

# Justice capsized?

The Coast Guard court system is supposed to be impartial in its handling of charges against mariners. But records suggest the system may be stacked against the seagoers

By Robert Little | Sun Reporter  
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Hundreds of tugboat captains, charter fishermen and other professional mariners face charges of negligence or misconduct every year under the U.S. Coast Guard's administrative court system, a forum established to be fair and impartial, like any other court.

The stakes are high for mariners. Even a temporary suspension can often end a career.

But a Sun investigation - based on evidence in federal court records, computer data files, internal memos and the sworn testimony of a former agency judge - suggests that the system isn't merely tough on mariners but is stacked against them.

Judge Jeffie J. Massey, who retired this year, said in a sworn statement that she was told by Chief Judge Joseph N. Ingolia to always rule in the Coast Guard's favor and came under intense pressure when she did not.

Judicial instructions Ingolia circulated privately to other judges have spawned not only outrage in the small community of attorneys who appear before the Coast Guard but also several lawsuits calling the practice illegal rulemaking and obstruction of justice.

A computer analysis of the court's records reveals a striking imbalance in the decisions of its judges, with mariners losing virtually every case before the court over the past eight years. Of more than 6,300 charges filed by Coast Guard investigators since 1999, mariners have prevailed in just 14 cases - three of which the agency is trying to reverse on appeal. Including dismissals, the Coast Guard wins or reaches a settlement in 97 percent of its cases. The Social Security Administration, by comparison, prevails in 43 percent of the cases heard by its administrative law judges.

Ingolia and other officials in the Coast Guard's administrative law office, based in Baltimore, declined to comment at the behest of the U.S. attorney in Louisiana, who is representing them in the suits. A spokeswoman for the agency said any perceived imbalance in the court's decisions is a reflection of the system's efficiency and the Coast Guard's reluctance to pursue weak cases. More than half the cases involve mariners who fail a drug test and acknowledge their guilt.

"These are fair hearings that offer mariners the opportunity to present their cases before impartial administrative law judges," said Cmdr. Jeff Carter, a spokesman at Coast Guard headquarters in Washington, D.C.

One former Coast Guard judge, James Lawson, said he was never coerced by Ingolia or anyone else.

"I always found everyone in Baltimore to be courteous and professional," Lawson said. "They were there to help, not to tell me what to do."

But comments from Massey, and details spelled out in interviews and a complex matrix of court records, raise questions about the integrity of the Coast Guard system and could cast into doubt administrative actions brought against civilian captains, engineers and other seafarers around the country, several of whom are seeking redress in federal court. Among The Sun's findings:

- In two internal memos obtained by The Sun, Ingolia issued private instructions telling other judges how to rule, a practice legal experts and judges from other agencies call inappropriate, and a possible violation of federal laws that require judicial rules to be published and subject to challenge.
- Attorneys on the chief judge's staff and an attorney on the commandant's staff who helps write appellate decisions have met privately with prosecutors about open cases, according to internal e-mails and court records, an ethical breach that defense attorneys and legal experts are calling obstruction of justice.
- Records at the Coast Guard's docket center in Baltimore are rife with complaints from defense lawyers who describe hostile hearings, with judges behaving as advocates for the Coast Guard and taking over the interrogation of mariners.
- One judge expressed fear for his job if he didn't rule in favor of the Coast Guard, despite his belief that the mariner had offered compelling evidence of his innocence, according to court records.

## Careers at risk

While the court system handles administrative matters rather than criminal charges and jail terms, rulings of the administrative law judges, or ALJs, are often vital to the nation's 200,000 captains, engineers and crew members, who need a Coast Guard-issued license or other document in order to work.

The charges are investigated and prosecuted by uniformed Coast Guard officers. The harshest penalty a Coast Guard judge can hand down is revocation of those credentials, but even a brief suspension can cause turmoil in the life of someone who has built a career working on the water.

Mississippi barge pilot Greg Periman lost his license for almost three years when he failed a drug test - a charge later thrown out when Periman proved that a laboratory official had lied under oath - and lost a construction business and most of his savings while he couldn't work. Even now, with his license restored, the 50-year-old captain says some

employers won't hire him, because after a long court battle he is perceived as an enemy of the Coast Guard.

