to Shawn Verdin's home, accompanied by Lt. Commander Derrick Collins. Shawn accompanied the officers to the office, where he was *Mirandized.* A waiver was executed at 10:30 p.m. Thereafter, some three hours and twenty-one minutes later during which he was questioned both by the officers who picked him up and by others, Shawn gave a short tape-recorded statement. He continued his denials that lie knew anything about, had possessed or had disposed of the bag.

Deputy Corey Guidry arrived at Tracy Trahan's house at about midnight. He accompanied the officers to the office, where he was read his *Miranda* rights and signed a waiver at 12:19 a.m. Thereafter, following over an hour of unrecorded questioning, Tracy gave a tape-recorded statement at 1:25 a.m., which lasted ten (10) minutes. In his statement, Tracy admitted that the two men had found, picked up and then thrown away the black bag, but told the officers they did not know what was in the bag and had tossed it away fearful that there might be drugs in it and that it might get them into trouble.

The defendants were not arrested that night because, according to Agent Rodrigue, the investigation was not finished. [R. 281, L. 29-32; R. 282, L. 1.] However, the only additional investigation was a visit by Agent Rodrigue to the dock almost two months later where he photographed Shawn Verdin's white Carolina skiff and another similar boat belonging to Skylar Verdin. Agent Rodrigue testified that he examined Shawn Verdin's boat at that time and found no pulley system for hoisting the nets on Shawn Verdin's boat, a statement that was proven to be false by the enlargements of his own photographs produced by the defense. According to Agent Rodrigue, this occurred on August 2nd.

Agent Rodrigue, in his testimony, provided the court with the background of the investigation, which led to the events of June 9. Prior to that time, other bales of cocaine had been found either floating or beached in the area waters. The federal Drug Enforcement Administration was handling this primary investigation, and the bales/bricks of cocaine that were retrieved during the investigation, with the exception of those in the bag found by the defendants, were asserted to be in federal custody at Fort Knox. The period during which these other bundles were retrieved covered about two weeks prior to June 9, and, according to Rodrigue, a total of approximately 600 kilos of cocaine were retrieved. There was no evidence, nor any allegation, that the defendants were in any way involved with these failed efforts to smuggle cocaine into the country.

With regard to the photographs he took, allegedly on August 2, Agent Rodrigue denied that the inclusion of Skylar Verdin's boat in the photographs had anything to do with this case. [R. 317, L. 1-2] Skylar's boat was located next to Shawn's at that time; however, Skylar Verdin's very similar white Carolina skiff was very pertinent to the case against Shawn and Tracy.

On June 9, the officers had been alerted to be on the look out for a white Carolina skiff bearing the registration number LA 5157 FD. This turned out to be the wrong boat, and not a Carolina skiff. However, it is evident from the photographs that Agent Rodrigue took, which were blown up by the defense, that the numbers on Skylar Verdin's white Carolina skiff were LA 5157, with the letters not being clearly visible. The similarity of numbers cannot reasonably be attributed to coincidence.

Thus, on June 9, having partially misconstrued the registration number on the white Carolina skiff they were supposed to look for, the investigating officers gave chase to the first and only white Carolina skiff they saw, which, by a bizarre twist of fate, was occupied by two innocent men who had happened upon the very contraband that the officers were seeking.

Action of the Trial Court

Following the bench trial, the trial judge rendered a verdict against both defendants of guilty of attempted possession of over 400 grams of cocaine. Defendants' post-trial Motion for Post-Verdict Judgment of Acquittal and Motion for New Trial were denied. The trial court sentenced each of the defendants to serve eight (8) years at hard labor in the custody of the Louisiana Department of Public Safety and Corrections, with credit for time served since the date of their arrest. The court then suspended the sentence and ordered that the defendants be placed on supervised probation for a period of five years, subject to serving one year of imprisonment[(1)] with credit for time served. The defendants' motion to reconsider sentencing was also denied. *[(1)Captain Trahan was released after 6 months incarceration in the Parish jail].*

Assignments of Error

1. The trial court erred in finding the defendants guilty of attempted possession of over 400 grams of cocaine and in denying the defendants' post-trial motions for Post Verdict Judgment of Acquittal and for New Trial, for the reason that the evidence adduced at trial was insufficient as a matter of law to sustain a verdict of guilt beyond a reasonable doubt.
2. The trial court erred overruling the defendants Motion for New Trial on the ground that the State failed to disclose exculpatory materials discovered pursuant to ***Brady v. Maryland,*** *373 U.S. 83, 83* S.Ct. 1194, 10 L.Ed.2d 215 *(1963).*
3. The trial court erred in denying the defendants' Motion for New Trial on the grounds asserted pursuant to La. C.Cr.P. Art. *851 (1),* (4) and (5).
4. The trial court erred in sentencing the defendants and denying their motion for reconsideration of the sentence, for the reasons that the sentence rendered was constitutionally excessive.

Issues Presented for Review

1. Whether the evidence adduced at trial was insufficient as a matter of law to sustain a verdict of guilty beyond a reasonable doubt of the offense of attempted possession of over 400 grams of cocaine.
2. Whether the trial court erred overruling the defendants' Motion for New Trial on the ground that the State failed to disclose discoverable exculpatory materials pursuant to *Brady v. Maryland, 373 U.S. 83, 83* S.Ct. *1194, 10* L.Ed.2d 215 *(1963).*
3. Whether the trial court committed an abuse of discretion and/or prejudicial error in denying the defendants' Motion for New Trial on grounds asserted pursuant to La. C.Cr.P. *851(1),* (4) and (5); whether the erroneous actions and omissions of the trial court in reaching its verdict created a prejudicial error or defect in the proceedings.

4. Whether the trial court erred in sentencing the defendants and denying their motion for reconsideration of the sentence, for the reason that the sentence rendered was excessive.■

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The Coast Guard Sticks Its Nose In

After spending a considerable amount of time speaking with Captain Trahan and his Attorney while this matter was under appeal within the state court, our Association reserved further comment on the trial.

The Coast Guard commenced its action against Captain Trahan when he applied for license renewal. Following his early release from the Parish Jail on "good time," Captain Trahan went back to work on towing vessels as a Master using his unexpired license. The validity of his Coast Guard license and the licenses of mariners affected by Hurricanes Katrina and Rita were extended by Act of Congress. During the post Hurricane period when fishing and shrimping virtually came to a standstill, Captain Trahan continued to work on towing vessels to support his wife and three children, one of whom is autistic. During this time he was under the supervision of a state-appointed probation officer, had to report to that officer at specified times, was tested for drugs, and generally won high grades from all concerned.

