complaint and has the authority to review ALJs' decisions and orders. Coast Guard ALJs have all powers necessary to conduct fair, fast, and impartial hearings including the authority to:

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on motions;
- (4) order discovery as provided for in 33 C.F.R. Part 20;
- (5) hold hearings or settlement conferences;
- (6) regulate the course of hearings;
- (7) call and question witnesses;
- (8) issue decisions;
- (9) exclude any person from a hearing or conference for disrespect, or disorderly or rebellious conduct; and
- (10) institute policy authorized by the Chief Judge.³

The ALJ program is a small unit that typically employs less than 30 people. Since its inception in 1948, the ALJ program has had three Chief ALJs. In 1991, the Coast Guard hired its current Chief ALJ, Joseph N. Ingolia. The Chief ALJ is the ALJ program's chief executive. The Chief ALJ's senior staff includes the Director of Judicial Administration, the Senior Attorney Advisor and the Attorney Advisor/Senior Law Clerk. The Chief ALJ delegates many of his administrative duties to his senior staff, giving them primary responsibility for the day-to-day management of the ALJ Program. As a result, the Chief ALJ's senior staff is responsible for training the field ALJs, providing ALJs with legal assistance and advice, and managing the ALJ program's more junior staff. Currently, the ALJ program operates ALJ field offices in Alameda, CA, Houston, TX, New Orleans, LA, New York, NY, and Seattle, WA. One

³ 33 C.F.R. § 20.202

ALJ is assigned to Baltimore, MD. Each ALJ field office typically employs one ALJ and one paralegal specialist.

The ALJ program's docketing center in Baltimore, MD functions as the program's headquarters. Created in 1997, the docketing center manages all filings associated with Coast Guard administrative proceedings by storing case files and records, maintaining a system for tracking and monitoring files, assisting parties in filing documents, and answering inquiries from the public. The docketing center has attorneys on staff who can assist ALJs with legal research or program rules of practice or policy. Although the docketing center does not provide formal training, it provides ALJs with an initial orientation and continuing legal education conferences. Since 1999, the docketing center has assigned uncontested cases to ALJs on a rotational basis. The docketing center generally assigns contested cases to the ALJ with responsibility for the geographic area where the Coast Guard filed the complaint.

ALJ Massey's Allegations

On May 9, 2007, retired Administrative Law Judge (ALJ) Jeffie J. Massey filed an affidavit in support of the plaintiff in *Dresser vs. Ingolia et al.*, Civil Action No. 07-1497 (Eastern District, Louisiana). In this case, Mr. Dresser alleged that the defendants, who at the time of the alleged events were employees in the Coast Guard ALJ program, violated his constitutional right to due process by trying to predetermine the outcome of proceedings with respect to his mariner's credentials. In her affidavit, ALJ Massey made several allegations regarding the ALJ program. First, ALJ Massey alleged that at a lunch on December 7, 2004, ALJ Brudzinski remarked about one of his cases, "If I ruled that way, the Chief Judge would have my job" and that based on his statements, ALJ Brudzinski was not an independent fact finder and the Chief ALJ told him how to rule in the Dresser case. Second, ALJ Massey said that during an April 8, 2005, meeting with the Chief ALJ, the Chief ALJ specifically told her that she should always rule for the Coast Guard. ALJ Massey also alleged that the Chief ALJ and others engaged in improper conversations regarding pending cases.

ALJ Massey did not disclose the alleged misconduct for nearly two years after the events occurred and just two weeks after she retired from the Coast Guard. ALJ Massey raised concerns of growing tension between her and Coast Guard investigating officers to the Chief ALJ and mentioned in an April 4, 2005, memorandum to the Chief ALJ that she felt she was being pressured to rule in favor of the Coast Guard. However, she first publicly reported her allegations to a mariner's attorney who regularly

appeared before her while she was a Coast Guard ALJ. The attorney used her statements in a lawsuit against Coast Guard employees.

The allegations have had serious repercussions for the ALJ program. Beginning on June 24, 2007, the *Baltimore Sun* published a series of articles about the ALJ program. In response, on July 31, 2007, the House Transportation and Infrastructure Committee's Subcommittee on the Coast Guard and Maritime Transportation held a hearing to explore these allegations. ALJ Massey testified at the hearing along with representatives of the Coast Guard. Neither the Chief ALJ nor any other member of the ALJ program with first-hand knowledge of the facts underlying ALJ Massey's allegations testified at the hearing. The subcommittee subsequently introduced legislation that, had it become law, would have transferred S&R proceedings and much of the ALJ program budget to the NTSB. As a result of these events, respondents scheduled to appear before Coast Guard ALJs have questioned the integrity of the ALJ program and its ALJs' independence.

Results of Review

In October 2008, the Coast Guard requested that we investigate ALJ Massey's allegations, which challenged the fundamental fairness of the Coast Guard's ALJ program. In January 2009, we initiated a review to determine whether the Chief ALJ directed subordinate ALJs to rule in favor of the Coast Guard and discussed desired outcomes in specific cases with other ALJs and other employees.

We were not able to substantiate ALJ Massey's allegations. Although ALJ Massey referred to other events as evidence of wrongdoing by the Chief ALJ, her allegations hinged primarily on her interpretation of two alleged remarks made in her presence. We did not determine that the Chief ALJ and others made the alleged remarks, or that the remarks, if made, meant that the Chief ALJ and others engaged in misconduct by directing subordinate ALJs to rule in favor of the Coast Guard. There is no evidence supporting ALJ Massey's claim except her own statements that the Chief ALJ held improper conversations with other ALJs about desired outcomes in specific cases. Given the protections afforded ALJs from improper adverse employment actions, as well as the construct of the Coast Guard ALJ program, neither the Chief ALJ nor the Commandant can remove a sitting ALJ without an MSPB proceeding. We did not identify any specific effect resulting from the Chief ALJ's alleged pressuring of ALJs to rule for the Coast Guard.

We did determine that the Chief ALJ was justified in instructing ALJ Massey to follow regulations because she was not following regulations. ALJ Massey and the Coast Guard interpreted the APA's guarantee of judicial independence differently, which caused a divide between ALJ Massey and the Coast Guard regarding the proper role of an ALJ in an S&R proceeding. Specifically, the Administrative Procedures Act safeguards an ALJ's decisional independence, that is, the authority to determine the facts based on the record, and to apply the law to those facts. However, the APA does not grant an ALJ the authority to ignore an agency's rules, regulations, policies, or interpretations of law. The Commandant issues statements of policy and interpretations of law via CDOAs, which are binding precedent that ALJs must follow. ALJ Massey repeatedly ruled in contravention of Coast Guard regulations and did not follow at least one CDOA.

As a result, ALJ Massey's brief employment at the Coast Guard was rife with conflict. We noted a pattern of growing tension and distrust between ALJ Massey and most of the Coast Guard employees with whom she interacted, including the Chief ALJ, several members of the ALJ program staff, and the Coast Guard's investigating officers and attorneys. These factors likely contributed to ALJ Massey's belief that the Chief ALJ and others were engaging in misconduct and pressuring her to rule against mariners. The circumstances surrounding the manner in which ALJ Massey disclosed the allegations also reinforced our conclusions and led us to doubt her claims.

We Could Not Substantiate ALJ Massey's Allegations

ALJ Massey's allegations hinge primarily on a few remarks allegedly made by ALJ Brudzinski during a December 7, 2004, lunch in New Orleans, LA, and by the Chief ALJ during an April 8, 2005 meeting at the docketing center in Baltimore, MD. Specifically, ALJ Massey alleges: (1) the Chief ALJ told her to rule in favor of the Coast Guard; (2) the Chief ALJ's use of the phrase "one big happy family" meant that she needed to do her part to support the Coast Guard; (3) ALJ Brudzinski stated, "If I ruled that way, the Chief Judge would have my job" and (4) the Chief ALJ discussed open cases with a subordinate ALJ. We could not substantiate these allegations. We did not identify any evidence that the Chief ALJ told his subordinate ALJs how to rule or attempted to control the outcome of a case.

There is No Evidence that the Chief ALJ Told ALJ Massey to Always Rule in Favor of the Coast Guard

Since leaving the Coast Guard in 2007, ALJ Massey stated on several occasions that the Chief ALJ specifically told her to rule in favor of the Coast Guard during a meeting held in Baltimore, MD on April 8, 2005. She made the allegation in her March 13, 2007, meeting with Mr. Mac Morgan. Mr. Morgan was counsel for the mariner who appeared before her in *USCG v. Elsik*. He also filed two lawsuits against the Coast Guard that were supported by a May 9, 2007 affidavit that he prepared based on ALJ Massey's statements at the March 13, 2007 meeting. In addition, ALJ Massey made the allegations before Congress on July 31, 2007, and she repeated them during her interviews with us in 2009.

ALJ Massey stated that it was not until her April 8, 2005, meeting with the Chief ALJ that she became certain that the ALJ program was biased in favor of the Coast Guard. During that meeting, ALJ Massey met with Chief ALJ Ingolia, the ALJ program's Director of Judicial Administration, and two ALJ program staff attorneys to discuss her interaction with Coast Guard personnel in New Orleans, her hostile work environment concerns, and a March 7, 2005, memorandum from the Chief ALJ to ALJs concerning discovery regulations. In her affidavit, ALJ Massey alleged that during the meeting Chief ALJ Ingolia told her the following:

“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 anyway 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. Chief Judge 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. Chief Judge 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.”