Tugboat captain Domenic Rizzo got a two-month suspension in 2001, after a barge he was towing sank in the Chesapeake Bay, and his boss told him he couldn't work because of the negligence claim on his record. The veteran captain, who now works for a tugboat company in New York, could have accepted a one-week suspension if he had admitted guilt but said he had invested too much time and money in his career to take the blame for something he didn't think was his fault.

"It was all by the book," Rizzo said of his actions on the water that day. "No one got hurt, we were in contact with the Coast Guard the whole time. Honestly, I thought we'd be commended for how it was handled. Instead I lost my job, and now every time I renew my license or go for a new job, I have to say I've been found guilty of negligence."

Complaints about the system are common on the waterways.

"Mariners have for decades suspected that the Coast Guard's administrative law system was unfair and completely devoid of due process," said Louisiana attorney J. Mac Morgan, who represents numerous clients before Coast Guard judges.

"There certainly is a perception that if you go before a Coast Guard ALJ, you're going to lose," said Ralph J. Mellusi, a New York attorney who has represented dozens of clients before the Coast Guard. "I think everyone loses."

That sentiment was given strong credence in March when Massey, within days of her retirement, gave a sworn statement describing direct pressure from the chief judge to find in the Coast Guard's favor in all cases.

"I was specifically told [by Ingolia] that I should always rule for the Coast Guard," Massey, an experienced judge who has held similar posts at other agencies, said in the statement. "He said 'the Coast Guard are out there keeping our seas safe and we have to do everything we can to support them. They know when to bring these cases and we're just supposed to help them.'"

When she resisted efforts by Ingolia and his staff to sway her rulings, Massey said, the chief judge informed her that she was the only one "making trouble." She says she retired under pressure.

Massey's experience contrasts with that described by former judge Lawson, who said he suspects that what his former colleague perceived as pressure was actually Ingolia's attempts - perhaps awkward or heavy-handed - to counsel a judge that he might have viewed as a rogue.

"My experience with Judge Ingolia was that he left me alone to do what I needed to do," said Lawson.

Still, statistics from the Coast Guard bear out any suggestion that the agency's judges are unlikely to rule in a mariner's

favor.

40-to-1 success rate

Of more than 6,300 charges brought by Coast Guard investigators since 1999, when the agency restructured its judicial system to broaden rights for defendants, just 16 have been ruled "not proved," equivalent to an acquittal. One of those cases was subsequently overturned by the Coast Guard commandant's office, which hears appeals of the court's decisions, and one is listed in the Coast Guard's records as both a win and a loss for the mariner. Appeals in three other cases are under consideration by the commandant.

Another 142 charges were dismissed, for reasons that are not apparent from the Coast Guard's electronic records. If each was considered a victory for the defendant, the Coast Guard's success rate is roughly 40 to 1.

In contrast, a prosecutor's odds of winning in federal criminal court are roughly 9 to 1, according to the U.S. Justice Department.

Most Coast Guard cases are settled without a hearing, and attorneys familiar with the system say large numbers of those mariners are clearly guilty and should be barred from piloting valuable cargo and lives on the water. They also suspect that some innocent mariners reach a settlement, rather than face the near-certainty of a guilty finding and a harsher penalty months later.

Since Ingolia took over 16 years ago, efforts have been made to improve the Coast Guard's legal system. Before 1999, the cases were handled informally, with judges setting their own rules and generally granting mariners little opportunity to subpoena witnesses or demand evidence in their defense.

Today the system, managed from the fourth floor of the 100-year-old Custom House in downtown Baltimore, more closely resembles a traditional court, with judges based in Baltimore, New York, Houston, Seattle and Alameda, Calif., presiding over an adversarial prosecution-style process. Mariners are entitled to "discovery" of evidence for their defense, all at the discretion of the ALJ. Attorneys say they prepare for Coast Guard cases much as they would for any trial in federal court, albeit with a near-certainty that in a Coast Guard case the government will win.