Tracey's renewal application faithfully reported his conviction and probation status. However, the Regional Examination Center immediately turned this information over to Investigating Officers at the Marine Safety Unit in Morgan City, LA. The Coast Guard investigators immediately took steps to revoke Tracey's license by asking him to "voluntarily surrender" it. Failing in that, they immediately prepared papers to bring him before an Administrative Law Judge to revoke his license. The appropriate papers were prepared and served upon him.

Suspend or Revoke?

At Captain Tracey Trahan's request, I accompanied him to a meeting with the Investigations Office in Morgan City. At that meeting, the Investigating Officers sought outright revocation of Captain Tracey's license rather than merely suspension. The fact that he was gainfully employed and supporting his family as well as the nature of his conviction and his non-association with drugs carried little weight. Consequently, unable to reach agreement and unwilling to voluntarily surrender his license and start his career from "scratch" the Coast Guard moved to place the matter before an Administrative Law Judge for settlement.

The Coast Guard's reasons for demanding revocation were as follows. This reasoning (and wording) was based on another case[(1)] decided by ALJ Jeffie J. Massey in Morgan City that was already "on appeal" to the Commandant since the summer of 2005 and had not been decided. *[(1)Coast Guard Case #2238983; S&R 05-0008]*

"In 2004, 46 U.S. Code § 7704(b) was amended by inserting "**suspended or**" after "shall be." ***The legal effect of this amendment was to remove the statutory requirement of mandatory revocation for proved drug convictions***. The "practical" effect of this code amendment was to remove the requirement for a hearing by allowing the Coast Guard to settle *minor* drug convictions, should it chose to do so."

[NMA Comment: The statute today clearly states "suspend" *OR* "revoke." Since the Investigating Officers would only "revoke," Captain Trahan wanted to tell his story to the Judge who might only "suspend" his license instead of taking it away completely and starting his career "from scratch" at the end of an additional minimum one-year "Assessment Period"– and probably longer – the REC would impose on him.]

In a footnote[(1)] that provides interesting background material, the Coast Guard explained that "Under current law, the merchant mariner's credential (MMC) must be revoked if the holder is convicted of violating a state or federal drug law, or found to use, or be addicted to, a dangerous drug. However, if evidence or proof of cure is provided, the credential of a drug user or addict need not be revoked. No option other than revocation is provided for a drug offense conviction." *[(1) Footnote 4]*

"In 1994, the Coast Guard began using "Settlement Agreements" to resolve suspension and revocation cases without a hearing. These have been particularly successful in cases involving drug use where the Administrative Law Judge (ALJ) need not revoke credentials if the holder provides satisfactory proof of cure. The Coast Guard seeks the discretion to suspend a mariner's credentials in dangerous drug law conviction cases. Use of that discretion will allow the use of "Settlement Agreements" to resolve cases involving minor drug convictions. The Coast Guard believes that granting ALJs discretion to approve settlement agreements will improve the administration of the MMC program by removing the requirement for a hearing and revocation in every case involving a drug conviction. This will allow minor cases to be settled quickly leaving resources available to focus on more serious cases."

"46 U.S. Code §7701(d) states, "The Secretary may prescribe regulations to carry out this chapter." The Secretary delegated this authority to the Commandant. 33 CFR §1.05-1(b). The Commandant created the regulations concerning drug convictions and those regulations require revocation. See 46 CFR 5.59(b)."

"***The 2004 change to 46 U.S. Code §7704(b) did not change the regulations. Nor has the Commandant changed the regulations (nor do we know if he intends to). The Administrative Law Judge[(1)] acknowledged this when she stated, "As of the date of the Decision, the USCG has not acted to amend the underlying regulatory provisions so that they are consistent with the amended provisions of 7704(b)***." *[(1) Judge Jeffie J. Massey]*

"Nowhere in the change to 46 U.S. Code §7704(b) did Congress require the Commandant to change his regulations. Ergo, 46 U.S. Code §7701(d) remains controlling, the Commandant "…may prescribe regulations to carry out this chapter." (Emphasis added.) 46 CFR §5.59(b) remains the law and revocation remains mandatory."

[NMA Comment: The Coast Guard position was to take a "hard-line" on Captain Tracey Trahan's case based upon the preceding argument which itself is in a case under appeal to the Commandant.]

Appealing the Investigating Officer's Decision

Captain Trahan was appalled by the Investigating Officers uncompromising, hard-line approach and directed an appeal

directly to the Chief Administrative Law Judge Joseph Ingolia on Apr. 19, 2007. Portions of that letter follow:

"…Up to this point, my problem has not been with the Coast Guard, it has been with the local justice system. However, the Coast Guard does not appear to be willing to allow the state justice system handle it. It is evident that the Investigations Officers in Morgan City are uncompromising in their desire to take my license away and thereby ruin my life. They not only seek to take away my license but also ruin my livelihood. This will hurt me and my family. My alleged "crime" had absolutely nothing to do with my license in any way, and there is no reason for the Coast Guard even to become involved at this late date.

"I can find no law or regulation that required me to report my arrest, conviction, or even my incarceration at the time of the alleged crime. Here I am ***years later*** and the Coast Guard is only now seeking to destroy my life again by bringing up this past incident they had absolutely no role in! I fail to find any justice here. I cannot see why other individuals knowing what I have discovered about the Coast Guard "justice" system would ever want to count on becoming a merchant marine officer if this is what they have to expect from the U.S. Coast Guard. I grew up on the water. I have almost ten years of licensed service. I do not deserve this treatment from the Coast Guard…."

I attempted to have my attorney, Mr. Doug Greenburg, represent me before an Administrative Law Judge in Morgan City. He respectfully declined citing his unfamiliarity with the procedures and the applicable administrative law and indicated that he did not feel qualified to represent me in that forum. I trust Mr. Greenburg. I then sought the advice of two other maritime attorneys. They indicated that such a trial could cost me a great deal of money, as much as $5,000 to $10,000 – money that I do not have without my license. Neither attorney offered to represent me.

I use my license to earn my living. My employer needs my services immediately because of the acute shortage of licensed and qualified personnel in the towing industry.