When we interviewed ALJ Massey, she firmly reiterated the statements in her affidavit. We asked ALJ Massey whether the Chief ALJ ever told her how to rule on a specific case pending before her. ALJ Massey did not identify a specific case in which the Chief ALJ told her how to rule. Rather, ALJ Massey replied that the Chief ALJ told her how to rule in all of her cases when he allegedly told her during the April 8, 2005, meeting to always rule in favor of the Coast Guard. Although ALJ Massey provided us with memoranda and personal notes that she believed supported her allegations, those documents did not prove that the Chief ALJ was directing her to rule for the Coast Guard.

At some point during the April 8, 2005, meeting with the Chief ALJ, all but one of the staff members was asked to leave so the Chief ALJ could have a more private conversation with ALJ Massey. According to the Chief ALJ and the ALJ program's attorney advisor still present at the meeting, the Chief ALJ did not tell ALJ Massey to "always rule in favor of the Coast Guard," and the Chief ALJ did not make a statement that could reasonably be interpreted to mean "always rule in favor of the Coast Guard." The Chief ALJ told us that he told ALJ Massey that she needed to follow the Coast Guard's regulations. According to the attorney, ALJ Massey's allegation that the Chief ALJ told her to always rule in favor of the Coast Guard is "a flat lie."

The attorney said she took notes during the meeting and ALJ Massey said she made her own notes of the meeting a few hours later. We compared the two sets of notes and made several observations. First, although the attorney advisor's version of the meeting's events was consistent with the Chief ALJ's version of the meeting, neither set of notes indicate that the Chief ALJ told ALJ Massey to always rule in favor of the Coast Guard. Second, the sets of notes parallel each other with regard to topics discussed and regarding certain statements made by the Chief ALJ. For instance, both sets of notes indicate that (1) the Chief ALJ made statements relating to the necessity of getting cases to hearing and not dismissing them on technicalities; (2) the Chief ALJ admitted that he did not know the specific facts of ALJ Massey's cases; and (3) the Chief ALJ and ALJ Massey discussed the use of Administrative Law Judge Internal Procedures and Practices (ALJIPPs) to offer policy guidance to ALJs. Third, both sets of notes indicate that the Chief ALJ made several comments that appeared to instruct ALJ Massey on both the law and her treatment of Coast Guard representatives.

Both sets of notes make clear that the Chief ALJ and ALJ Massey strongly disagreed with respect to the proper interpretation of the Coast Guard's discovery regulations. Specifically, the Chief ALJ appears to have asserted that the Coast Guard's regulations only provide for limited discovery and that the need for discovery must be balanced by the need for speed and efficiency in hearings, while ALJ Massey remained firm in her belief that broad pre-hearing discovery was a permissible tool to aid judicial economy.

The attorney's notes and ALJ Massey's notes both indicate that the Chief ALJ told ALJ Massey that she was the problem in District 8. ALJ Massey asserts that when the Chief ALJ told her she was the cause of the problems that she was having with District 8 investigating officers, he meant that she was the problem because she refused to rule in favor of the Coast Guard. According to the Chief ALJ, however, the fact that ALJ Massey ruled against the Coast Guard was not the problem. The Chief ALJ said the problem was ALJ Massey's refusal to follow the Coast Guard's laws and regulations and her unprofessional manner toward the Coast Guard investigating officers.

The notes from the meeting along with the testimony of the attorney show that the Chief ALJ told ALJ Massey to follow Coast Guard law and regulations when deciding cases. The Chief ALJ's instruction did not violate the law, and this direction was consistent with his duty to train ALJs and oversee the ALJ program. There is no evidence except ALJ Massey's statements to support her allegations that the Chief ALJ told her to rule in favor of the Coast Guard. Current and former ALJs as well as several Coast Guard employees stated that the Chief ALJ did not discuss pending cases with ALJs, and as we noted, ALJ Massey did not allege that the Chief ALJ told her how to rule on any particular case.

We Could Not Substantiate ALJ Massey's Interpretations of Alleged Remarks by the Commandant, the Chief ALJ, and ALJ Brudzinski

ALJ Massey supported her allegation that the Chief ALJ told her how to rule with inferences that she made from certain remarks by the former Commandant, the Chief ALJ, and ALJ Brudzinski. Specifically, she asserted that the Commandant's remark during her job interview that "we take care of our own here at the Coast Guard," the Chief ALJ's use of the phrase "one big happy family," and ALJ Brudzinski's alleged statement "if I ruled that way, the Chief Judge would have my job" all supported her contention that

the Chief ALJ directed his subordinate ALJs to rule in the Coast Guard's favor. ALJ Massey told us that, excluding the comments attributed to ALJ Brudzinski, she did not develop her current interpretation of those comments until after the April 8, 2005 meeting, and did not tell anyone of her interpretation until two years later.

ALJ Massey noted that during her interview process, when she heard the Commandant say, "We take care of our own," she believed he meant that the Coast Guard supported its employees with respect to family or work-related issues. She also stated that before the April 8, 2005 meeting, whenever she heard the Chief ALJ use the phrase, "one big happy family," she believed that he was referring solely to the ALJ program and not to the Coast Guard as a whole. In addition, in her contemporaneous notes from the December 7, 2004 luncheon with ALJ Brudzinski, ALJ Massey does not state either that she believed that ALJ Brudzinski was not an independent fact finder or that he had predetermined the outcome of the *Dresser* matter. This is inconsistent with the level of certainty that she expressed on those issues over two years later in her affidavit and, even later in her 2009 interviews with us.

ALJ Massey's Interpretation of the Commandant's Alleged Remark

ALJ Massey stated that during her interview process she met with Commandant Collins for approximately five minutes, and that they did not discuss anything substantive. She stated that when she heard the Commandant say, "We take care of our own," she believed at the time that he meant that the Coast Guard supported its employees with respect to family or work-related issues. ALJ Massey later interpreted this alleged remark to mean that the Commandant was not saying that the Coast Guard supports its employees, but instead was hinting that he expected her to treat the Coast Guard favorably in her official capacity as an ALJ. We did not conclude that if the Commandant uttered this phrase he was in fact telegraphing an expectation that she rule in favor of the Coast Guard once she became a Coast Guard ALJ. Furthermore, neither the Chief ALJ nor ALJ Massey ever felt obligated to follow such an alleged directive.

We do not agree with ALJ Massey that the Commandant implied to her before she was hired that Coast Guard ALJs are expected to forsake their oath of office and rule for the Coast Guard. It is

unlikely the Commandant could affect such behavior on that comment alone. Coast Guard Commandants serve a four-year term and must be appointed by the President and confirmed by the Senate. They are not involved in the issuance of S&R CDOAs, having delegated that authority to the Vice Commandant, and the operation of the S&R adjudication process would not take up a significant amount of the Commandant's time and attention. Historically, S&R hearings and CDOA issuance represent only a small portion of the Coast Guard's mission-related activities and LMI's workload, respectively.

In contrast, the Chief ALJ's tenure is indefinite. And, as is discussed in greater detail below, the APA protects the Chief ALJ and all other ALJs from being subject to improper adverse employment actions. Further, given the length of time it takes for an ALJ decision to be appealed and the periodic rotation of Coast Guard military employees, including the Commandant, even if the Commandant had directed the Chief ALJ to pressure his ALJs to rule in the favor of the Coast Guard, he would have no way to ensure that the Chief ALJ followed his directive. Finally, Chief ALJ Ingolia asserted that no Commandant has ever instructed him to rule in favor of the Coast Guard, nor has a Commandant ever implied that the Coast Guard ALJ should "take care of its own" when presiding over S&R proceedings.

ALJ Massey's Interpretation of the Chief ALJ's Frequently Used Remark, "One Big Happy Family"

ALJ Massey told us that when she first heard the Chief ALJ use the phrase, "one big happy family," she believed the phrase referred to the ALJ program and not to the Coast Guard as a whole. However, in her March 2007 affidavit, she alleged that in the April 8, 2005, meeting "Chief ALJ Ingolia made it very clear that 'we're one big happy family' means [she] need[s] to do [her] part to support the Coast Guard." ALJ Massey also alleges that by "support the Coast Guard, [she] was specifically told that [she] should always rule for the Coast Guard." Therefore, ALJ Massey interpreted Chief ALJ Ingolia's use of the phrase "one big happy family" to mean that she should always rule for the Coast Guard.

The Chief ALJ told us that he uses this phrase often and is referring to ALJ program employees, more specifically, the docketing center employees and the ALJs. No current or former employee with whom we spoke shared ALJ Massey's interpretation of what the phrase means. We interviewed several

current and former ALJ program staff members regarding the Chief ALJ's use of this phrase, and each of them insisted the Chief ALJ uses the phrase to refer only to the ALJ program staff and that they have never heard him use the phrase as a reference to the Coast Guard as a whole. They explained that the Chief ALJ preferred to run the ALJ program, particularly the docketing center, like a large family, avoiding conflict where possible and taking notice of each other's family lives and personal achievements.

We uncovered no evidence through witness testimony, supporting facts, or other documentation that the Chief ALJ expects the ALJs to rule in favor of the Coast Guard or has directed them to do so. On the contrary, Chief ALJ Ingolia has undertaken several steps to make the ALJ program more independent from the Coast Guard. The ALJ program occupied offices in buildings where S&R program staff were located but did not share office space with S&R program staff. He limited his interaction with other Coast Guard senior leadership, and declined to review ALJ's pending cases although his job description authorizes him to do so.