But a review of Coast Guard records suggests that some rulings mariners get from the bench are predetermined by specific judicial policies circulated privately from Ingolia to the other judges.

When Edwin Turbeville failed a drug test for marijuana use in March 2001 - the first blemish, he said, on a 31-year record of sailing as an able seaman on ocean-going cargo ships - he chose to fight it. The Baltimore resident believed the test result was caused by dietary products he had been consuming that contained hemp oil.

In prior years, several military and civilian courts had thrown out drug-use charges against defendants who ingested hemp

because of studies showing it contained the same ingredient laboratories search for to detect marijuana use. The Coast Guard had resolved the issue for uniformed service members by prohibiting them from using hemp products, but no such rule applied to civilian mariners, and Turbeville said he was unaware of the problem.

In September that year, he filed notice with the Coast Guard that he would raise hemp oil ingestion as his defense. Then in October, at a hearing before Ingolia, he brought in a witness who had seen him use hemp products and a scientist who said the products caused his positive test result.

"I'll never forget after the hearing, the judge seemed so sincere," said Turbeville, 65. "He told me, 'I just don't know how I'm going to rule in this case. I just don't know.'"

Yet eight days earlier - three weeks after Turbeville filed notice of his defense - Ingolia had sent a memo to all the Coast Guard's judges instructing them that "hemp oil should not be accepted as a defense." The memo was never mentioned at the hearing, or in the 17-page order Ingolia issued several months later revoking Turbeville's merchant seaman's credentials.

Angela Hirsch, a Coast Guard spokeswoman, said that the timing of Ingolia's memo was "a coincidence" and that it was meant to establish policy for future cases, and not those active at the time, such as Turbeville's.

Some legal experts say the memo's mere existence is disturbing, however, because it appears to establish a judicial rule without giving defendants the right to challenge it or even know about it. For a judge to circulate such a statement while presiding over a case in which the issue is under consideration - and to do so without telling the parties involved - is so improper, some experts said, that they found it hard to believe.

"That's just extraordinary, and highly inappropriate," said William Funk, a professor at Lewis & Clark Law School in Portland, Ore., and co-author of two textbooks on administrative law.

Ingolia's decision forced Turbeville, then 59, to retire six years early, before his savings and pension had reached the level he was counting on. His attorney, John A. Bourgeois, called the memo "highly troubling," on learning about it from The Sun, and said he likely would have handled the mariner's case differently if he had been aware of it at the time.

"Public confidence in the fairness and impartiality of judges is an absolute requirement for any judicial system to work," Bourgeois said. "The mere appearance of impropriety or bias on the part of a judge is sufficient to damage that confidence. We intend to investigate this matter fully."

The system was hardly what Massey expected in 2004, when she gave up a job as an administrative law judge for the Federal Energy Regulatory Commission in Washington to take the Coast Guard position in New Orleans, closer to her

family in Texas.

'Big happy family'

Massey declined to discuss her time with the Coast Guard, saying she preferred that the issues be handled in court. But her experience is spelled out in affidavits and an 87-page sworn statement she gave to a lawyer who represents mariners, along with detailed notes, memos and correspondence obtained by The Sun.

A veteran lawyer and an experienced ALJ, Massey had also once served as chief administrative law judge for an office of the Social Security Administration. Yet from her earliest experiences with the Coast Guard, Massey said she encountered disturbing differences.

In April 2004, during a job interview, she said, Ingolia referred twice to the Coast Guard's "big happy family" and that the Coast Guard commandant, the agency's top official, told her that "we take care of our own." She recalled Ingolia talking on the telephone with another administrative law judge, then hanging up and saying, "He calls me from time to time and we talk about his cases."

She dismissed the comments as meaningless pleasantries but says they made her uncomfortable. Because administrative law judges are employed by one of the parties that appear before them in court, they are particularly sensitive about chumminess with the agency they work for, or any other perceived bias. Other agencies where she worked frowned on judges discussing open cases with anyone, much less someone in a position of influence and authority.

"I certainly never had a chief judge tell me anything like that before," she said of the "family" references.