The fact is that I do not believe that I had "guilty knowledge" nor was I attempting to possess drugs with any criminal intent. It may take me years to complete the appeal, but I have the duty and obligation to provide for my family while my case is on appeal…

I respectfully request that you review this case and use your good offices to allow the license renewal procedure to continue so that I can regain my license and resume my job. I want you to be assured that I am a law-abiding citizen and can be trusted to continue to act as a responsible, professional merchant marine officer. This letter and its enclosures should contain all the information you need and everything I would have presented before an Administrative Law Judge if I had professional legal representation. If you need anything further, please contact me.

[NMA Comment: Chief Administrative Law Judge Joseph Ingolia never answered the appeal. However, he passed the entire case file including Attorney Greenburg's summary of the case (above) to Judge Parlen McKenna in Oakland, California to schedule a hearing. This never happened.]

Updated Information

On Jan. 23, 2011, our Association petitioned the Coast Guard Maritime Safety and Security Council to initiate a rulemaking project to reflect the 2004 Congressional amendment to 46 U.S. Code §7704(b) and bring existing Coast Guard regulations into compliance with the statute. Essentially, the law now reads "suspend or revoke" where the regulation only states "revoke."

We asserted that this change in wording by Congress on Sept. 9, 2004 should have applied to Capt. Tracey Trahan whose case was based upon an event that occurred 6 months later on March 28, 2005. The difference between "suspend" or "revoke," ***if applied***, could have allowed our mariner to go back to work to support his family two years earlier. The Coast Guard investigating officers fully understood the difference in the wording but stated they could only apply "Coast Guard regulations (i.e. "revoke" the mariner's license) in spite of the amended statute that allowed them to decide between suspension or revocation.

We brought this matter to the attention of the Coast Guard Judge Advocate General in a letter dated Oct. 19, 2010. Having received no reply, on Jan. 23, 2011 we presented our formal petition to amend the text of 46 CFR §5.59 to align with 46 U.S. Code §7704(b).

As a result of our correspondence, the Coast Guard opened Docket #USCG-2010-1021 where the public can view all of the related correspondence and documents. A docket is nothing more than an electronic folder containing all pertinent documents.

On April 14, 2011 we received a letter from Commander Sandra K. Selman, Executive Secretary of the Maritime Safety and Security Council who stated in part:

The Coast Guard agrees with your observation that there is an apparent inconsistency in the language of 46 U.S. Code §7704(b) and Title 46 CFR §5.59. We also note that Commandant Decision on Appeal (CDOA) 2678 (USCG vs. Savoie) when considered along with the apparently inconsistent regulatory text establishes a basis for regulatory change. ***Therefore, the U.S. Coast Guard will be taking action to initiate a rulemaking that we believe will address the concerns you have raised.***"

This bureaucratic process will play out in months or years – too late to be of any assistance to Captain Trahan.

CHAPTER 15 – ALJ FITZPATRICK REVOKES MASTER'S LICENSE FOR "REFUSAL TO TEST"

Introduction

On Tuesday Jan. 6, 2004, I first learned from his attorney that one of our mariners, Captain ■ (name withheld) was scheduled to appear before Administrative Law Judge Peter Fitzpatrick the following day at MSO Morgan City, LA. The Attorney, Robert Lansden, Esq. filled me in on essential details of the case.

I arrived in the courtroom at 0900, and met Captain ■ and his wife. Judge Fitzpatrick arrived from Norfolk, VA, to handle the case.

Background

Captain ■ was the master of a 99 GT, 145 foot, Offshore Supply Vessel, the M/V PETER CALLAIS operated by Abdon Callais Offshore. The vessel's Certificate of Inspection (COI) calls for the vessel, when in 24-hour service, to be manned by one licensed master, one licensed mate and two ordinary seamen. In fact, there were three seamen assigned to the vessel on the days in question – May 20 and 21, 2003. Since the vessel is less than 100 gross tons, none of the unlicensed seaman was required to hold a merchant mariner's document.

The tour of duty on this vessel is 28 days on duty and 14 days off duty. Company policy calls for both licensed officers to hold masters licenses although the Certificate of Inspection calls for a master and a mate. Captain ■ was the senior captain on the vessel, was "in charge" of the vessel, and received slightly higher pay as a result of his position. On conclusion of his tour of duty, Captain ■'s "mate" was scheduled to step up to the top slot as the "relief master" and work for the next two weeks in command of the vessel. At the end of two weeks, Captain ■ was scheduled to return to the vessel as Master.

The company Human Resources Director testified by speakerphone while the company's former Safety Director appeared in court. In his testimony, the Human Resources Director stated that the Master of the vessel was responsible for setting the vessel's watch schedule that, for the period in question, was 12 hours on watch followed by 12 hours off watch. In fact, Captain ■ held the 0600 to 1800 hour (day) watch on May 20th while his relief held the 1800 to 0600 (night) watch. He also testified that the Captain was responsible for conducting the details of the scheduled crew change on the vessel on crew-change day (i.e., the following day, May 21st) and that the company did not become involved in the details of the crew change. There was no disagreement on this point.

The vessel arrived in Port Fourchon, LA, on May 20, 2002. Captain ■ stood his full 12-hour watch from 0600 to 1800 during which time he closed out his paperwork for the past month, made arrangements for technicians to service the vessel, supervised the crew and performed all other duties required of him. He telephoned the relief mate and learned he was en route to the vessel from his home in the Houston area. The Captain remained on the vessel until about 1930 when his wife arrived to pick him up to drive him home located approximately 45 minutes away. He shook hands with his relief as he left stating that he would return for crew change at about 0730 the next morning. In addition, Captain ■ spoke with the charterer of the vessel (i.e., the "company man"), double-checked to be sure the boat was not scheduled to leave port, advised him that he was going home, left his phone number with his mate, and then left the boat with his wife and drove home. He arrived home shortly thereafter.

The relief captain (i.e., "mate") testified by speakerphone that he was an experienced mariner with 21 years service and held a Master's license. He reported that he assumed the 1800 to 0600 watch and awaited crew change at 0730 the following morning. As a matter of professional courtesy, Captain ■ assumed that his relief would "cover" the additional 90 minutes until his relief mate arrived. All of this planning was routine and represented a customary practice – and went exactly as planned.

The Fly in the Ointment

Unknown to Captain ■ and the crew, Abdon Callais Offshore arranged with Lafourche Services to conduct a random drug and alcohol test of the vessel. Although the boat spent the entire day in port, the test took place at about 2200 hours at night.

Apparently the urine collector and Abdon Callais' human resources duty clerk showed up on the vessel at about the same time. The relief captain called Captain ■, now at his home and informed him of the random drug and alcohol test.