We Could Neither Substantiate ALJ Brudzinski's Alleged Remark nor ALJ Massey's Interpretation of it, and There is No Evidence that ALJ Brudzinski Prejudged the *Dresser* Case

In the affidavit filed in *Dresser v. Ingolia*, ALJ Massey alleged that during a lunch conversation on December 7, 2004, ALJ Brudzinski made certain statements to her. ALJ Massey attended the hearing in New Orleans as an observer. According to ALJ Massey, at the lunch, which took place during a break in the *USCG v. Dresser* hearing, ALJ Brudzinski said that if he ruled in favor of Mr. Dresser, the Chief ALJ "would have [his] job." ALJ Massey asserted that ALJ Brudzinski was serious when he made this statement and that he repeated it while shaking his head. This alleged statement led her to believe that the Chief ALJ told ALJ Brudzinski how to rule in the case and that the outcome of the case was predetermined prior to the beginning of the hearing.

We cannot say with complete certainty whether ALJ Brudzinski made these statements. However, we did not identify any evidence that (1) confirmed that ALJ Brudzinski actually made the alleged statements in a serious manner; (2) ALJ Brudzinski prejudged the outcome of the *Dresser* matter; (3) ALJ Brudzinski believed that Chief ALJ Ingolia could or would fire him for not ruling in favor

of the Coast Guard; or (4) Chief ALJ Ingolia told ALJ Brudzinski how to rule.

When we asked ALJ Brudzinski whether he made the statement that ALJ Massey ascribed to him in her affidavit, he could not specifically recall his actual statements at the December 7, 2004, lunch. However, he insisted that had he made the alleged statement or a similar remark, he was not and could not have been serious, and ALJ Massey must have misunderstood the context in which he made it. Two ALJ program staff members, both of whom had left the ALJ program by the time of our interview, attended the luncheon with ALJ Brudzinski and ALJ Massey. Neither former staff member remembered ALJ Brudzinski making the alleged remark, though all four people were sitting in a booth at a fast food restaurant at the time. In addition, they both stated that had he made the remark, they would have noticed and remembered it, because ALJ Brudzinski had a reputation within the ALJ program for being a good, thoughtful judge. The former staff members present at the lunch believe that if ALJ Brudzinski made the alleged statement, he did not mean for it to be taken literally.

ALJ Brudzinski asserted that at that time of the December 7, 2004, lunch, he had not yet determined the outcome of the *Dresser* matter. He stated that it took him several months to review the voluminous record in the matter and to reach a decision. He noted that the breadth and depth of his final opinion in *Dresser*, which was 60 pages long, reflects that fact. One of the ALJ program staff members who attended the December 7, 2004, lunch, was a law clerk assigned to assist ALJ Brudzinski in writing the *Dresser* opinion. This law clerk confirmed that she and ALJ Brudzinski spent a long time reviewing the facts in the *Dresser* matter, trying to determine which party should prevail. She insisted that the outcome of the case was not predetermined and noted that ALJ Brudzinski did not issue his opinion in *Dresser* until six months after the lunch.

For ALJ Massey's allegation that ALJ Brudzinski was serious when he allegedly said the Chief ALJ would "have his job" to be valid, ALJ Brudzinski had to believe that Chief ALJ Ingolia could actually fire him for not ruling according to Chief ALJ Ingolia's alleged instructions. There was no evidence that ALJ Brudzinski believed that Chief ALJ Ingolia could fire him for ruling contrary to Chief ALJ Ingolia's direction. ALJ Brudzinski asserted that an ALJ's independence is protected by the APA and that every ALJ knows that they cannot be summarily fired by their agency. He

told us that it is common knowledge among ALJs that they cannot be removed by the agency unless there is a determination of good cause by the MSPB.

We confirmed ALJ Brudzinski's statements regarding both the protections afforded the ALJs and the fact that the existence of those protections is common knowledge among ALJs. The APA prohibits an agency from removing, suspending, or reducing the pay or grade of an ALJ without good cause and adjudication of the matter before the MSPB.⁴ Further, OPM regulations prevent agencies from giving an ALJ a performance evaluation, setting an ALJ's pay rate, or giving any monetary or honorary award or incentive to an ALJ.⁵ These protections help to safeguard an ALJ's decisional independence, because the agency can neither penalize nor reward an ALJ, regardless of whether it agrees or disagrees with the ALJ's decisions.

There is no evidence to support ALJ Massey's allegation that Chief ALJ Ingolia told ALJ Brudzinski how to rule. Both Chief ALJ Ingolia and ALJ Brudzinski stated that they rarely spoke to each other until they were both named as defendants in *Dresser v. Ingolia*. ALJ Brudzinski told us that when they did speak, they did not speak about pending cases. ALJ Brudzinski also stated that Chief ALJ Ingolia was a "hands off" manager and current and former members of the ALJ program's senior staff and other Coast Guard ALJs confirmed this fact. The Chief ALJ delegates much of his administrative and supervisory authority to the Director of Judicial Administration and his senior staff. Further, he rarely initiated any substantive contact with the field ALJs, with the exception of the ALJ program's annual training conferences or periodic, program-wide conference calls. For example, the Chief ALJ does not require docketing center staff to obtain his approval before assigning cases to ALJs, providing legal support and advice to ALJs, or assisting ALJs with any logistical issues. As a result, the Chief ALJ is largely removed from the day-to-day administration of the ALJ program and is unlikely to know the status of any particular case assigned to a field ALJ. In fact, certain ALJs and docketing center senior staff felt that perhaps he was too removed from the workings of the ALJ program and did not provide enough guidance to his staff or support to his field ALJs.

⁴ 5 U.S.C. § 7521.

⁵ 5 C.F.R. § 930.205-.206.

In addition, ALJ Massey did not explain, and neither did ALJ Brudzinski, as to why he, who barely knew her, allegedly confessed to her in this manner and about such a serious issue. And although ALJ Massey now contends that she was extremely bothered by ALJ Brudzinski's remarks, she treated ALJ Brudzinski and the two staff members as if nothing happened the day after the lunch. She did not mention her concerns to anyone at the lunch or during her tenure as a Coast Guard ALJ.

ALJ Massey's allegation that Chief ALJ Ingolia told ALJ Brudzinski how to rule is based on inference and speculation. She admitted that ALJ Brudzinski never said the Chief ALJ had told him how to rule in *Dresser*, nor did ALJ Brudzinski ever tell her which party would ultimately prevail in the matter. During her March 13, 2007 meeting with Mr. Morgan, ALJ Massey stated, "ALJ Brudzinski never said, 'the Chief ALJ told me how to rule in this case,' but the gist of the conversation was, in my professional opinion, that there had been conversations and the Chief ALJ had indicated to him how the case needed to come out." Thus, ALJ Massey's allegation that ALJ Brudzinski prejudged the *Dresser* matter at the Chief ALJ's direction is only based on her own supposition.

There is No Evidence that the Chief ALJ Engaged in any Improper Discussions About Pending Cases

In her affidavit and in her interviews with us, ALJ Massey discussed two instances in which she believes pending cases were inappropriately discussed. In various venues, she has also asserted that these discussions may have constituted prohibited, *ex parte* communications. In the first instance, she mentioned that during her job interview with Chief ALJ Ingolia, the Chief ALJ told her that he was on the phone with ALJ Brudzinski and that, from time to time, he talks about active cases with ALJ Brudzinski. However, even if her allegations are true, they do not, without more facts, provide evidence of any improper conduct. The second instance occurred on February 24, 2005, when ALJ program staff and an attorney who handles appeals to the Commandant met with District 8 S&R program staff to hear their complaints about ALJ Massey's rulings and demeanor. As discussed below, this meeting did create an appearance of impropriety. However, there was no evidence that any *ex parte* communications occurred at the meeting or that the Chief ALJ or the Commandant ever directed the outcomes of any pending S&R case or appeal, respectively.

Under the APA, an *ex parte* communication is defined as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.”⁶ The APA prohibits *ex parte* communications when the communications between an “interested person” and an agency decision maker are “relevant to the merits of the proceeding.”⁷ The APA also prohibits certain commingling of investigative and adjudicative functions. Specifically, “[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review, except as witness or counsel in public proceedings.”⁸ In this case the ALJ, in addition to the agency presiding official, cannot consult a person or party regarding a fact at issue in a proceeding unless all parties in the matter are given notice and an opportunity to participate.⁹ The ALJ program explicitly requires Coast Guard ALJs to follow the APA’s prohibitions on the commingling of functions and *ex parte* communications. Further, the Coast Guard has incorporated the APA’s prohibition on *ex parte* communications into the regulations governing S&R proceedings.¹⁰

It is Permissible for the Chief ALJ to Discuss Pending Cases with the ALJs

As stated above, ALJ Massey alleges that the Chief ALJ told her that he routinely discussed pending cases with ALJ Brudzinski. In addition, she asserted that the discussion of pending cases between the Chief ALJ and one of his subordinate ALJs is inherently improper and could be construed as a prohibited *ex parte* communication. However, neither the APA nor the American Bar Association’s (ABA) Model Code of Judicial Conduct (Model Code) prohibits ALJs from discussing pending cases with each other or with members of their staff. Further, the Chief ALJ may review and discuss pending cases in furtherance of his administrative responsibilities.

Both the APA and the Model Code prohibit ALJs from acquiring facts not already in the record without giving notice to all parties to

⁶ 5 U.S.C. § 551(14).

⁷ 5 U.S.C. § 557(d)(1)(A) & (B).

⁸ 5 U.S.C. § 554(d).

⁹ 5 U.S.C. § 554(d)(1).

¹⁰ 33 C.F.R. § 20.205 (mandating that ALJs must comply with 5 U.S.C. § 557(d)).

the proceeding. Under the APA, ALJs are prohibited from discussing the merits of a case with outside parties, but no such prohibition exists regarding discussions with other employees engaged in adjudicatory functions such as other ALJs or their law clerks. ALJs are prohibited from consulting with Coast Guard employees performing investigative or prosecutorial tasks, or with mariners or their counsel, about the facts at issue in a pending matter without notice to all parties. Nothing prohibits ALJs from discussing the merits of a pending case with fellow members of the ALJ program. As a practical matter, in order to obtain legal research and advice from the ALJ program's law clerks, attorney advisors, and fellow ALJs, an ALJ must discuss the substantive issues in their cases.

