



COMDTINST 5830.3
14 FEB 2017

COMMANDANT INSTRUCTION 5830.3

Subj: COMMUNICATION AMONG PERSONNEL FROM THE OFFICE OF INVESTIGATIONS AND ANALYSIS (CG-INV), THE OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE (CG-00J), AND THE OFFICE OF THE JUDGE ADVOCATE GENERAL (CG-094) AND (CG-094C)

Ref: (a) Investigations and Complaints Against Administrative Law Judges, ALJIPP 5830.1 (series)

1. PURPOSE. To establish communication guidelines for personnel involved in the investigation, administrative proceedings, adjudication, and appellate review of Merchant Mariner Credential suspension and revocation cases while ensuring the process remains free from influences that are not part of the record, such as ex parte communications.
2. ACTION. All Coast Guard unit commanders, commanding officers, officers-in-charge, deputy/assistant commandants, and chiefs of headquarters staff elements shall comply with the provisions of this Instruction. Internet release is authorized.
3. DIRECTIVES AFFECTED. None.
4. BACKGROUND.
 - a. Since 1942, the Coast Guard has been responsible for administering vessel inspection and navigation laws as well as issuing Merchant Mariner Credentials. A credential identifies the holder as having the necessary qualifications to perform certain maritime functions competently and safely. To promote safety at sea, Congress gave the Coast Guard authority to suspend or revoke Merchant Mariner Credentials for acts of incompetence, misconduct, negligence, and use of dangerous drugs. Chapter 77 of Title 46 U.S.C., requires Suspension and Revocation (S & R) proceedings to be adjudicated in accordance with the Administrative Procedure Act at 5 U.S.C. §§ 551-559 by Administrative Law Judges (ALJs) appointed under 5 U.S.C. § 3105.

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NON-STANDARD DISTRIBUTION:

- b. Under 46 C.F.R. § 1.01-20(c) the Commandant assigns a Chief Administrative Law Judge to “(1) Act as adviser and special assistant to the Commandant on matters concerning the administration of hearings under 46 U.S.C. chapter 77 . . . [and] (5) Act as adviser to the Chief Counsel [Judge Advocate General] in preparation of the final action of proceedings conducted under subparts I, J, and K of part 5 of this chapter.” To discharge these duties effectively, Administrative Law Judge Program personnel shall communicate with personnel involved in the investigation and prosecution of administrative hearings as well as personnel involved in the preparation of the final action proceedings. Discussions among these entities are limited by the prohibition of ex parte communications.

5. DISCUSSION.

- a. The Administrative Procedure Act (APA) prohibits ex parte communications. Ex Parte communication is defined by the APA at 5 U.S.C. § 551(14) as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.” Ex parte communications are prohibited for hearings required under section 553 or 554 of the APA, which discuss formal rulemaking or adjudications, but is not prohibited during the informal rulemaking process. The Coast Guard’s S&R procedural regulations provide ex parte communications are governed by 5 U.S.C. § 557(d). See 33 C.F.R. § 20.205. That Section prohibits interested persons outside the agency from making ex parte communication with the Administrative Law Judge relative to the merits of the proceeding or to persons in the agency responsible for the decision making process except as authorized by law. It also prohibits Administrative Law Judges or other agency employees responsible for the decision making process from making ex parte communications relative to the merits of the proceeding to any interested person outside the agency. It should be noted that the prohibition of consultation found in Section 557(d)(1), applies to persons inside or outside the agency concerning facts in issue. See Butz v. Economou, 438 U.S. 478, 514 (1978).
- b. The S&R process requires investigating, advocating, decision-making, adjudicating, and appealing. See generally, 46 C.F.R. Part 5. First, the Office of Investigations and Analysis (CG-INV) oversees the investigation of marine casualties or matters pertaining to the conduct of persons applying for or holding a merchant mariner’s credential by the various Sector Offices and advocates the Coast Guard’s position for seeking a sanction. The Office of Maritime and International Law (CG-LMI) and District Legal Offices work with investigators to prepare and present a case at a hearing. The Office of the Chief Administrative Law Judge (CG-00J) conducts hearings and makes decisions regarding questions of fact and law. Finally, an independent component of the Judge Advocate General’s Office, the Administrative Appeals attorneys in Commandant (CG-094C), reviews and prepares appeal decisions for the Commandant or Vice-Commandant’s consideration.

6. DISCLAIMER. This guidance is not a substitute for applicable legal requirements, nor is it itself a rule. It is intended to provide operational guidance for Coast Guard personnel and is not intended to nor does it impose legally-binding requirements on any party outside the Coast Guard.

7. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS.

- a. The development of this Instruction and the general policies contained within it, have been thoroughly reviewed by the originating office in conjunction with the Office of Environmental Management. These general policies are categorically excluded (CE) under current USCG CE # 33 from further environmental analysis in accordance with Section 2.B.2. and Figure 2-1 of the National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, COMDTINST M16475.1 (series). Because this Instruction implements, without substantive change, the applicable Commandant Instruction or other federal agency regulations, procedures, manuals, and other guidance documents, Coast Guard categorical exclusion #33 is appropriate.
- b. This Directive will not have any of the following: significant cumulative impacts on the human environment; substantial controversy or substantial change to existing environmental conditions; or inconsistencies with any federal, state, or local laws or administrative determinations relating to the environment. All future specific actions resulting from the general policies in this Instruction, shall be individually evaluated for compliance with the National Environmental Policy Act (NEPA), DHS and Coast Guard NEPA policy, and compliance with all other environmental mandates.