The company's human resources duty clerk ordered him to report back to the boat to be tested. It is at this point where things became very technical. The direct result of these technicalities led to two separate problems the court was called upon to judge – that we will call 1) "Unexcused Absence" and 2) "Refusal to Test":

Unexcused Absence

Captain ■ and his wife were at home and in bed when the first call came. After 28 days at sea and away from home and after completing a full 12-hour day on duty, Captain ■ and his wife reported they "had several glasses of wine and went to bed." Captain ■ was relaxed, fully convinced he was off duty, and told his relief that he was not going to return to the boat. He confirmed the boat was in good hands and that there was no emergency…nor was there any hitch in the plans for crew change as the boat was going nowhere. In fact, the boat did not leave port for several days thereafter.

Then the human resources duty clerk, representing the company, called and insisted that Captain ■ return to the boat at once. He refused stating emphatically that he had completed his watch, was off-duty, had handed the boat over to his relief. After drinking several glasses of wine, he stated that he would not risk losing his license by failing an alcohol test.

The human resources duty clerk decided to push the matter. He informed the urine collector of Captain ■'s name and social security number and stated that he had "refused" to return to be tested over the telephone. ***The collector testified that it was his job to test only those individuals who were physically present on the boat at the time; since Captain ■ was not on the boat he could not test him.***

However, since the human resources duty clerk furnished his name and social security number and stated that he "refused" to be tested, the urine collector filled out a blank form, put Captain ■'s name on it with the word "refused" and sent it to the SAMSHA-approved drug lab. At the same time, one of the three deckhands who was on the boat earlier in the day, was also off the boat and unavailable for testing. However, no "refusal to test" report ever was filed against him.

The following morning, Captain ■ returned to the boat. At that point, he heard from a crewmember that the "relief captain" had been promoted to senior captain. Captain ■ then removed all his belongings accumulated over two years service on the boat and prepared a brief letter of resignation effective the preceding evening at the end of the last watch he served. The following day, he turned in his resignation to the office and picked up his paycheck.

The Abdon Callais Human Resources Manager testified that, even though the company left the crew change up to the crew, Captain ■ left the boat before crew change without being properly relieved. He complained that the vessel could not go to sea in an emergency without its four-man crew – even though there were no plans for the vessel to leave port and there was no emergency. ***The "relief captain," who now serves as the vessel's master, testified telephonically from the pilothouse of the same boat as it was underway in the Gulf of Mexico that he was "not properly relieved***." While this might have been technically correct, it appeared as a fragile, transparent and self-serving technicality.

Nevertheless, before Captain ■'s attorney could summarize his testimony in a closing statement, Judge Fitzpatrick said that Captain ■ had made a very serious error and that he "did not buy" that he was properly relieved. However, this effectively stifled the argument that the vessel's Certificate of Inspection only requires two licensed officers when the boat is in 24-hour service.

As a direct result, Judge Fitzpatrick ordered the Coast Guard to lock Captain ■'s license in their safe until such time as he could decide the matter of what "sanction" (penalty) to apply to Captain ■'s "Refusal to Test."

Refusal to Test

Since our Association was formed, we have gone to great lengths to study and report on the problems that our lower-level mariners face. In doing so, we have written letters, asked questions, solicited advice from many different sources, attended conferences, visited Coast Guard Headquarters and contacted members of Congress on numerous occasions. Here is what the rules say and what we said about "Refusal to Test."

49 CFR §40.191 What Is A Refusal To Take A DOT Drug Test, And What Are The Consequences?

(a) As an employee, you have refused to take a drug test if you:

(a)(1) **Fail to appear for any test** (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see §40.61(a));

(a)(2) **Fail to remain at the testing site** until the testing process is complete; Provided, That an employee who leaves the testing site before the testing process commences (see §40.63(c)) for a pre-employment test is not deemed to have refused to test;

(a)(3) **Fail to provide a urine specimen** for any drug test required by this part or DOT agency regulations;[(1)] Provided, That an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see §40.63(c)) for a pre-employment test is not deemed to have refused to test;

(a)(4) In the case of a directly observed or monitored collection in a drug test, fail to permit the observation or monitoring of your provision of a specimen (see §§40.67(l) and 40.69(g));

(a)(5) **Fail to provide a sufficient amount of urine** when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see §40.193(d)(2));

(a)(6) **Fail or decline to take a second test** the employer or collector has directed you to take;

(a)(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under §40.193(d). In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment; or

(a)(8) **Fail to cooperate with any part of the testing process** (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process).

(b) As an employee, if the MRO reports that you have a verified **adulterated or substituted test result,** you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (including, in the case of the collector, printing the employee's name on Copy 2 of the CCF), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received. As a referral physician (e.g., physician evaluating a "shy bladder" condition or a claim of a legitimate medical explanation in a validity testing situation), you must notify the MRO, who in turn will notify the DER.

(d)(1) As the collector, you must note the refusal in the "Remarks" line (Step 2), and sign and date the CCF.

(d)(2) As the MRO, you must note the refusal by checking the "refused to test because" box (Step 6) on Copy 2 of the CCF, and add the reason on the "Remarks" line. You must then sign and date the CCF.

(e) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have **NOT REFUSED** to take a DOT test. There are no consequences under DOT agency regulations for refusing to take a non-DOT test.[(1)]

[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001.

[(1)] GCMA reported to the Coast Guard that a number of employers use non-SAMSHA laboratories to pre-screen employees and were told that this practice is illegal.]

The Judge did not resolve the matter of what sanctions to apply to the "Refusal to Test" at the trial although he stated that the charge was "Proven." He commented that this part of the case was "tragic." He pointed out that one serious error, Captain ■'s unexcused absence led to a problem that was potentially more serious. The Coast Guard investigating officer reiterated that he would push for revocation (not just "suspension") of Captain ■'s credentials.

Judge Fitzpatrick ordered the Coast Guard to hold the mariner's credentials. He asked both the Coast Guard Investigating Officer and Captain ■'s attorney to research case law to find how other judges handled similar cases of "Refusal to Test" and to report their findings back to him within two weeks.

Our Warning to Mariners

: The Coast Guard interpretation of "refusal" to test covers a wide assortment of cases settled by Commandant Decisions on Appeal (CDOA) that have closed just about every possible loophole – even those most mariners consider reasonable. At least three separate cases are pertinent: 1) Appeal Decision #2624 (Downs) (2001); 2) Appeal Decision #2578 (Callahan) (1996); and 3) Appeal Decision #2641 (Jones) (2002). We recommend that our mariners read our Report #R-315-B, Drug Testing: Refusal to Test.