ALJ Massey alleged that the Chief ALJ's discussions with ALJ Brudzinski were improper. However, the law, judicial canons, and agency policy authorize the Chief ALJ to discuss pending cases with ALJs. The Model Code also allows ALJs to discuss pending cases with each other and with their staff. According to the Model Code:

A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.¹¹

However, the Model Code states that judges cannot abdicate their decision-making responsibility to another. ALJ Massey concluded that there were *ex parte* communications between Chief ALJ Ingolia and ALJ Brudzinski because she thought the Chief ALJ must have told ALJ Brudzinski how he expected him to rule. Although she did not specifically make the connection, we assumed she based this allegation on the Chief ALJ's alleged statement regarding his discussions of active cases with ALJ Brudzinski and ALJ Brudzinski's alleged statement at lunch on December 7, 2004. Nevertheless, ALJ Massey acknowledged that

¹¹ ABA Model Code of Judicial Conduct, Canon 3B(7)(c) (1990). *See also* Rule. 2.9, Comment 5, "A judge may consult with other judges on pending matters, but must avoid *ex parte* discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter." Model Code of Judicial Conduct (2007).

she neither heard the Chief ALJ discuss pending cases with another ALJ nor heard the Chief ALJ direct another ALJ how to rule. She also admitted that ALJ Brudzinski never said that the Chief ALJ told him how to rule. ALJ Massey did not provide any evidence that the Chief ALJ had ever either discussed facts outside the record with his subordinate ALJs or prevented or improperly influenced any ALJ from deciding their cases as they saw fit. The Chief ALJ told us that during the April 8, 2005, meeting he told ALJ Massey that he would have ruled differently than she did on the issues in certain matters. That said, the Chief ALJ only discussed ALJ Massey's rulings in closed cases. ALJ Massey did not allege that the Chief ALJ tried to influence her with respect to any specific case.

There is No Evidence that Prohibited *Ex Parte* Communications Took Place at the February 24, 2005, Meeting

ALJ Massey alleges that improper, *ex parte* communications may have taken place either between the ALJ program staff and the investigating officers or between an attorney from LMI and investigating officers at the February 24, 2005 meeting. Although there is no evidence that any prohibited, *ex parte* communications took place at the meeting, there were two instances of contact between the Coast Guard's adjudicative staff and its S&R program staff that were ill-advised and made the meeting appear improper.

No prohibited *ex parte* communications took place at the February 24, 2005, meeting because the relevant agency decision maker, i.e., ALJ Massey, was not in attendance. Although the investigating officers discussed various issues regarding the proper interpretation of discovery regulations in the context of their cases, the ALJ program representatives who attended, the Director of Judicial Administration and two ALJ program staff attorneys, were not involved in any matters pending before ALJ Massey, and did not have any decision-making role with respect to those matters.

Although we concluded that there were no prohibited, *ex parte* communications, there were two instances of ill-advised contacts between the adjudicative and prosecutorial arms of the Coast Guard S&R program. In the first instance, an LMI attorney who was involved with drafting CDOAs on behalf of the Vice-Commandant, attended the meeting. In the second instance, a member of the Chief ALJ's senior staff debriefed ALJ Massey on what occurred at the meeting, which led her to conclude that the District 8 investigating officers were complaining about her rulings

in pending cases. However, there is no evidence that the Commandant or the Chief ALJ directed these individuals to influence the outcome of a pending S&R case or appeal, or that contact between the adjudicative and prosecutorial arms of the Coast Guard influenced the outcome of any case.

When the Chief ALJ sent members of his senior staff to New Orleans to investigate the complaints about ALJ Massey's treatment of investigating officers in her courtroom, he gave instructions that they should not discuss pending cases and, in particular, not discuss cases by name. Instead, he only wanted his staff to discuss the general issues about which the investigating officers had complaints, with the hope of being able to resolve those issues without having to undertake a more formal investigation of ALJ Massey's conduct. When the meeting began, attendees were given ground rules prohibiting them from discussing specific cases by name. Chief ALJ Ingolia only allowed members of his staff who were not providing assistance to ALJ Massey on pending cases to attend the meeting. The staff members who attended the meeting told us that prior to the meeting they believed the investigating officers' complaints to be frivolous and based largely on the officers' dislike of ALJ Massey's demeanor.

Unbeknownst to the Chief ALJ and his staff, the S&R program staff invited the LMI attorney to attend the meeting and act as the S&R program's expert on Coast Guard policy and precedent. Between the time that the Chief ALJ's office received the investigating officers' written complaints in December and the February meeting, ALJ Massey had issued several rulings, primarily involving discovery matters, that the District 8 attorneys and investigating officers believed were incorrect as a matter of law. Although the LMI attorney attended the meeting to be a resource for the S&R program staff, she told us and other meeting attendees confirmed that she was not an active participant in the meeting.

The LMI attorney's attendance was not an improper *ex parte* contact because none of the matters being discussed were under appeal to the Commandant at the time of the meeting. As a result, she was not involved in the agency's decision-making process at that time. However, she should have been prohibited from later participating in the appeals of ALJ Massey's cases. Despite the attendees' assertions that no case names were discussed during the meeting, attendees knew that ALJ Massey's cases were the subject

of discussion and it is possible that the LMI attorney could have recognized the cases once they reached LMI on appeal. Although there is no evidence that the LMI attorney's attendance affected the outcome of the appeals, she was involved in drafting the initial CDOAs for almost all of ALJ Massey's cases. The Coast Guard asserts that because the CDOAs undergo several levels of review before they are submitted to the Vice Commandant for signature, the LMI attorney's presence at the meeting did not affect the outcome of any CDOA. Without regard to whether her attendance at the meeting affected the outcome of the CDOA, it created an appearance of impropriety and exposed the need for procedures to prevent improper contact between the S&R program staff and the appellate staff.

The second contact occurred after the February 24, 2005, meeting. The Chief ALJ assigned one of the staff attorneys who attended the meeting to act as a liaison between the Chief ALJ's staff and ALJ Massey during the Chief ALJ's investigation into the investigating officers' allegations. The staff attorney provided ALJ Massey with a copy of the investigating officers' complaints before the meeting. He also invited ALJ Massey to the February 24, 2005, meeting. A few days after the meeting, he called ALJ Massey to inform her of the investigating officers' complaints at the meeting. However, the Chief ALJ was unaware that the senior attorney was sharing the investigating officers' written complaints and the topics discussed during the meeting with ALJ Massey. Likewise, the Chief ALJ was unaware that the senior attorney initially invited ALJ Massey to attend the meeting.

While listening to the ALJ program attorney recount the details of the meeting, ALJ Massey asserted that the investigating officers had discussed issues that had arisen in cases pending before her, and she abruptly ended the call before the senior attorney could assure her that no case names were discussed and that precautions were taken to prevent improper *ex parte* discussions. Although the members of the Chief ALJ's senior staff, including the senior attorney who briefed ALJ Massey after the meeting, did not know whether the matters discussed with the investigating officers related to ALJ Massey's pending cases because they were not involved in them, ALJ Massey recognized her own pending cases.

By discussing the matters from the February 24, 2005, meeting with ALJ Massey, the senior attorney gave ALJ Massey the impression that the Coast Guard was dissatisfied with her rulings and was, as a result, trying to get the Chief ALJ to discipline her

and thereby force her to rule in the Coast Guard's favor. Although communications between the ALJ program staff attorney and the investigating officers could not be considered *ex parte* because the staff attorney was not involved in any of the pending cases, by conveying the investigating officers' comments to ALJ Massey, he could have inadvertently conveyed *ex parte* information to her. He could have provided ALJ Massey with facts that were not in the case record in violation of the Model Code. But to the extent that he did, only ALJ Massey would have been in the position to recognize that fact and make note of it on the record, as is required by the Model Code, the APA,¹² and Coast Guard regulations.¹³ ALJ Massey did not enter any information relating to the February 24, 2005, meeting on the record.

Although we identified two instances in which problematic contact occurred in conjunction with the February 24, 2005, meeting between the Chief ALJ's senior staff and the Coast Guard's S&R prosecutorial staff, none of these contacts were made either under the direction of or with the knowledge of the Chief ALJ. In addition, none of the contacts that were made involved contact between a party and a member of the ALJ program who was involved in the drafting and issuing of decisions in ALJ Massey's Coast Guard cases.

The Chief ALJ Instructed ALJ Massey to Follow Regulations

We could not find sufficient evidence to support ALJ Massey's allegations that Chief ALJ Ingolia told her during an April 8, 2005, meeting that she should always rule in favor of the Coast Guard. Further, both the Chief ALJ and the ALJ program's attorney advisor present asserted that the Chief ALJ only told ALJ Massey to follow the law and did not otherwise direct her how to rule in her cases. Upon further review of contemporaneous documents, witness statements, and ALJ Massey's rulings, the Chief ALJ's version of events appeared accurate.

We substantiated the Chief ALJ's assertions that (1) ALJ Massey repeatedly ruled in contravention of the Coast Guard's discovery

¹² See 5 U.S.C. 557(d)(1)(C) (requiring an ALJ who receives a prohibited *ex parte* communication to place on the public record of the proceeding: "(i) all such written communications; (ii) memoranda stating the substance of all such oral communications; and (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii)...").

