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Homeland Security

United States
Coast Guard



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DEPARTMENT OF HOMELAND SECURITY

U. S. COAST GUARD

STATEMENT OF

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ASSISTANT COMMANDANT FOR POLICY AND PLANNING**

AND

**CAPT THOMAS SPARKS
COMMANDING OFFICER, MARINE SAFETY UNIT PORT ARTHUR**

ON THE

COAST GUARD ADMINISTRATIVE LAW JUDGE SYSTEM

BEFORE THE

COAST GUARD AND MARITIME TRANSPORTATION SUBCOMMITTEE

U. S. HOUSE OF REPRESENTATIVES

JULY 31, 2007

Good morning, Chairman Cummings, Ranking Member LaTourette and members of the Subcommittee. Thank you for this opportunity to speak with you about the Coast Guard's Administrative Law Judge system. Specifically, I would like to provide some historical background on our ALJ system, explain to the Subcommittee how our process works, how it protects public safety, and make clear how it affords due process to mariners.

Background and Authority

Since 1942, the Coast Guard has been responsible for issuing mariner credentials. These credentials serve to identify the individual as having the necessary qualifications and experience to undertake certain vital maritime transportation functions in the interest of public safety. The vast majority of the more than 200,000 licensed mariners perform their demanding jobs with great distinction, uphold the highest standards of safety and professional conduct, and rightfully deserve the tremendous public trust placed in them.

An integral part of the issuance, oversight, and integrity of these important safety credentials is the requirement to investigate when standards of public safety or professional conduct are alleged to have been breached, and to file complaints and seek suspension and revocation of credentials when appropriate. The suspension and revocation process is designed to determine if allegations are true and take appropriate action against the credential where warranted in an administrative process that provides the mariner with due process and a fair opportunity to be heard before a decision is reached.

In 1946, the Administrative Procedure Act (APA) set forth the basic procedures and protections for handling suspension and revocation cases expeditiously and fairly. While the APA contains certain basic requirements such as proper notice, opportunity to present evidence and rebuttal, limited cross-examination, and the chance to submit proposed findings or exceptions, it largely leaves to agency discretion such issues as the scope of discovery, the imposition of time limits, and certain evidentiary guidelines.

In order to fulfill the APA requirements, the Coast Guard hired its first Hearing Examiners in 1948 pursuant to approval from the Civil Service Commission (now the Office of Personnel Management). These hearing examiners later became administrative law judges (ALJ's); a nomenclature change which took place in accordance with the APA. The number of judges, their locations, and the nature of cases have varied over the years. Until the early 1980's, most cases involved shipboard discipline aboard deep draft vessels subject to inspection. Changes in regulatory policy, greater Coast Guard responsibility for uninspected vessels, and the advent of drug testing brought major changes to the nature of cases.

In 1999, the procedural rules for handling Coast Guard ALJ cases were updated to reflect the best practices in administrative law. These new rules were based on the Model Rules of Administrative Procedure proposed by the Administrative Conference of the United States and new procedural rules developed by the Department of Transportation. The intent of this update was to provide additional due process protections and transparent and consistent procedures to both the mariner and the suspension and revocation process. For example, the new rules provided for modern motions practice, expanded discovery, and detailed procedures for handling evidence and conducting hearings.

The emphasis of the suspension and revocation process is public safety and security, especially the control of the use of drugs and alcohol by marine transportation workers. Since 1999, nearly three quarters of allegations against mariners involve drug and alcohol use and include positive drug tests, operation of a vessel under the influence of drugs or alcohol, refusal to take drug or alcohol tests, providing substituted or adulterated specimens, and DUI convictions. Another major charging area is in the provision of false information concerning prior convictions in merchant mariner credential applications.

The Coast Guard ALJ program also provides ALJ services and hears fisheries violation cases from the National Oceanic and Atmospheric Administration, civil penalties and airman certificate suspension or revocation for the Transportation Security Administration for security related cases, and cases for the Bureau of Industry and Security.

The Hearing Process

When, after thorough investigation, the Coast Guard decides it is appropriate to bring an action against a mariner's credential, a Coast Guard investigating officer prepares a complaint. Once the complaint is served, the mariner may seek a settlement or a non-adjudicatory option. Coast Guard rules also allow for voluntary surrender or voluntary deposit of a credential (approximately 50 such cases a year are resolved in this manner.). Voluntary surrender permits any credential holder with the option to surrender a license, certificate or document to the Coast Guard in preference to appearing at a hearing. In the case of voluntary deposit, the holder may deposit a credential with the Coast Guard in any case where there is evidence of mental or physical incompetence, until such a time, that the incompetence is resolved.

The most common response to a complaint is a settlement, often a drug rehabilitation settlement offered in drug use and drug test refusal or adulteration cases. This affords the respondent an opportunity to go through drug rehabilitation and potentially return to service as a mariner if they fully recover. In 2004, Congress amended the suspension and revocation statute regarding drug convictions to encourage such settlement agreements. Other forms of settlement include mitigated sanctions, retraining programs, and compliance programs.

Admissions cases are another common response whereby the respondent admits the allegations and agrees to the sanction. In these cases, an ALJ will review the complaint to determine the legal adequacy of the allegations and the sanction.

If the mariner files an answer and denies any allegation, the case will be assigned as a contested case. Similarly, temporary suspension cases, where the Coast Guard suspends a credential for forty-five days without a hearing, typically for operation while intoxicated or under the influence of drugs, are treated as contested cases.

Handling of Contested Cases

Contested cases are assigned to an ALJ based on geographic areas of responsibility, unless caseload or availability dictates otherwise. While the ALJ is independent and has considerable discretion on how the case will be processed, the procedural rules set out the framework for case processing. The fundamental requirement is that both sides have an opportunity to be heard. All motions and replies must be on the record, either in writing or at a hearing.