Fighting the Government

Not only must your lawyer work hard to prepare your case, but also the Coast Guard Investigating Officer must work equally hard to prepare his case. If your case ever reaches the trial stage, you had better understand that the Coast Guard represents the power and prestige of the Federal government and that they are there to WIN – as is your lawyer!

Unless you spend time in court, most mariners are not able to adequately understand how to defend themselves without legal assistance. Our Association wants to make it clear that, without legal help, we believe most mariner are faced with no choice but to take whatever "settlement agreement" the Coast Guard is willing to dish out as an alternative to appearing before an Administrative Law Judge. Unfortunately, this case may dictate future "settlement agreements" the Coast Guard can accept in cases of refusal-to-test.

In fact, we need to go even further to say that some attorneys have gone so far as to tell us that they have trouble coping with the Coast Guard's existing Administrative Law system. Freely translated, this means that you may have trouble even finding a lawyer to defend you.

The Coast Guard "owns" its own Administrative Law system with its background of over 2,600 cases available to view on the internet. Captain ■ confided to me that he felt the full weight of the Federal government was turned against him. As the day progressed, the Coast Guard produced a number of witnesses both live in the courtroom and by telephonic testimony. The case proceeded like a well-scripted play with each player primed to hold the right documents in his hand and to refer to them immediately upon call.

Captain ■'s attorney ably defended him with reasonable and convincing arguments. Captain ■ was forthright and clear in his testimony as were the Coast Guard's witnesses.

It is very difficult, if not impossible, to avoid being crushed by "the system." It is particularly troubling for another mariner to watch events like this unfold…as I watched them occur over the past four years. As a mariner, you must learn "the rules of the game" in much the same way as you learned the "rules of the road." Like the rules of the road, each word you read (as in the regulations cited above) means exactly what it says. Without the knowledge of the "rules of the game" in regulations obscure to most mariners, your career at sea or on the river can come to a sudden and screeching halt practically without warning. Even worse, events like this can end your career and ruin your entire life. This case is a horrible example of what can happen when commonplace events are interpreted out of their usual context. It is events like this that make many mariners ask whether any job that can have such sweeping consequences possibly can be worth having.

Where does this lead us?

The Coast Guard upholds "the law." The law consists of Acts of Congress and many more detailed "rules and regulations" promulgated by the Coast Guard to carry out the expressed wishes of Congress. In addition to this are guidelines and policies that are not laws but simply outline the Coast Guard's way of doing business. While they are not "law" or "regulation" it is often hard to tell the difference. ***More disturbing, however, is that the Coast Guard also enforces company rules, regulations and policies***. This involves much more than just the Company's "Operations Manual" that often appears to be as realistic and practical as Alice in Wonderland. The Coast Guard is willing to enforce company written instructions of all kinds and, as was brought out in this trial, and can enforce "oral instructions" as well. Unfortunately, that deals both the Coast Guard and your employer a winning hand.

Captain ■'s attorney, himself an unlimited Master later commended for his services during Hurricane Katrina, pointed out during the lunch break that this case would have never occurred if the Captain had been represented by a union. A union, as long as it is strongly supported by its members, has the power to step between a company and its employees, for example, to decide upon the meaning of "on-duty" versus "off-duty" time when a vessel is in port and what activities are and are not permissible. In a union, jobs are based upon a negotiated written contract with tenure and promotion based upon seniority with an employer – rather than with playing company politics as occurred in this case.

The Coast Guard presented its arguments to revoke Captain ■'s credentials within the required time period. These arguments were summarized in a "Conclusion" that appears (edited with our emphasis) as follows:

Conclusion

Dicta[(1)] in the Downs case[(2)] discussed "doubt" when a post incident test is refused and "doubt" when a reasonable suspicion test is refused. That dicta appears to be an attempt to put a ranking order on refusals based on the seriousness of the type of test ordered. Such a ranking is inappropriate. All (drug and alcohol) tests are required in order to ensure the safety of life and property at sea. *[(1)**Vocabulary: Dicta: An observation made on a legal opinion.** (2)One of the three "Appeal Decisions" cited above and available on the internet.]*

To make the sanction less for refusing a random than far refusing a post-incident test or a reasonable-cause test is

tantamount to stating it is okay to use drugs as long as nothing happens. The issue of "doubt" is the same in all tests. Captain ■ stated he did not take the test because he couldn't pass the alcohol screen. That may be true or may not be true. It is just as likely that he refused the test, jeopardizing his income as "First Captain" and his Coast Guard license, because he was using drugs. There is "doubt" – we don't know because Captain ■ refused to take the test.

Arguendo,[(1)] to order a lesser sanction for refusing a random (test) than for refusing a post incident (test) or reasonable cause (test) would appear to say the random is the least important of the tests. In fact, the unannounced random (test) is the heart of the drug testing system. Both the past incident and the reasonable cause tests are done after the fact – after life and property have already been jeopardized. They are both ordered in response to something. On the other hand, the unannounced random (test), is a preventative test. Unannounced random tests remove mariners from the seas before life and property have been jeopardized. Further, it is likely that many mariners refrain from using dangerous drugs because they know that the next unannounced random could happen at any time. Prevention is always superior to response. *[(1)**Vocabulary: Arguendo** = for the sake of argument.]*

If a mariner takes a drug test and comes out negative, all is well and good. If a mariner takes a drug test and (it) comes out positive, there is a procedure – although time consuming and expensive – to cure the mariner and return the credentials. If a mariner refuses to take a drug test, there is no procedure available (and) the system fails. It is irrational to offer a drug cure without knowing whether or not the mariner uses drugs. The refusing mariner of course cannot be treated as a clean mariner as if be had taken the test and passed it. So into what category does the mariner that refuses a test fall?

This Court should not set the precedent that a mariner who states he refused the test because he was drinking gets to keep his license yet the mariner who refuses the test but doesn't state he was drinking is revoked. ***A proven refusal should equal revocation in all cases and for all types of tests. There is always "doubt" when the mariner refuses***.

The system cannot stand if it is ignored. The system is being ignored if mariners can refuse to test and receive a sanction of anything less than revocation.

The Commandant looked favorably on the ALJ's decision to revoke credentials, despite clean records:

- In 1996 concerning a post incident drug test refusal (Callahan).
- In 2000 concerning a reasonable cause drug test refusal (Downs); and
- In 2003 concerning a random drug test refusal (Jones).