¹³ According to 33 C.F.R. 20.205, "Ex parte communications are governed by subsection 557(d) of the Administrative Procedure Act (5. U.S.C. 557(d)).

regulations; (2) she refused to be guided by ALJ program staff when he advised her to follow the law; and (3) as a result of a backlog in the CDOA process, without his intervention, ALJ Massey would have been able to issue orders in contravention of the regulations for years before the Commandant could correct her errors of law on appeal. This would have allowed the S&R program's busiest judicial district to operate in a dysfunctional manner for an indefinite period of time. According to the Chief ALJ, it was for these reasons that he tried to address the ALJ program's concerns with ALJ Massey's discovery rulings during the April 8, 2005, meeting by instructing her to follow the Coast Guard regulations.

ALJ Massey Did Not Follow Coast Guard Law

We believe the Chief ALJ's assertion that at the April 8, 2005, meeting, he directed ALJ Massey to follow the law. ALJ Massey had not followed Coast Guard's discovery regulations repeatedly and, in one instance, openly refused to follow Coast Guard precedent.

At the time of the April 8, 2005, meeting, ALJ Massey had just finished issuing a series of controversial discovery orders in *USCG v. Rogers* and *USCG v. Elsik*, which ended with her dismissing the matters with prejudice because of the Coast Guard's refusal to comply with those orders. In both cases, ALJ Massey ordered the Coast Guard to comply with discovery orders that she issued in contravention of Coast Guard regulations without giving the Coast Guard a chance to object to their issuance. For example, in *USCG v. Rogers*, the respondent requested a subpoena without filing a motion as required by 33 C.F.R. § 20.608(a) and without establishing the circumstances requiring discovery as required by 33 C.F.R. § 20.601(e). The next day, ALJ Massey issued the subpoena without making the necessary determinations required by 33 C.F.R. § 20.601(d). Further, she granted the motion within 24 hours, thereby denying the Coast Guard the 10 days to respond as required by 33 C.F.R. § 20.309(d). In effect, ALJ Massey shifted the respondent's burden of proof to the Coast Guard, requiring the Coast Guard to prove why further discovery should not be granted instead of requiring the respondent to prove that it should. In addition, in the *Elsik* matter, ALJ Massey openly refused to follow binding Coast Guard legal precedent. Specifically, she stated during a prehearing conference that she disagreed with the Commandant's reasoning in a CDOA and would not follow it. In the *Elsik* decision, ALJ Massey reiterated her refusal to follow

Coast Guard precedent, asserting that she found the Commandant's logic "peculiar" and "creative."

In both the *Elsik* and *Rogers* cases, the Vice Commandant reversed ALJ Massey on appeal for having erred on the law. In *Rogers*, the Vice Commandant found that ALJ Massey abused her discretion and exceeded her authority by dismissing the case with prejudice on the basis of the Coast Guard's discovery violations. In *Elsik*, the Vice Commandant also reversed ALJ Massey, holding that she (1) committed an error of law when she dismissed the misconduct allegations in contravention of the plain-language of the statute; (2) abused her discretion and committed an error of law when she dismissed the negligence allegation for a discovery violation; and (3) acted arbitrarily and capriciously by failing to follow the applicable discovery rules. In short, the Vice Commandant found that ALJ Massey "misunderstood the applicable law and misapplied the Coast Guard's procedural rules."¹⁴

ALJ Massey did not have the authority to ignore federal regulations or Coast Guard precedent when deciding her cases. Although the APA contains a number of provisions designed to guarantee the decisional independence of hearing examiners, the ALJ's decisional independence is necessarily limited because "[o]n matters of law and policy...ALJs are entirely subject to the agency."¹⁵ According to the APA, an ALJ's enumerated powers in presiding over a hearing are subject to the published rules of the agency. Furthermore, the APA allows agencies to retain the right to review an ALJ's decisions and to reverse those decisions on policy grounds, thereby allowing the agency to impose its policy views on ALJ decisions through the appeals process. In essence, Congress has directed the agency to promulgate regulations, to formulate policy through fact-finding and application of the law, and to issue the agency's position in any given matter. The APA does not authorize the ALJ to usurp that authority.

Accordingly, the Commandant always retains the right to issue a final determination in S&R proceedings as to both fact and law. Specifically, the Commandant has the ability to direct the ALJ's policy determinations and interpretation of the regulations by issuing binding Decisions on Appeal. Thus, as a Coast Guard ALJ, ALJ Massey was required to follow not only Coast Guard

¹⁴ Appeal Decision 2658 (ELSIK) (2006).

¹⁵ *Ass'n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

regulations, but also the Commandant's statements of policy as articulated in CDOAs. ALJ Massey did not have the authority to ignore the Coast Guard's regulations, policies, or procedures or the authority to create her own interpretations of law that were independent of the agency.¹⁶

ALJ Massey Refused Guidance to Follow the Law

Although ALJ Massey may have construed the Chief ALJ's guidance to follow the law to be an infringement upon her decisional independence and an improper directive as to how to rule in her S&R cases, such instruction is appropriate and in keeping with the Chief ALJ's role as head of the ALJ program. The Commandant has delegated to the Chief ALJ the authority to ensure "general compliance of subordinate judges' decisions with agency rules and procedures" and to develop and implement "policies and other guidance which has usage throughout the agency-wide ALJ program." In addition, the Chief ALJ is tasked with training new and incumbent ALJs, reviewing the ALJs' decisions to ensure that the ALJs are complying with the applicable law and generally making certain that ALJs are performing their duties competently.

In interviews, the Chief ALJ as well as current and former members of his senior staff asserted that many of the actions that ALJ Massey interpreted as attempts to pressure her to rule in favor of the Coast Guard were in fact attempts to get ALJ Massey to rule according to the law. According to ALJ program staff, the Chief ALJ was attempting to get ALJ Massey to rule in accordance with the law without having to initiate an informal disciplinary action against her. The ALJ program's senior staff told us that after the February 24, 2005, meeting at which the investigating officers complained about ALJ Massey ruling in contravention of Coast Guard discovery regulations, the ALJ program was put on notice that ALJ Massey was not following the law. Soon thereafter, the ALJ program issued the March 7, 2005, discovery memorandum.

According to the ALJ program, they designed this memorandum to be a clear restatement of the regulations and to put an end to any misunderstandings of the Coast Guard's discovery regulations that existed among the ALJs. ALJ program senior staff stated that they anticipated that ALJ Massey would likely--and, in our view, correctly--believe that the memorandum was directed at her, but

¹⁶ 5 U.S.C. § 556(c).

they felt preventing any further erroneous rulings was more important. The Coast Guard district that ALJ Massey presided over generated more contested S&R cases than any other in the Coast Guard and the ALJ program believed that a dysfunctional adjudicative process in her courtroom could severely disrupt both the ALJ and S&R programs. Furthermore, given the lengthy appeals process, the ALJ program feared that without the Chief ALJ's intervention, ALJ Massey would continue to issue erroneous rulings for years before the relevant cases were overturned by the Commandant.

It is evident in her affidavit, her memoranda to the Chief ALJ, and in her interviews with us that ALJ Massey believed that the March 7, 2005, memorandum was an "attempt to invade the domain of [her] judicial independence." She suspected that the S&R program staff may have been involved in the drafting of the March 7, 2005, memorandum. For example, in her April 4, 2005, memorandum to the Chief ALJ, ALJ Massey stated that similarities between the content of the March 7, 2005, memorandum and two pleadings filed by the Coast Guard in her cases showed that the Coast Guard was using the Chief ALJ's office to get its way with respect to rulings on issues in cases before her. However, there is no evidence that anyone outside of the ALJ program was involved in the drafting in the discovery memorandum, nor is there any evidence that the memorandum was intended to influence any ALJ to rule in favor of the Coast Guard. In fact, much of the language in the March 7, 2005, memorandum appears to be drawn directly from the Coast Guard's discovery regulations and the Federal Register, and in any event, would be equally applicable to all parties in Coast Guard proceedings

During this same time, ALJ Massey decided that the legal research given to her by the docketing center staff attorneys and law clerks were further attempts by the Chief ALJ to influence her judicial decision-making, even if the research was performed in response to her own requests for assistance. In both the *Rogers* and *Elsik* matters, she ignored the staff attorneys' legal research that showed that her decisions were not supported by, and in some cases were in direct contravention of, Coast Guard precedent. For example, in the *Elsik* matter, a docketing center intern advised ALJ Massey in a legal research memorandum that "Coast Guard law firmly supports the use of criminal statutes to establish misconduct," and referred her to binding CDOAs. Nevertheless, ALJ Massey ruled contrary to precedent. We found no evidence that either the Chief ALJ or any member of his senior staff ever directed the outcome of any

legal research or advice that the docketing center provided to the Coast Guard ALJs.

Thus, at the time of the April 8, 2005, meeting, ALJ Massey had refused the ALJ program's attempts to get her to rule according to the law. This supported the Chief ALJ's statements that during the meeting he was instructing her to follow Coast Guard regulations, and was not directing her to always rule in favor of the Coast Guard.



The Coast Guard Did Not Issue CDOAs in a Timely Manner

Although waiting for the appeals process to run its course might have ultimately proved less disruptive to the ALJ program than the Chief ALJ instructing ALJ Massey to follow regulations, there was a significant backlog of CDOAs during ALJ Massey's tenure at the Coast Guard. Excluding the fact that at least one of the appeals of ALJ Massey's cases may have been stayed as a result of subsequent civil litigation, some of her cases were pending on appeal for almost two years. In addition, ALJ Massey's Coast Guard district produced more contested S&R cases than most of the other districts combined. Allowing ALJ Massey to continue to rule in contravention of the law would have further burdened the appeals process, prevented mariners from getting a speedy and final resolution of matters in which their livelihood was at stake, and allowed mariners who did not operate in compliance with marine safety laws to retain their licenses indefinitely.