8. DISTRIBUTION. No paper distribution will be made of this Instruction. An electronic version will be located on the following Commandant (CG-612) web sites. Internet: <http://www.uscg.mil/directives/>, and CGPortal: <https://cgportal2.uscg.mil/library/directives/SitePages/Home.aspx>.

9. PROCEDURE.

- a. Guidelines to avoid prohibited ex parte communications.
 - (1) All personnel responsible for the investigation, administrative proceeding, adjudication, administrative, and appellate review of S&R matters should not to discuss the merits of any pending S&R case between or among themselves or with persons outside the Coast Guard. This guideline shall remain in effect until the time for appeals expires. Procedural inquiries, status reports, notice of settlement discussions, or other communications that are administrative in nature are not discussions on the merits and are not prohibited.
 - (2) The guidelines contained in this Directive provide examples of acceptable communications among the above entities. It is not an exhaustive list. Inquiries concerning communications not on this list should be made to the appropriate legal servicing office.
- b. The following guidelines are established for training.
 - (1) Commandant (CG-00J) does not provide training to Coast Guard units. However, Commandant (CG-00J) participates in meetings to discuss legal updates affecting S&R proceedings. Representatives from other CG units may attend. Any presentations or briefings, if in written or transmittable form, will be placed on the internet for public view at <http://www.uscg.mil/alj/>.

- (2) The Office of Investigations and Analysis (CG-INV) develops policies and procedures for training Investigating Officers in the field. Training Center Yorktown uses this information to develop the curriculum for the S&R and Investigating Officer (IO) training course. Personnel from Commandants (CG-094C) and (CG-LMI), the ALJ Docketing Center, and Commandant (CG-00J) may participate in the training courses in the capacity of providing an overview of their roles and missions. Coast Guard personnel attending as instructors, lecturers, or students from all Coast Guard entities are not to discuss the merits of any pending S&R case.
- c. The following guidelines are established for pending Suspension & Revocation (S&R) cases.
- (1) Coast Guard personnel participating in a pending S&R case or who have developed or are developing a position in a pending case are not to communicate the merits of that case with any ALJ or ALJ employee advising the Judge in that case or any factually related case except on the record.
 - (2) Any senior member in the chain of command of a Coast Guard member or employee participating in an S&R hearing is to avoid communicating with any ALJ or ALJ employee regarding the merits of a pending case or any factually related case.
 - (3) A Coast Guard ALJ's paralegal specialist is the appropriate point of contact for questions concerning case status, scheduling pre-hearing conferences, procedural issues, or other questions unrelated to the merits of a pending case.
 - (4) All persons may contact the ALJ Docketing Center to inquire on case status, procedural issues, MISLE technical questions, or website assistance as well as other questions unrelated to the merits of a pending case. The ALJ Docketing Center is generally staffed by attorneys, paralegal specialists, legal administrative specialists (who also perform court reporting duties), and administrative support assistants. ALJ Docketing Center staff members are not prosecutors or investigators, but do provide support to the ALJs and interested parties.
 - (5) The Office of Investigations and Analysis (CG-INV) exercises program oversight for investigation and prosecution of S&R cases with assistance from the Coast Guard's S&R National Center of Expertise and the Investigations National Center of Expertise. As such, there are no prohibitions on communications within and between these entities and the Investigating Officers.
 - (6) The Office of Maritime and International Law (CG-LMI) provides counsel to the Office of Investigations and Analysis (CG-INV) in all legal matters including S&R proceedings. As such, there are no prohibitions on communications between these entities. However, there shall be no discussion on the merits of pending S&R cases by these entities with personnel within the Office of the Judge Advocate General (i.e., CG-094C) assigned to prepare proposed decisions on appeal or review. Personnel from Commandant (CG-094C) may seek general assistance or guidance from Commandant (CG-LMI), Commandant (CG-INV), or other CG entities regarding current laws, recent decisions, Coast Guard policies,

or marine safety practices to aid them in preparing appeal decisions as long as Paragraph 6.c.(7) below is followed.

- (7) Investigating Officers, the Office of Investigations and Analysis, and other persons in the Office of the Judge Advocate General are not to discuss the merits of any pending S&R case with personnel within the Office of the Judge Advocate General (i.e., CG-094C) that prepare proposed decisions on appeal or review.
- (8) Communication guidelines for individuals reporting or investigating an incident of alleged ALJ misconduct shall follow procedures established in Reference (a).
- (9) This Directive does not proscribe communications among the above referenced entities concerning data bases or relevant systems and procedures necessary for the efficient administration of the S&R program such as the Marine Information System for Law Enforcement (MISLE).

d. The following guidelines are specific to Administrative Law Judges.