Within eight months, Massey's simple concern grew into a firm belief that the Coast Guard system was not just different but rigged against the mariners.

On Dec. 7, 2004, Judge Walter J. Brudzinski, an ALJ for the Coast Guard in New York, came to New Orleans to hear a case concerning a marine engineer named Christopher Dresser, whose charge of failing a marijuana test had been plodding through the Coast Guard system since 1997. (Dresser's brother, Michael, is a staff reporter for The Sun but played no role in the newspaper's investigation.)

Massey attended the hearing as a spectator, and after listening to testimony from a scientist and from Dresser's mother, she and Brudzinski went to lunch. According to Massey's statement, Brudzinski expressed frustration that the evidence made him inclined to rule in Dresser's favor, but added: "If I ruled that way, the chief judge would have my job."

"He was not saying this in a kidding way," Massey said.

Brudzinski never directly said that Ingolia had told him how to rule, Massey said, "But the gist of the conversation was, in my professional opinion, that there had been conversations and the Chief Judge had indicated to him how the case needed to come out."

Massey left lunch convinced that the outcome of the case had been predetermined, and two days later began taking notes on her encounters with Ingolia and his staff. She said later in an affidavit, "The whole goal of the day was simply to go through the motions of holding a hearing. The hearing didn't make any difference. There was never an issue of the outcome of the case. Mr. Dresser was going to lose and the Coast Guard was going to win."

On June 14, 2005, Brudzinski ruled for the Coast Guard. He declined to discuss the case or Massey's statements with The Sun.

Rosemary Denson, a former Coast Guard ALJ in St. Louis who left her position 10 years ago, said she, too, found the Coast Guard's court system to be manipulated by her boss and biased against mariners, although less overtly.

Several years after she joined the agency in the early 1980s, Denson said, the chief judge - Ingolia's predecessor - began urging lawyers in the commandant's office to overturn her rulings. When she complained, the judge began assigning cases in her district to other judges, according to a letter she wrote to the Coast Guard chief of staff.

Once Ingolia arrived, Denson said, he asked her to help train Coast Guard investigators who prosecute cases. She refused, suggesting it would be inappropriate unless the training were also extended to defense attorneys.

But other judges complied, she said. It was just one sign of a relationship between Coast Guard judges and investigators that she considered improper, and even unethical. During her tenure, judges routinely lunched with investigators, she said, or asked them for rides to the airport. Court files show mariners sometimes complained about the practice, but they were overruled.

"It's always been like that," said Denson, who was an attorney for the Department of Justice before joining the Coast Guard. "They don't care about even the perception of a conflict of interest."

As her own cases matured, Massey said, she came under increasing pressure to rule in favor of the agency. Another attorney on Ingolia's staff, at the chief judge's request, sent analyses of her cases that Massey hadn't asked for, identifying "problems" and suggesting "solutions."

By early 2005, Massey had three separate cases in which she had ordered the Coast Guard to provide evidence to mariners for their defense. In each, the Coast Guard refused, saying it would provide only what it believed was required.

#### Evidence refused

One case involved a tugboat captain named James Elsik, who was accused of bumping into a barge on the Mississippi River but said he was unaware of the incident and asked for the Coast Guard's evidence that the collision took place. Massey ordered Coast Guard investigators to produce the evidence.

They refused, arguing that federal law doesn't permit a Coast Guard judge to order evidence until after each side exchanges a list of potential witnesses and exhibits - lists that don't need to be produced until 15 days before a hearing.

Massey disagreed and noted that the relevant law begins with the words "Unless the ALJ orders otherwise."

Coast Guard investigators frequently complained that Massey was hostile to them and biased in favor of mariners. Vice Adm. Terry M. Cross, the Coast Guard's vice commandant, noted in an order overturning one of Massey's decisions a year later that she "consistently ruled against the Coast Guard, often in a derogatory manner," but concluded that she was not biased against the agency.

On Feb. 24, 2005, lawyers from Ingolia's office in Baltimore and Coast Guard headquarters in Washington met in New Orleans with Coast Guard investigators and discussed the issues in Massey's open cases, according to accusations filed in several lawsuits in federal court. Exact details of the meeting are unclear, but its existence is confirmed by e-mail messages - viewed by The Sun - between Massey and lawyers in Baltimore.