Our Association Brown-Lists the Employer

The foregoing is an objective view of the events that occurred from the eyes of a mariner who observed them in the courtroom. They provide a hard lesson of what can happen if you "refuse" to take a drug test for any reason. The "lesson" is now set in stone! The lesson is don't ***ever*** refuse to take a drug test when your employer orders you to do so. Unfortunately, this is the same lesson that we now try to teach our mariners in our Report #R-315 *series* of reports. It is, however, only part of the story.

I am convinced in talking with Captain ■ and his attorney that Captain ■ is a professional mariner and did his best to perform his job to the best of his ability for the company he worked for several years. In this matter, he may have cut a corner or two, but with a background of several years of service with the same employer, he could reasonably expect them to "cut him some slack." The problem, however, is that his employer acted little more than a snake in the grass. What they did to destroy Captain ■ and his wife is simply unforgivable!

I also believe that this case had nothing to do with drugs. Unfortunately, I, like the Coast Guard investigators, am left without a scrap of test evidence to support my opinion that is nothing more than a gut feeling.

It seems that if a reputable company like Abdon Callais was displeased with Captain ■ for any reason, the company could have terminated him at any time and for any reason whatsoever. His employment was not protected by a union contract. For example, if Abdon Callais took exception to his leaving his post as Master and "going home" six hours early, they chose not to consider that he left their boat under the capable control of another person with a Master's license and with 20-years experience. In fact, within hours, the company turned around and promoted the mate – who was also a licensed master.

The mate apparently found nothing wrong with Captain ■'s early departure and gave no sign of protest until he willingly stated that he was not properly relieved over the speakerphone in the courtroom. If there ever was a "low blow", that was it.

As his employer, the company could have fired, demoted or taken a number of other meaningful actions on their own against Captain ■ without ever involving the Coast Guard. They could have asked him to take a drug test the next morning to resolve any questions they might have had!

If a serious event, such as a fire or accident had occurred during his absence, then the Coast Guard could have acted on a charge of "unexcused absence" if the company pushed the issue. In either case, short of a major accident, resorting to the Coast Guard to punish Captain ■ is like shooting a squirrel with an elephant gun!

A mariner must always remember that his credential is an easy target because it is closely tied to his ability to make a living.

What is so disturbing is that the management of this company failed to use any of the tools readily available to discipline an employee for infractions of their "company rules." From the beginning, they chose to escalate this problem beyond the company level and dropped it into the Coast Guard's lap. They chose not to give a formerly trusted employee the benefit of the doubt. Without strong and active union representation, there was no buffer between the mariner and the Coast Guard to urge that calmer minds prevail in the several days before the company finally decided to report the incident to the Coast Guard.

There appears to be little rapport between the company "human affairs" department and the Captain they placed in charge of a multi-million dollar vessel and who appears to have served them well in that position.

Based on what occurred, we would be hard-pressed to encourage any other employee of this company at any level to ever trust their livelihood to this employer again. Two years of service with this company apparently meant so little to company management that they were willing and determined

destroy Captain ■'s career and disrupt his and his wife's domestic life over a matter that could and should have been handled within the company at a much lower level.

The "Human Resources Clerk," who to the best of our knowledge was neither a licensed nor a documented mariner, apparently was given the freedom to act on his own. This person volunteered Captain ■'s name and social security number in the middle of the night to the urine collector from Lafourche Services who was only under instructions to test only those persons present on the boat. This betrayal is either a case of exalted self-importance, aggressive stupidity, or concealed intent to carry out some intra-company political feud.

If that was the case, Captain ■ got the message the next morning when he returned to the boat and found that his former mate had been "promoted" to "First Captain." Captain ■ "resigned" in writing as of the time he left the boat and, when he returned several days later let the Human Resources Manager know that his decision was final and that he would not to consider returning to work for the company. It was at this point where the Human Resources Manager sent a letter to the Coast Guard formally stating Captain ■'s "Refusal to Test." It was this letter that the Coast Guard acted upon and set the wheels of revocation in motion.

Captain ■ was not fired. Rather, he submitted his resignation because he believed the company harassed him on his off-duty time after he had already completed 12-hours on watch as well as every other duty except for the final formality of a routine crew change. He even checked out with the "company man" who represented the vessel's charterer before going home.

If this is an example of the way that Abdon Callais treats its employees, this is certainly one company that any of our mariners looking to make an upward career move needs to avoid like the plague. There are only a limited number of licensed and experienced personnel available in the job market. There is an increasing personnel shortage, and the situation shows signs of getting worse before it gets better. In a competitive marketplace stories spread very quickly. This company was willing to persecute a skilled and experienced mariner is, therefore, a company that our mariners ought to avoid recommending to any fellow mariner under any circumstances.

As a licensed mariner, I would never work for a company that I knew would sell me out in a minute as was done here. Consequently, I placed Abdon Callais Boat Rentals on our "Brown List" of employers for mariners to avoid.

CHAPTER 16 – THE OPEN AND SHUT CONSEQUENCES OF REFUSING TO TEST

On Dec. 2, 2004, the Coast Guard notified our Association it had filed a complaint against the licensed Mate of a crewboat working for a local boat company for refusing to take a random drug test. The hearing before ALJ Jeffie Massey was set in the Federal courtroom in Houma, LA. We received no details of the complaint in advance and did not know the mariner.

The session started promptly at 13:30 with ALJ Jeffie Massey presiding in the large, spacious, high-ceiling, well equipped but seldom-used courtroom. Approximately 16 persons attended not counting several uniformed federal security guards. Of these 16 persons, four were witnesses subpoenaed by the Coast Guard from the local boat company. Aside from the respondent, the remaining personnel were uniformed and civilian Coast Guard employees participating in or observing the proceedings.

Judge Massey opened the session by explaining that her job to be certain that the record of the proceedings was complete and in order. She explained that she could question all parties to the case to determine facts where necessary in pursuit of maintaining the completeness and clarity of the record. She inquired as to whether the respondent was represented by legal counsel.

The Mate spoke clearly in his behalf stating that he did not have a lawyer and asked whether the court could appoint a defense counsel to represent him. Judge Massey replied politely that, ***although certain courts did provide court-appointed lawyers, that there were no provisions for that under the regulations she operated under***. However, she assured him that she would be fair and would be certain that all of his rights were protected.