During her tenure as a sitting Coast Guard ALJ, ALJ Massey presided over 12 S&R hearings. Although a mariner never appealed one of ALJ Massey's decisions, the Coast Guard appealed 7 of her decisions and the Commandant overturned 3 of them. These numbers do not include the *USCG v. McDonald* matter that the Coast Guard planned to appeal, but later withdrew its appeal when ALJ Massey realized her error of law and voluntarily agreed to vacate her erroneous decision. Thus, including the McDonald matter, the Coast Guard appealed two-thirds of ALJ Massey's cases; one-third of her cases were either overturned or contained an error of law. Moreover, the

disagreement between ALJ Massey and the investigating officers over the correct interpretation of the Coast Guard's discovery regulations that underlie many of these appeals and errors of law were escalating over time.

According to ALJ program senior staff, the ALJ program was compelled to intervene and try to stop ALJ Massey from ruling in contravention of Coast Guard regulations because of the length of time it would take the appellate process to correct her rulings. The disagreements between ALJ Massey and the Coast Guard's investigative officers over her refusal to follow Coast Guard regulations were such that they believed she was jeopardizing S&R proceedings. The Chief ALJ and his senior staff assert that as a result of these concerns the Chief ALJ tried to guide ALJ Massey to rule according to the law via the March 7, 2005, discovery memorandum and then later via the April 8, 2005, meeting.

Given the Chief ALJ's role as the head of the ALJ program and his duty to train new ALJs, it is logical that he would provide guidance to a new ALJ who was ruling in contravention of the law. The March 7, 2005, discovery memorandum does not contain any language that could be reasonably be construed as directing the outcome of S&R proceedings or requiring ALJs to rule in favor of a particular party. Although the parties' notes and the statements of various witnesses do establish that the Chief ALJ offered ALJ Massey guidance on the discovery regulations and instructed her to follow the regulations, there is no evidence other than ALJ Massey's statements two years later that he told her to always rule in favor of the Coast Guard. In sum, while we could not substantiate ALJ Massey's statements, we could corroborate many of the Chief ALJ's statements.

ALJ Massey's Conduct Undermined the Gravity of the Allegations

The timing and manner in which ALJ Massey made her allegations also undermined the gravity of the allegations. On March 13, 2007, ALJ Massey first made her allegations in a sworn statement filed in a civil action in support of a mariner challenging the USCG's decision to suspend his credentials and requesting \$5,000,000 in compensatory damages and \$10,000,000 in punitive damages, jointly and severally, from the Chief ALJ, ALJ Brudzinski, and two docketing center employees, including a former law clerk. The filing took place nearly two years after her

April 8, 2005, meeting with the Chief ALJ and only two weeks after her official retirement from the Coast Guard. In her written testimony for the July 31, 2007, hearing before the U.S. House of Representative's Transportation and Infrastructure Committee's Subcommittee on the Coast Guard and Maritime Transportation, ALJ Massey made the following statement:

“Between July 2004 and August 2005, I came to know first hand that the administration of due process in S&R hearings at the Coast Guard was not a priority and NEVER (*emphasis in original*) to be a concern if its preservation would result in a ruling adverse to a position of the Coast Guard. 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 Coast Guard in the administration of its hearings. From Judge Ingolia all the way down to the newest IO [investigating officer], the environment was saturated with a total disregard for Mariner's rights.”

ALJ Massey's statement depicts a flawed judicial system that does not provide justice to mariners. Her written testimony, as expressed in the May 9, 2007, affidavit and in conjunction with the July 31, 2007, congressional hearing, is inconsistent with the fact that she would allow the program to continue for over two years without notifying the appropriate authorities. ALJ Massey did not report her allegations to the Office of Inspector General, Special Counsel, the MSPB or the Commandant—all of whom have the authority to investigate, remediate, or take action regarding any alleged agency misconduct. Instead, she disclosed her allegations in the context of a multimillion dollar lawsuit against the Coast Guard filed by Mr. Morgan, a private attorney who had represented mariners in S&R proceedings before her. When asked why she chose to make her allegations public through Mr. Morgan, ALJ Massey stated that she initially had no intention of mentioning her concerns at all. She said she signed the affidavit for Mr. Morgan simply because Mr. Morgan asked her to sign it.

The Coast Guard used the ABA's 1990 Model Code as a guide for ALJs during ALJ Massey's tenure as a Coast Guard ALJ, and it provides standards of ethical conduct for judges, including standards for when judicial misconduct, i.e., a violation of the Model Code, should be reported to an appropriate authority. The

Model Code makes clear that judges “shall uphold the integrity and independence of the judiciary.”¹⁷ Further, a judge “shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.”¹⁸ In addition, the Model Code requires any judge “who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action,” including but not limited to direct communication with the judge who has committed the violation and reporting the violation to the appropriate authority.¹⁹ When a judge receives actual knowledge of a violation of the Model Code, the judge is obligated to report the knowledge to the appropriate authority.²⁰

According to ALJ Massey’s affidavit, on December 9, 2004, she prepared a memorandum based on what ALJ Brudzinski said during lunch on December 7, 2004. In her affidavit, she stated that she prepared the memo because ALJ Brudzinski’s alleged remarks were such that she “knew” that ALJ Brudzinski was not an independent fact finder and that she worked under “a Chief Judge who would dare tell an ALJ how to rule in a case.” If true, these statements show that in December 2004 ALJ Massey believed that both the Chief ALJ and ALJ Brudzinski had committed judicial misconduct and violated the Model Code. ALJ Massey should have reported the matter to an appropriate authority.

Although she did not report her allegations to an appropriate authority, ALJ Massey was not completely silent regarding the problems she felt existed within the Coast Guard ALJ program. She expressed her displeasure with some of Chief ALJ Ingolia’s actions in a series of memoranda she addressed to him. For instance, in a memorandum dated March 31, 2005, she wrote, “The timing of the [March 7, 2005 discovery] memorandum felt like an attempt to invade the domain of my judicial independence with respect to three proceedings where serious discovery issues were/are under consideration on the date of its issuance.” ALJ Massey followed up on April 4, 2005, with another memorandum in which she reiterated her feeling that the timing of the March 7, 2005, Discovery Memorandum was an attempt to further invade the domain of her judicial independence and stated, “a reasonable mind could and I believe would see the ‘guideline’ memorandum

¹⁷ Model Code, Canon 1 (1990).

¹⁸ Model Code, Canon 2(B)..

¹⁹ Model Code, Canon 3(D)(1) and Comment to 3(D).

²⁰ Model Code, Canon 3(D)(1)(1990).

as your office's attempt to pressure me into ruling a certain way in the three cases at issue." ALJ Massey's statements in these memoranda show that she felt she was being pressured to rule a certain way on discovery issues in 2005. However, her statements do not contain the specificity nor do they reflect the gravity of the allegations she made in her March 2007 affidavit.

ALJ Massey was aware of an attorney's general obligation to report a violation. She stated to us, "I mean every lawyer, at least the oath I took in the State of Texas is that if you are aware of another attorney violating the law, then you are under an affirmative obligation to report that." We questioned ALJ Massey specifically about ALJ Brudzinski's comment at the December 2004 lunch and about an ALJ program attorney who worked with ALJ Brudzinski. ALJ Massey stated, "To the extent that she knew that Judge Brudzinski was going to rule a certain way because he'd been told to by Judge Ingolia, that means she was aware of a violation of law, and, as an attorney, she had a duty to report that, okay, just as a licensed attorney." In addition, ALJ Massey mentioned that to the extent this attorney had not yet revealed the information, this attorney retained an obligation to report the information and said, "I mean, to this day, technically speaking, as an officer of the court, if she knew, she would have an obligation to tell somebody."

ALJ Massey's statements reveal that she was aware of outlets to report ALJ Brudzinski and Chief ALJ Ingolia and that she understood the affirmative obligation to report such concerns. She acknowledged to us that she considered reporting her complaint to the Office of Special Counsel and noted that she probably could have spoken to one of the ALJ program staff attorneys who attended the lunch with her on December 7, 2004. She also noted that she tried to figure out if she could go directly to the MSPB with her complaint. We asked ALJ Massey whether she considered reporting her complaint to the Office of Inspector General or a State Bar organization, and she stated that she thought about those options. However, she did not report her concerns to anyone prior to giving her affidavit to Mr. Morgan. She told us that she felt like it was a fight she could not win because ALJ Brudzinski could deny he said it and the other people at the table could say that they did not remember. However, ALJ Massey's concern over her ability to prove the validity of her allegations does not diminish her obligation to report her concerns.

ALJ Massey’s statements about her own obligations further contradict what she outlined to us as an obligation for any attorney and specifically for the ALJ program attorney that attended the December 7, 2004, lunch. ALJ Massey told us that she felt she had no reason to report ALJ Brudzinski’s alleged statement. She commented that it was “not [her] problem” and that she “had no dog in that fight.” She also said she did not see the need to get in the middle of what she thought was ALJ Brudzinski being used by Chief ALJ Ingolia. ALJ Massey told us that she took the situation only as a warning to be watchful of the environment and said, “It was wrong and I knew it, but I was taking that information in for my own purposes and evaluating what that told me about the environment that I was working in and which, in fact, got a lot worse right after that.” Describing the situation, she said, “That’s a serious charge to bring against somebody, you know. To me, it’s serious.” She went on to state, “It wasn’t like you’re trying to stop someone from getting shot or something and you have like a civic duty.”