Administrative law judges from other agencies, who were not familiar with the Coast Guard system or with Massey, said a private meeting between a judge's staff and investigators to discuss issues in open cases is unfair to the mariners involved and would be grounds for a dismissal.

"That would be so unusual that it would surprise me if it actually happened," said David F. Barbour, an administrative law judge for the Federal Mine Safety and Health Review Commission and former chief judge for the agency. "I mean, no one would stand for it. Not around here."

One lawyer who allegedly attended was Hanna Lidington, an attorney on the commandant's staff who works on appeals of decisions by Coast Guard judges. Coast Guard officials said Lidington and other lawyers from the agency would not comment. But Funk, the administrative law professor, said if an attorney from the commandant's office discussed with investigators details of cases that were subsequently reviewed by her office on appeal, it would be a violation of federal laws guaranteeing separation of a court's judicial and appellate functions.

Two attorneys in New Orleans filed complaints this year with the Justice Department and the U.S. attorney in Louisiana suggesting that the meeting, and other claims from Massey, amount to criminal obstruction of justice. The Justice Department and federal prosecutors in Louisiana declined to comment about the complaint.

Shortly after the meeting, Ingolia issued a memo saying judges should not order subpoenas or other evidence until after witness lists are exchanged, using the same argument that Coast Guard investigators had offered.

Like the hemp oil memo, the directive about evidence was

never published or circulated among defense attorneys. J.C. Johns, an attorney adviser for the Coast Guard in Baltimore and the only attorney the agency would allow to talk with The Sun, said the memorandum is simply guidance to Coast Guard judges that they can disregard at their discretion.

Lawson, who reviewed both memos at The Sun's request, said he considered them legitimate vehicles for Ingolia to share his interpretations with other judges.

"The timing may be another matter," Lawson said. "The timing of the discovery memo could certainly, arguably be seen as an attempt to influence [Massey]."

"But it sounds like he had a judge who had gotten herself entangled in a procedural morass and maybe he was just trying to rescue her from it."

#### Feeling pressure

Jeffrey S. Lubbers, an administrative law specialist at American University's Washington College of Law, said a private memo "is not an appropriate way" for a chief judge to attempt to change agency procedures.

"The appropriate way would be for the agency to amend its procedural rules or for the commandant to issue an appellate decision," said Lubbers, who also reviewed the memos at The Sun's request.

As for the attorneys charging obstruction of justice, he said: "Given the timing of it, I can see why the counsel would make this claim. And I can also understand why Judge Massey might feel pressured."

A review of Coast Guard case files shows that mariners and their lawyers frequently complain that they are denied fair treatment or access to evidence by Coast Guard judges.

William Hewig III, a Boston lawyer who has represented mariners in Coast Guard hearings since the early 1980s, said he had a case several months ago in which a mariner was accused of misconduct, but the Coast Guard's complaint didn't say who was making the claim or what specific conduct was in question. He petitioned Judge Parlen L. McKenna for more evidence but was denied.

"He said he doesn't believe in discovery, that it turns his courtroom into a circus," said Hewig.

McKenna declined to speak to The Sun.

In Savannah, Ga., last year, a federal harbor pilot, John McCarthy, was accused of piloting a ship too fast past a liquefied natural gas tanker, creating a wake that caused the tanker's gangway to collapse and several of its mooring lines to break. McCarthy asked Judge Peter A. Fitzpatrick for numerous subpoenas and documents, trying to show that a pair of tugboats alongside the tanker had not performed their duties and had ignored several radio calls he made announcing his intention to sail past. All but one of his requests were denied.

Two weeks before his hearing, the Coast Guard announced that it would call 16 witnesses, and McCarthy quickly asked for more subpoenas and documents. The requests were denied, partly because his hearing was nine days away and "would impose undue burdens on the companies required to respond."