It was clear to this observer throughout the hearing that the Judge provided this mariner with every possible opportunity to speak without being intimidated by the formality of his surroundings. She did so with a certain warmth that is not always prevalent in hearings of this nature. It is clear that she realized that the respondent was alone in the courtroom and that she wanted to make the surroundings appear less intimidating so that the process would move smoothly.

The Coast Guard Investigations Officer presenting the case, Ensign Timothy Tilghman, a recent graduate of the U.S. Coast Guard Academy in New London, CT. He was forthright, well prepared, and clearly in command of the situation at all times – as is expected of a Coast Guard officer. He was assisted by Chief Warrant Officer Jason Boyer who was also well prepared. There were no "dirty tricks" of any sort in the proceedings. A court reporter went about her work competently and unobtrusively throughout the afternoon.

Judge Massey then called for opening statements. The Ensign briefly outlined the case he planned to present. The respondent chose not to offer an opening statement. The Judge advised him that no opening statement was required and that any opening statement would not be considered as "evidence" in any case.

The Coast Guard proceeded with its case. Essentially, the Company decided to give the crew of their crew boat a random drug test while the vessel was at their fabrication yard in Houma and dispatched an authorized collector (i.e., a trained and certified company employee) to obtain urine specimens. When he obtained the specimen from the Mate, he tested its temperature and found it was below the required minimum acceptable temperature of range of 90°F to 100°F as specified in the custody and control form. This temperature observation, immediately evident, obviously posed a problem whose solution is spelled out in the DOT regulations.

Subpart I of the DOT drug-testing regulations at 46 CFR Part 40 is titled "Problems in Drug Testing." When the collector discovered the problem, he told the Mate that he would have to provide another specimen "under observation" – a procedure also covered in the DOT regulations. At this point, both the collector and the Mate left the boat, walked across the yard to the Personnel Office, and spoke with the Company Human Resources Director. A conversation followed in which the Mate asked what would happen if he refused to provide a sample. There were two divergent views of exactly what was said but the result was that the Mate refused to provide a second specimen "under observation." He also signed a statement to that effect.

As a direct result, the Mate was terminated (April 8, 2004) and was escorted back across the yard to the crew boat where he picked up his personal belongings and left the yard. End of story – well, not yet. The wheels of the bureaucracy would have to turn for eight more months!

The Coast Guard Prosecutor had to extract all of this evidence from four company employees that he called as government witnesses. One important lesson stands out and is worth mentioning.

One Important Lesson

The Company, like most boat companies has a drug policy that closely reflects federal requirements. Their policy is included as part of a company "Operations Manual."

When a mariner goes to work for this company (and for just about any company) at his "orientation" he is required to sign a statement that he has read and presumably understands the Company policies he must abide by – including, among many other things, the company drug policy. This Company also provides training in different areas and, as a part of a structured training program, requires mariners to acknowledge in writing that they have received this training. Maintaining these records is a reasonable and sensible business practice and is common throughout the industry.

The Coast Guard presented the Mate with a signed statement verifying that he had read and understood the company policies in the Operations Manual. At that point in the hearing, the Mate admitted that his signature was genuine ***but protested vigorously that he had never received the orientation he had signed for and never received a copy of the company manual to read***. He indicated that form was just one of many forms he had to sign when he applied for the job and that there wasn't even a copy of the manual on his boat. Although one of the company employees was asked several questions about the manual, the ***net result of the signed statement left the Mate in a very bad light for his willingness***

to sign his name for something he had not done.

However foolish this may look, we need to point out that the **danger** to a mariner can be much greater than appears on the surface. As we pointed out in the past, 46 CFR §5.57 defines **misconduct** as "human behavior that violates some formal, duly established rule … such as statutes, regulations, common law, the general maritime law, **a ship's regulation or order** … (or) similar source." The warning to all our mariners is clear: You work for an employer who probably publishes his version of an "Operations Manual." On a towing vessel, it might be your Company's version of the AWO's Responsible Carrier Program (RCP) or, "Safety Management System" as mentioned in recent legislation.

Every mariner needs to pay close attention to what his employer's policies are. If a mariner is unable or unwilling to comply with any of these policies for any reason, he or she may want to either discuss or clarify these policies with the employer or reconsider working there. However, the Coast Guard does expect you to comply with these company policies.

The Judge gave the Mate the opportunity to question each witness called by the Coast Guard. He did so in several cases by challenging both the specimen collector and the Human Relations Director.

The keystone as far as evidence was concerned was the signed statement where the Mate refused to provide the second urine specimen.

Failure to Submit

Coast Guard regulations for "Chemical Testing" (i.e., drug tests) appear at 46 CFR Part 16. 46 CFR §16.105 states that "Refuse to Submit means you refused to take a drug test as set out in 49 CFR §40.191. Since all drug testing must follow regulations in 49 CFR Part 40, there are really two separate sets of regulations in effect. Credentialed mariners should take the time to read and understand these regulations to adequately protect themselves. Nevertheless, "reading" and "understanding" these regulations pose a serious problem for many mariners.

49 CFR §40.191 goes into considerable detail about what constitutes "refusal." This should not be a mystery to any of our readers because we covered this in our report Report #R-315-B, Drug Testing: Refusal to Test. We originally published this report as a direct result of a meeting between approximately 10 of our Association's licensed mariners and the Coast Guard's Drug Program Director ("Drug Czar") at Coast Guard Headquarters in 2002.

To summarize, one subsection states: "As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations" – in other words, revocation of your license!

When the Coast Guard finished presenting its evidence, it was crystal clear that the Mate had refused to be tested. Although the Mate stated clearly and with the utmost sincerity that he "never did drugs" that simply was not the question at hand. By refusing to be tested, he lost his only opportunity to prove his innocence.

Judge Massey then called for closing statements, again stating that these statements were not treated as evidence and were not "required." The Coast Guard offered its brief closing statement; while the respondent did not.

The Judge then declared that she was prepared to give her decision from the bench but also stated that she was required to prepare a written opinion that would be ready within a week and asked if there were any objections. There were none.

Then, addressing the Mate, she asked politely whether he had anything whatsoever to say in his own behalf and that she was ready and willing to listen to anything he had to say at that time before announcing her decision. It was at this point that the Mate rose to make comments to the effect that the company had worked him long hours, that they had treated him unprofessionally and that the drug test and his termination was a great personal embarrassment to him.

The Mate's statement was followed by several minutes of silence as Judge Massey appeared to carefully weigh the impact of his words. You could have heard a pin drop in the courtroom.