[REDACTED]

[REDACTED]



Appendix A

Purpose, Scope, and Methodology

We undertook this review at the request of the Vice Commandant, Coast Guard to assess the validity of allegations of bias in the Coast Guard ALJ program, particularly in connection with the adjudication of cases involving the suspension and revocation of merchant mariner documents and licenses. The Vice Commandant's request, made at the urging of the Coast Guard's Chief ALJ and all other active Coast Guard ALJ's, stemmed from allegations of bias made by former Coast Guard ALJ Jeffie J. Massey. These allegations, contained in an affidavit submitted by the former ALJ, were submitted in two lawsuits filed against the Chief ALJ, another ALJ, and other career employees of the Coast Guard ALJ program.

Our goal was to determine whether the allegations were meritorious. In particular, we sought to determine whether the Chief ALJ (1) directed subordinate judges to rule in favor to the Coast Guard, and (2) discussed desired outcomes in specific cases in *ex parte* communications with other ALJs and other employees.

We interviewed ALJ program personnel who were employed with the program during ALJ Massey's tenure at the Coast Guard. We interviewed ALJ Massey, on multiple occasions, both in our office and via telephone, the Chief ALJ, ALJ Brudzinski, and the former Director of Judicial Administration, and certain current and former docketing center employees and senior staff. We also interviewed all current and former ALJs during the operative time period with the exception of one ALJ who passed away shortly after we initiated this review.

We interviewed Coast Guard personnel who appeared before ALJ Massey and others who provided support or oversight, including a number of investigating officers in District 8, supervisory investigating officers, and Coast Guard attorneys, both at District 8 and at Coast Guard headquarters in Washington, DC. We also interviewed those who worked on the CDOAs for decisions of ALJ Massey that were appealed. In addition, we contacted representatives of the mariner community, including legal practitioners and members of mariner's advocacy groups.

We reviewed S&R decisions issued by ALJ Massey and underlying transcripts or recordings where available; related CDOAs; the transcript of the July 31, 2007, Congressional hearing and related materials; and correspondence between the Chief ALJ

Appendix A

Purpose, Scope, and Methodology

and ALJ Massey, and with the docketing center, during the operative time frame, as well as other materials provided to us by ALJ Massey, by the docketing center, and others. We also reviewed other reference and legal materials.

We did not undertake a wholesale evaluation of the S&R program. In addition, we did not evaluate (1) whether the ALJ program should be moved to the NTSB or otherwise removed from the Coast Guard; and (2) how the Coast Guard allocates resources and, in particular, whether it should assign attorneys to represent the Coast Guard in all suspension and revocation proceedings. However, information that we gathered during this review served as the basis for a companion report entitled, *Recommendations to Improve the Coast Guard's System for Adjudicating Suspension and Revocation Matters* (OIG-10-107). In that report, we make recommendations to improve the effectiveness of the Coast Guard's suspension and revocation adjudication process.

We performed fieldwork from January 2009 through December 2009 at the Coast Guard docketing center in Baltimore, MD and at Coast Guard headquarters in Washington, DC.

Our review was conducted under the authority of the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency

Appendix B
Management Comments to the Draft Report

The Coast Guard declined to submit formal comments in response to our draft report.

Appendix C

Chronology of Relevant Events

The key events surrounding ALJ Massey's allegations of misconduct within the ALJ program occurred over a period of about 18 months, starting with ALJ Massey's interview for the Coast Guard ALJ position in February 2004 and ending with Hurricane Katrina in August 2005. In her affidavit in *Dresser v. Ingolia*, ALJ Massey cites several events that took place during her tenure as a Coast Guard ALJ to support her allegations.

It is difficult to evaluate the significance of those events and whether they provide sufficient and credible support for her allegations without placing them within the larger context of related events that happened within the ALJ program and during ALJ Massey's employment with the Coast Guard. We reference events from the following chronology throughout our report:

December 15, 2003

The Chief ALJ assigned *USCG v. Dresser*, a case on remand from the NTSB, to ALJ Brudzinski. Although the case arose out of Sector New Orleans, the New Orleans ALJ position was vacant at the time of the remand. Jeffie J. Massey would not join the Coast Guard for another seven months, but later alleged that the Chief ALJ should have assigned the case to her.

February 2004

Jeffie J. Massey applied for the Coast Guard ALJ position located in New Orleans, LA. Prior to submitting her application for this position, ALJ Massey worked for more than six years as an ALJ, first with the Social Security Administration and then with the Federal Energy Regulatory Commission (FERC).

June 2004

As part of the interview process, Jeffie J. Massey met Chief ALJ Ingolia at his Washington, DC office. When she arrived, Chief ALJ Ingolia was on the phone. According to her, Chief ALJ Ingolia told her that he was talking with ALJ Brudzinski. Additionally, she alleged that Chief ALJ Ingolia told her that from time to time, he and ALJ Brudzinski talk about active cases that ALJ Brudzinski is handling.

June 2004

The Coast Guard extended a job offer. Prior to officially joining the Coast Guard, ALJ Massey attended the annual Coast Guard ALJ Conference in Baltimore, MD.

Appendix C

Chronology of Relevant Events

On or about July 11, 2004

The Coast Guard hired ALJ Massey, and she began working in New Orleans, LA. The New Orleans ALJ presides over S&R hearings that arise out of the Coast Guard's District 8, which is headquartered in New Orleans. Within the New Orleans ALJ's geographic area of responsibility lies the Marine Safety Unit (MSU) located in Morgan City, LA. The Morgan City MSU generated the majority of ALJ Massey's contested S&R cases.

October 6, 2004

Shortly after she began hearing Coast Guard cases, ALJ Massey issued an order in *USCG v. McDonald* that erroneously dismissed the Coast Guard's complaint on the grounds that it was deficient as a matter of law. The Coast Guard planned to file an appeal, but the ALJ program convinced it not to do so because ALJ Massey corrected her ruling.

October 22, 2004

ALJ Massey sent an email message to the ALJ program's Director of Judicial Administration in which she admitted her error in the *McDonald* matter and asked for assistance in understanding the law in her pending cases. Specifically, she asked that someone from the Chief ALJ's office be assigned "to review the complaint/answer in each case, and prepare a short memo of law about the elements of the government's case, any defenses the Respondent has raised, and refer [her] to any significant authorities [she] should be aware of in a particular case."

December 2004

As early as December 2, 2004, the S&R program officials at Coast Guard headquarters began forwarding complaints that they received about ALJ Massey to the Chief ALJ's office for further investigation. These complaints included allegations that ALJ Massey had an unprofessional demeanor and subjected Coast Guard investigating officers to "belittling attacks."

December 7, 2004

During a break in the *USCG v. Dresser* hearing that ALJ Massey observed in New Orleans, ALJ Massey attended lunch with ALJ Brudzinski and two attorneys from the docketing center. In her affidavit in *Dresser v. Ingolia*, ALJ Massey states that during the lunch, ALJ Brudzinski discussed the testimony the respondent, represented by J. Mac Morgan, presented that morning. According

Appendix C

Chronology of Relevant Events

to ALJ Massey, ALJ Brudzinski said that although he found the testimony compelling, if he ruled for Mr. Dresser, the Chief ALJ would have his job. No other attendee at the lunch recalled ALJ Brudzinski making that statement.

December, 13, 2004

ALJ Massey reopened *USCG v. McDonald* to correct her previously-issued ruling (see October 6, 2004)

In late 2004 or early 2005

Shortly after ALJ Massey's December 7, 2004, lunch with ALJ Brudzinski, J. Mac Morgan, respondent's counsel in both the *Dresser* matter, then pending before ALJ Brudzinski, and *USCG v. Elsik*, then pending before ALJ Massey, visited ALJ Massey at her office to file a pleading. ALJ Massey and Mr. Morgan had a 15 minute conversation in her office during which Mr. Morgan discussed the *Dresser* matter. ALJ Massey witnessed Mr. Morgan's representation of the respondent in this matter on December 7, 2004. During this conversation, Mr. Morgan also shared with ALJ Massey his allegation that the Coast Guard ALJ program was biased against Mr. Dresser. Mr. Morgan also referred ALJ Massey to a former Coast Guard ALJ who was critical of the ALJ program and who also testified at the July 2007 congressional hearing.

January 6, 2005

In *USCG v. Elsik*, ALJ Massey granted the Motion for Interrogatories by respondent's counsel, Mr. Morgan, in contravention of Coast Guard regulations and 33 CFR 20.601(d), which required certain showings to be made before the discovery motion could be granted, and 33 C.F.R. 20.309(d), which gave the Coast Guard the right to respond to the motion before it was granted. In addition, ALJ Massey did not follow 33 CFR 20.603(e) because she gave the Coast Guard 15 days to respond to the interrogatories rather than the 30 days provided by this regulation.

January 12, 2005

In *USCG v. Rogers*, ALJ Massey granted respondent's request for a subpoena in contravention of 33 CFR 20.608(a), 33 CFR 20.601(d) and 33 CFR 309(d). Specifically, ALJ Massey granted the respondent's request for a subpoena (1) without requiring the respondent to make a formal motion, (2) without making the

Appendix C

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necessary determination of fact, and (3) within 24 hours of receiving the request, which prevented the Coast Guard from having an opportunity to respond—all of which were in contravention of the Coast Guard’s discovery regulations.

February 3, 2005

In *USCG v. Rogers*, the Coast Guard refused to comply with the subpoena, arguing that it should not have to do so because ALJ Massey granted the subpoena improperly and in contravention of the Coast Guard’s discovery regulations.

February, 24, 2005

Members of the ALJ program’s senior staff met with Coast Guard S&R program representatives, including headquarters staff and district-level attorneys and investigating officers, to discuss the complaints about ALJ Massey’s conduct. The S&R program staff also invited an attorney from the Coast Guard’s Office of Maritime and International Law. ALJ Massey was aware of the complaints and was invited to the meeting by an ALJ program attorney, but she declined. Chief ALJ Ingolia did not attend the meeting. The ALJ program prohibited meeting participants from mentioning case names and prevented ALJ program staff involved in any of ALJ Massey’s pending matters from participating in the meeting.