- (1) Coast Guard ALJs are permitted to consult with ALJ Program attorneys on all matters including the merits of pending cases. ALJ Program attorneys are responsible for advising Coast Guard ALJs and assisting them in carrying out their responsibilities. ALJ Program attorneys are also permitted to consult with other ALJ Program attorneys but are expected to avoid ex parte discussions with an ALJ Program attorney that had previously assisted an ALJ disqualified from hearing that case and with decision makers responsible for preparing proposed decisions on appeal.
- (2) Coast Guard ALJs are also permitted to consult with one another on pending matters but are expected to avoid ex parte discussions with an ALJ previously disqualified from hearing that case and with decision makers responsible for preparing proposed decisions on appeal or review.
- (3) In the event an ex parte communication involving the merits of a pending case occurs, the presiding ALJ will place it in the record in accordance with 5 U.S.C. § 557(d)(1)(C).
- (4) Taking action to address known misconduct is a judge's obligation under the America Bar Association Model Code of Judicial Conduct. To avoid communications with investigators, prosecutors, or appellate review personnel, ALJs shall report incidents of misconduct by a Coast Guard Representative to the Director of Judicial Administration who will report the incident to the appropriate authority within the Office of Investigations and Analysis or the Office of the Judge Advocate General for further inquiry.

e. The following guidelines are specific to the Office of the Chief Administrative Law Judge.

- (1) Advisory communications between the Commandant and the Chief Administrative Law Judge are prescribed under 46 C.F.R. § 1.01-20(c)(1). Those communications include discussions of the law or case administration but not facts relevant to the merits of a pending case.

- (2) Advisory communications between the Office of the Judge Advocate General and the Office of the Chief Administrative Law Judge are prescribed under 46 C.F.R. § 1.01-20(c)(5). Those communications also include discussions of the law or case administration but not facts relevant to the merits of a pending case.
- (3) In handling inquiries and requests to examine and copy records, ALJ Docketing Center personnel are guided by procedures in 33 C.F.R. § 20.903 and 6 C.F.R. Part 5 and are not to discuss the merits of any pending case or reveal pre-decisional information.
- (4) When coordinating responses to Freedom of Information Act requests with Commandant (CG-094), personnel in the Office of the Chief Administrative Law Judge are not to discuss the merits of pending S&R cases or reveal pre-decisional information.
- (5) Personnel in the Office of the Chief Administrative Law Judge are not to discuss the merits of pending S&R cases with other members of the Coast Guard during congressional inquiries and regulatory meetings.

f. S&R Proceedings Working Group.

- (1) To ensure the integrity and efficient administration of the S&R process, an S&R Working Group was established.
- (2) The S&R Working Group consists of personnel from the Office of Investigations and Analysis (to include the S&R National Center of Expertise), the Office of the Chief Administrative Law Judge, and the Office of the Judge Advocate General.
- (3) The S&R Working Group meets semi-annually to discuss the following recurring agenda items:
 - (a) Regulatory issues or concerns,
 - (b) Congressional inquiries,
 - (c) MISLE issues or concerns,
 - (d) Procedural issues or concerns,
 - (e) Training,
 - (f) Action Items, and
 - (g) New business.
- (4) Each year, the S&R Working Group appoints a Chair that will rotate among personnel from the three entities.
- (5) The incoming Chair will coordinate the dates and times of the Group's session(s) and distribute an agenda sufficiently in advance so that participants have an opportunity to prepare.

- (6) S&R Working Group meetings are not to discuss the merits of any pending S&R case.
10. RECORDS MANAGEMENT CONSIDERATIONS. This Instruction has been thoroughly reviewed during the directives clearance process, and it has been determined there are no further records scheduling requirements, in accordance with the Federal Records Act, 44 U.S.C. 3101 et seq., NARA requirements, and Information and Life Cycle Management Manual, COMDTINST M5212.12 (series). This policy does not have any significant or substantial change to existing records management requirements.
11. NO RIGHT OF ACTION. Nothing in this Instruction creates a private right of action or legal duty, and no violation of the Standards of Ethical Conduct, COMDTINST M5370.8 (series) or the ABA Model Code of Judicial Conduct creates a private cause of action or presumption of a breach of legal duty. Complaints against ALJ Program civilian personnel other than ALJs are processed in accordance with Civilian Personnel Actions: Disciplinary, Adverse, and Performance Based Actions, COMDTINST M12750.4 (series). Complaints against ALJs are processed in accordance with Administrative Investigations Manual, COMDTINST M5830.1 (series). Allegations of ALJ misconduct are processed in accordance with Reference (a).
12. FORMS/REPORTS. None.
13. REQUEST FOR CHANGES. All requests for change shall be in writing and submitted electronically to aljdoCKETcenter@uscg.mil or faxed to the Office of the Chief Administrative Law Judge (202)372-8304. In the event electronic means is not available, written changes may be accepted by first class mail or commercial carrier (such as Fed Ex or UPS, etc.) to: Commandant (CG-00J); U.S. Coast Guard; Stop 7000; 2703 Martin Luther King Jr. Ave SE; Washington, DC 20593-7000.

W. J. BRUDZINSKI /s/
Chief Administrative Law Judge
U.S. Coast Guard