While previous rules had no provisions for discovery, the 1999 rules require parties to share witness lists, summaries of expected testimony, and all exhibits. For example, in drug test cases, the respondent can obtain information directly from the laboratory in accordance with Department of Transportation drug testing rules. Additional discovery is permitted by order when the ALJ determines that:

- it will not unreasonably delay the proceeding;
- the information sought is not otherwise obtainable;
- the information sought has significant probative value;
- the information sought is neither cumulative nor repetitious; and
- the method or scope of the discovery is not unduly burdensome and is the least burdensome method available.

The ALJ routinely holds pre-hearing conferences to simplify issues and facilitate settlement. When settlement is not possible, the ALJ will schedule a hearing where the parties can present witnesses and exhibits on the record in an adversarial proceeding using the rules of evidence typical for administrative proceedings.

Once the hearing has concluded, the ALJ prepares a decision that sets out the procedural history of the case, makes findings of fact and conclusions of law, and sets out the reasoning for the decision. Each determination is a permanent record.

Since the new rules went into effect in 1999, there have been approximately 740 contested cases; 131 of these were dismissed for different reasons such as the evidentiary burden could not be met, voluntarily surrender of the respondents credential, or procedural reasons.

Of the remaining contested cases, approximately half settled. In other cases, the respondent failed to appear or the respondent changed their answer to an admission. As a result, since 1999, there have been only 152 decisions issued after hearing fully contested cases resulting in 21 decisions issued that granted full relief for the respondent and 31 additional cases where the ALJ found some charges not proved and/or issued a sanction less than that requested by the Coast Guard. These decisions are based on the record of the case and an explanation of the facts found. These decisions are permanent and available and provide transparency in the adjudication process.

Appeals to the Commandant

Parties have the right to appeal ALJ decisions by filing a notice of appeal within thirty days of the issuance of the decision. After the parties file their briefs, the Commandant will consider the briefs, the decision, and the administrative record in making a written decision of the appeal. These decisions are published and available to the public. The underlying case file is available for at least 25 years before disposal.

Since 1999, there have been 37 appeal cases by mariners. The ALJ decision was overruled in only four cases and the decision was modified in two others. In the other cases, the ALJ decisions were affirmed or the appeal dismissed for procedural reasons. During this same time the Commandant decided six appeals by the Coast Guard. The ALJs decision was affirmed two times, in one case the sanction was modified, and three times, the Commandant found the judge erred, and remanded the cases for further proceeding. In one of those cases, both sides appealed and the ALJ was affirmed.

Appeals to the NTSB

Mariners are afforded a unique opportunity for another level of administrative appeal; Commandant Decisions may be appealed to the National Transportation Safety Board. Since 1999, 32 cases were so appealed to the NTSB with the Commandant being overruled in only two cases (one of those NTSB decisions against the Commandant was subsequently overturned by a federal circuit court). In two other cases, the NTSB modified sanctions. In the other 28 cases, the agency was affirmed or the appeal was dismissed or withdrawn.

Judicial Review

Finally, as in all administrative adjudications, there is the opportunity for judicial review in federal court to consider whether the agency afforded the respondent due process and whether the decision is supported by the record and the law. Access to the judicial system is generally only available once the respondent has exhausted his/her administrative remedies.

ALJ Independence

One of the cornerstones of the administrative law judge system is the use of impartial and neutral decision-makers. A comprehensive system ensures ALJ independence through the following measures:

- ALJs must pass an examination conducted by the Office of Personnel Management.
- ALJ pay is not subject to performance evaluation by the Coast Guard.
- Coast Guard ALJs are carefully segregated in the Coast Guard organization to ensure, for example, that no ALJ is supervised by anyone who investigates for or represents the Coast Guard.
- The Coast Guard cannot independently remove an ALJ. This can only be done through the Merit System Protection Board based on misconduct, incompetence or judicial disability. Similarly, if an ALJ believes that their caseload has been reduced for improper reasons, the ALJ may bring an action against the agency with the MSPB.
- Parties who believe for good cause that an ALJ is biased against them may seek to disqualify the ALJ. This is typically accomplished by filing a motion to disqualify, although an ALJ may disqualify himself or herself at any time. Rulings on these motions can serve as the basis for an appeal, if not granted.
- ALJs may not engage in ex parte communications not allowed by the APA.

While ALJs have complete judicial independence in rendering decisions, they are still bound by agency regulations and precedent. They are also bound by the Code of Judicial Conduct and, as federal employees, the Standards of Ethical Conduct for Employees of the Executive Branch.

Reports of ALJ misconduct or judicial disability are initially investigated by the Chief ALJ. An appropriate independent investigating officer or law enforcement investigator may be assigned depending on the nature of the allegations.

Conclusion

As with all programs vital to ensuring the safety and security of the maritime sector, the Coast Guard continually works to improve the ALJ Program with such new proposals as:

- Allowing respondents and counsel to file pleadings and answers electronically,
- Improving public access to records, and
- Improving on-line access to ALJ, Commandant, and NTSB decisions.

Mariners have a right to be heard in matters affecting their credentials. The Administrative Law Judge System provides protections for mariners through due process. In approximately 50% of cases involving drug use, mariners enter a treatment program and prove cure. As a result, they are able to reapply for merchant mariner credentials and return to their livelihood. Moreover, the rate of recidivism is extremely low. The process to prove "cure" is long, thorough, and enduring. The Administrative Law Judge system is ultimately a public safety system. The Coast Guard embraces the opportunity to work with stake holders to improve this system to best serve the needs of mariners and the maritime community. I would be happy to take any questions at this time.