February 28, 2005

A member of the ALJ program staff briefed ALJ Massey on the February 24, 2005, meeting. During their conversation, ALJ Massey determined that the investigating officers had discussed issues in cases that were still pending before her and she stated she abruptly terminated the conversation.

March 7, 2005

Pursuant to the advice of the ALJ program’s senior staff, Chief ALJ Ingolia issued a memorandum titled, “Guidelines for Discovery Requests” (the “March 7, 2005, discovery memorandum”) to all Coast Guard ALJs. According to ALJ program senior staff, one of the purposes of the memorandum was to correct ALJ Massey’s and the District 8 investigating officers’ misinterpretations and misapplications of the Coast Guard’s discovery regulations.

Appendix C

Chronology of Relevant Events

March 15-17, 2005

ALJ Massey exchanged email messages with the ALJ program's senior staff attorney who was responsible for providing the Coast Guard ALJs with legal research, assistance and advice. ALJ Massey asked whether the Chief ALJ and the Director of Judicial Administration were directing the content of the legal advice ALJ Massey would be receiving. The senior attorney explained that the Chief ALJ was not involved in the provision of legal research to ALJs and that it was the individual ALJ's decision whether to solicit or be guided by the staff attorney's advice.

March 21, 2005

ALJ Massey received a legal research memorandum from an ALJ program legal intern regarding a legal issue in the *Elsik* matter. In the memorandum, the intern explained that dismissing the misconduct allegations in the matter would be improper and in contravention of well-settled Coast Guard law.

March 22, 2005

In *USCG v. Elsik*, ALJ Massey stated in a pre-hearing conference that she disagreed with binding Coast Guard precedent. Instead of following Coast Guard precedent, and in violation of 46 CFR 5.65, she relied on an opinion from the Ninth Circuit Court of Appeals. The Commandant would later reverse her decision on appeal.

March 24, 2005

ALJ Massey received a memo from an ALJ program staff attorney regarding an issue in the *Rogers* matter. In the memorandum, the staff attorney advised that dismissal of the *Rogers* matter with prejudice was an inappropriate sanction for the Coast Guard's refusal to comply with the subpoena. However, the attorney advised that sanctions against the Coast Guard were warranted and referred ALJ Massey to the sanction authorized by 33 CFR § 20.607(a).

March 25, 2005

ALJ Massey rejected the ALJ program staff attorney's advice and dismissed the *Rogers* matter with prejudice as a sanction for the Coast Guard's failure to comply with a subpoena ordered by the respondent and issued by ALJ Massey. On appeal, the Vice Commandant reversed ALJ Massey's decision and held that she abused her discretion and exceeded her authority as an ALJ by

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dismissing the case with prejudice on the basis of the Coast Guard's discovery violations.

March 28, 2005

The Director of Judicial Administration contacted ALJ Massey on the Chief ALJ's behalf and arranged for ALJ Massey to meet the Chief ALJ in Baltimore, MD.

March 31, 2005 and April 4, 2005

ALJ Massey sent memoranda to Chief ALJ Ingolia stating that the March 7, 2005 Discovery Memorandum improperly infringed upon her judicial independence and was an attempt to pressure her into ruling in a certain way. In addition, in the March 31, 2005, memorandum, ALJ Massey stated that the Chief ALJ's March 7, 2005, Discovery Memorandum contained "flawed and/or puerile reasoning."

April 6, 2005

In *USCG v. Elsik*, ALJ Massey dismissed the Coast Guard's complaint with prejudice. Specifically, she relied on a Ninth Circuit decision, which was not binding precedent in this matter, to dismiss the Coast Guard's misconduct allegations in contravention of well-settled Coast Guard law. She also dismissed the remaining negligence allegation as a sanction for the Coast Guard's failure to comply with her discovery orders. On appeal, the Vice Commandant reversed ALJ Massey, holding that she (1) committed an error of law when she dismissed the misconduct allegations in contravention of the plain-language of the statute; (2) abused her discretion and committed an error of law when she dismissed the negligence allegation for a discovery violation; and (3) acted arbitrarily and capriciously by failing to follow the applicable discovery rules.

April 8, 2005

ALJ Massey met with Chief ALJ Ingolia and three members of his staff. Eventually, all but one of the staff members was asked to leave so that the Chief ALJ could have a more private conversation with ALJ Massey. Chief ALJ Ingolia told ALJ Massey that she was the cause of the problems in District 8. According to ALJ Massey, it was during this meeting that the Chief ALJ told her to always rule in favor of the Coast Guard. According to the Chief ALJ and the senior staff member present, the Chief ALJ did not say anything that could reasonably be construed as directing ALJ

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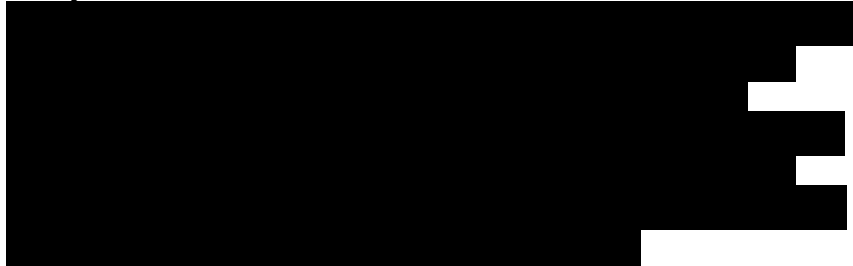
Chronology of Relevant Events

Massey to rule in favor of the Coast Guard. Instead, they assert that the Chief ALJ only instructed her to follow Coast Guard's regulations.

May 31, 2005

As a follow-up to the April 8, 2005, meeting, ALJ Massey sent Chief ALJ Ingolia a memorandum that stated her belief that the senior investigating officers' complaints about her conduct and demeanor were without merit. She asserted that the complaints were personal attacks on her because of her adverse rulings and because of her gender. ALJ Massey requested that an independent investigation take place in order to clear her personal and professional reputation.

Early summer 2005



On or about July 21, 2005

ALJ Massey called the former ALJ to whom she had been referred by Mr. Morgan. She discussed the assignment of the *Dresser* matter with this ALJ, erroneously stating that Chief ALJ assigned the *Dresser* matter to ALJ Brudzinski after ALJ Massey had been hired by the Coast Guard. In fact, the Chief ALJ assigned *Dresser* to ALJ Brudzinski in December 2003.

August 26, 2005

ALJ Massey presided over a hearing in *USCG v. Boudreaux*. In that hearing, the Coast Guard rested its case without calling any witnesses, as it had failed in its attempt to get ALJ Massey to reconsider her previous denial of its motion to have certain witnesses participate by telephone. In response, the respondent moved to dismiss the Coast Guard's complaint. ALJ Massey granted the respondent's motion from the bench and dismissed the complaint with prejudice based on the Coast Guard's failure to present any evidence and thereby prove the facts in its complaint.

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August 28, 2005

Hurricane Katrina hit New Orleans, LA. The storm significantly interrupted Coast Guard operations in District 8. ALJ Massey did not preside over any S&R hearings or receive any new cases from August 2005 to her retirement in March 2007.

November 29, 2005

ALJ Massey issued the written decision in *USCG v. Boudreaux*. In her decision and order, just as in her May 31, 2005, memorandum, she accused the Coast Guard and a certain senior investigating officer of “demonizing” her by making false statements about her judicial demeanor.

December 14, 2005

[REDACTED]

January 29, 2006

[REDACTED]

March 16, 2006

[REDACTED]

June 2006

[REDACTED]

July 2006

[REDACTED] ALJ Massey followed up with Mr. Morgan after he attempted to contact her. She tentatively agreed to meet with him [REDACTED] [REDACTED] Otherwise, she intended to continue to work as a Coast Guard ALJ.

Appendix C

Chronology of Relevant Events

July 2006-March 2007

ALJ Massey engaged in monthly phone conversations with Mr. Morgan, who ALJ Massey said was inquiring about the status of her retirement request.

March 3, 2007

[REDACTED] ALJ Massey retired from the Coast Guard.

March 13, 2007

ALJ Massey provided testimony to Mr. Morgan. Two weeks later, Mr. Morgan filed the *Dresser v. Ingolia* complaint against the Commandant, Chief ALJ Ingolia, and various Coast Guard and ALJ program employees. The allegations in the complaint are based largely on ALJ Massey's testimony.

May 9, 2007

ALJ Massey signed an affidavit in the *Dresser v. Ingolia* matter based on her March 13, 2007, testimony. In the affidavit, ALJ Massey alleged that the Coast Guard's ALJ program is biased against mariners and the Chief ALJ told her to always rule in favor of the Coast Guard.

June 24 2007

The *Baltimore Sun* used ALJ Massey's affidavit and the *Dresser v. Ingolia* lawsuit as the basis for the first in a series of articles that questioned the integrity of the Coast Guard administrative law program.

July 31, 2007

Following the *Sun* article, the U.S. House of Representatives' Transportation and Infrastructure Committee's Sub-committee on Coast Guard and Maritime Transportation held a hearing regarding allegations of bias in the Coast Guard administrative law program. ALJ Massey testified at this hearing regarding her affidavit and allegations, as did a former Coast Guard ALJ to whom Mr. Morgan had referred to her.

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Appendix E
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Kimberley Cox, Inspector
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René Rocque Lee, Assistant Counsel
Adam Berlin, Assistant Counsel

Appendix F
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