McCarthy was subsequently found guilty of negligence, and his pilot's license was suspended for eight months - long enough, he said, that vessel operators have told him they'll be reluctant to hire him if the penalty stays on his record.

"They wouldn't even listen to what I had to say," said McCarthy, who has been allowed to continue sailing while his case is appealed. "I got one month less than what the captain of the Exxon Valdez got, for what was basically a wake violation. They might as well have given me a death sentence. I'll have to find another job."

Fitzpatrick could not be reached for comment, either at his home or through the Coast Guard.

Attorney Craig Weston represented an Oregon charter fisherman, Theodore Howell, whose boat flipped and killed two people. After determining Howell had not been negligent, the Coast Guard charged him with failing to post a safety checklist and conduct a proper passenger safety briefing. A transcript shows that throughout Howell's hearing, which was videotaped to be used as a Coast Guard training tool, the judge berated the captain and frequently took over interrogation from the Coast Guard. Howell was found guilty and his license was revoked.

"In 25 years of practicing law I have never observed a judge engage in such an adversarial role," Weston wrote in Howell's appeal, which was denied.

In a 2004 California case, the Coast Guard charged a crew member of a government transport ship with "incompetence," arguing that during a voyage he was "unable to safely perform his required duties." The charges did not contain any more specific information, and the mariner argued that he needed more details to build a defense. After a private phone conversation with McKenna, Coast Guard investigators amended the charge to read "professional incompetence" but still included no specifics. McKenna later ruled that was sufficient and ruled against the mariner.

The decision also was upheld by the National Transportation Safety Board, which hears appeals of the commandant's decisions, though one member objected that the mariner had so little time to build a defense.

"I feel compelled to express disappointment in the U.S. Coast Guard's procedural handling of this case," wrote NTSB member Deborah A.P. Hersman. "The Coast Guard's boilerplate complaint provided no details or facts from which the appellant could formulate a defensive argument."

Private conversations between a judge and representatives of one side of a case are forbidden in judicial proceedings, except for strictly procedural discussions. And administrative

law judges from other federal agencies say that even discussions between a judge and his or her boss are taboo because of the perceived infringement on the judge's impartiality.

But Denson said such ex parte communications were tolerated while she worked for the Coast Guard. The agency's court files hold numerous allegations about it.

Periman, the Mississippi pilot whose drug case was overturned on appeal, was preparing for a new hearing in his case when the judge suddenly dismissed the charge based on "newly discovered evidence." Notes from the Coast Guard investigators in the case, which Periman said he obtained from the Coast Guard, show they discussed the evidence privately with the judge. The details have never been revealed.

"The appellate people, the prosecution, the investigators, the judge, they all receive their paychecks out of the same bucket," said Periman. "What do you think's going to happen? You know you're not going to win."

#### Tool for the agency

Massey was summoned to Baltimore on April 8, 2005, soon after she complained about the meeting in New Orleans and the memo Ingolia circulated afterward.

"[The Chief Judge] started in on me about how I obviously didn't understand what the program was about and that my rulings were causing problems for his big happy family and that I needed to stop," Massey said in an affidavit filed in federal court.

Ingolia, Massey said, made clear that she should not consider

herself a judge but rather a tool for the agency to implement policy that it knows to be correct.

"He said that I was the only person making trouble for him," she said.

On the plane back to New Orleans, she scrawled out a note detailing Ingolia's directives during the meeting: She was never to make the Coast Guard do more work than it wanted and should not concern herself with the hardship that caused mariners. Even if the Coast Guard can't really prove allegations, it knows what it's doing, and she should rule in its favor, she said she was told.

Massey eventually dismissed all three cases in which investigators refused her orders to produce evidence. Elsik's was later reinstated by the commandant's office, partly using the same logic in Ingolia's memo. The other two are under appeal.

Massey retired from the Coast Guard on March 3 this year and 10 days later testified in a detailed statement with Morgan, the attorney who represented Elsik and Dresser.

Her comments have quickly spread though the small community of mariners and lawyers who specialize in Coast Guard cases, sparking additional lawsuits.

"No one who has been within a mile of a law school could possibly think this kind of conduct is correct," said Hewig.

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