The Judge then announced that the Coast Guard had proven its case and that she would hand the Mate's license over to the Coast Guard for the necessary administrative action. She would furnish him with written instructions if he chose to appeal her written decision or could speak to the Coast Guard about "***Administrative Clemency***" procedures. *[Refer to our Report #R-377, Rev.2.]*

The "Guilty Until You Prove Yourself Innocent" Dilemma

The indictment or formal complaint against any person is not evidence of guilt. Indeed, the person is presumed by the law to be innocent. The law does not require a person to prove his innocence or produce any evidence at all. In an administrative hearing of this type, ***the Government has the burden of proving a person is guilty in light of the preponderance of the evidence***. This is not as high a standard as proving guilt "beyond a reasonable doubt." However, if the Government fails to do so, the person is not guilty.

In this case, the respondent had a clear opportunity to prove his innocence by taking and passing a drug test. Regulations in force since the late 1980s requires mariners (and all other transport workers in the United States) to submit to drug testing as a condition for holding their licenses or merchant mariner documents. The random and unannounced nature of these tests is part of an administrative program designed to protect the public safety. Since the government cannot force you to provide a urine or blood specimen by force, other administrative steps and presumptions are necessary. Under these regulations, refusal to submit to a test means you refused to take a drug test and leaves you open to a penalty – in this case, license revocation. The point the Government must prove guilt by the preponderance of the evidence presented that a mariner "**refused to submit**" to a legitimate drug or test following DOT and SAMSHA guidelines and **not** that he was "doing drugs." This is why the Mate's protests that he "did not do drugs" fell on deaf ears – as will similar protestations of this nature. Whether he "did drugs" was no longer an issue. The only issue was his refusal to test.

The USCG Cannot Take a Mariner's Credentials Without Due Process

With limited exceptions, Coast Guard cannot "take away" a mariner's credentials. This can only be done by an Administrative Law Judge who follows a strict set of guidelines. Even a plea agreement (e.g., a "Sweeney" agreement in a drug case and a "settlement agreement" in other types of personnel actions) between Coast Guard investigators and individual mariners must be justified to

and approved in writing by an Administrative Law Judge.

A "Sweeney agreement" is, in effect, an administrative procedure in which a mariner admits his/her guilt and accepts punishment without undergoing the expense and formality of a hearing before an Administrative Law Judge. In this particular case, the matter was so "open and shut" (e.g., the mariner signed a paper refusing to submit to a test) that there is little or nothing that any attorney could do to help him. However, the mariner did gain eight months in which he still had possession of his license…although the court date was hanging over him like the Sword of Damocles.

The Cost to Our Government

The cost of conducting this hearing was borne by the Coast Guard in money, time, and effort. It took two weeks of work for the Marine Safety Office investigators to prepare the case for trial. At least a dozen Coast Guard officials spent most of the day traveling to and from Morgan City to Houma and preparing the courtroom. The Administrative Law Judge had to travel from New Orleans to conduct the hearing in a courthouse leased by the federal government. In another case, an ALJ traveled from Norfolk, VA, heard a case in Morgan City, LA.

CHAPTER 17 – ILLINOIS WATERWAY BRIDGE ALLISION HEARING MASKS SIGNIFICANT REGULATORY SHORTCOMING

***[Source:** NMA Report #R-399]*

The Windy City

In a case tried before a Coast Guard ALJ, the Coast Guard Marine Safety Office in Chicago attempted to cover up its own failure to impose reasonable restrictions on oversize tows on the heavily traveled Illinois Waterway by jumping on a towboat Captain for an accident that was not his fault.

Six years later, the Coast Guard still has not imposed reasonable restrictions in this area leaving the public infrastructure as well as our licensed merchant marine officers using that section of the Illinois waterway at risk. The public in this case was deprived to the use of a major urban drawbridge for more than six months. Our Association closely followed this case that almost destroyed the career of an experienced senior towboat pilot. Fortunately, the employer chose to defend its employee because its corporate interests and the mariner's interests happened to coincide.

Introduction

Because the towing industry has been allowed to conduct its business for the past thirty-five years in a laissez-faire business climate with an absolute minimum of Coast Guard regulation, a "high risk" voyage by a towing vessel is often treated by many towing companies as a routine assignment. "High risk" only becomes evident when the Coast Guard must respond to and subsequently "investigate" an accident – especially when that accident affects the public and draws media attention. That is what happened here.

When a towboat pilot, and the term may apply to either a Master or a Pilot when he is acting as officer in charge of a navigation watch on a towing vessel, accepts a "high risk" piloting assignment, he must understand that he will be held responsible for the consequences if anything goes wrong on his watch – even events clearly beyond his control. Consequently, a pilot should take all reasonable self-protective steps in case something unforeseen happens because he will be judged by a very high standard of both knowledge and competence.

[NMA Comment: As a direct result of this accident, we urge our mariners to take an increasingly conservative approach to accepting any high-risk piloting assignment and carefully consider every possible consequence of your actions if something goes wrong.]

Before getting underway, a pilot should carefully evaluate whether the assignment is a "high risk" assignment. Many jobs that pilots routinely perform carry a high degree of risk whether that risk is evident or not.

The incident described in this paper was a bridge allision that occurred on the Illinois Waterway on May 2, 2003 in the heart of the City of Joliet, Illinois, a Chicago suburb with a population of 105,000.

The Illinois Waterway

The Illinois Waterway is a 300+ mile waterway that serves as a connecting link between Lake Michigan and the Upper Mississippi River at Grafton, IL. It provides a shallow draft (9 ft.) all-water route between the Great Lakes and the Gulf of Mexico. As a commercial waterway, much of its structure dates back to the 1930s and, in many ways is outdated and too constricted to handle tows of up to 15 barges that often travel as far north as Lamont, IL, at mile 300 about ten miles above the Lockport Lock and Dam. In other words, the upper stretches of the waterway in Cook and Will Counties, Illinois, present many risks for pilots – risks that are not always plainly evident to waterway users.

The portion of the Illinois Waterway above (i.e., north) of Lockport Lock and Dam is known as the Chicago Sanitary and Ship Canal while the segment immediately below the dam that runs through Joliet Harbor is known as the Des Plaines River.

The Chicago Sanitary and Ship Canal was constructed to keep a 500+ square mile basin including the City of Chicago from flooding during rainstorms as well as for sanitary purposes. Construction continues on the municipal flood control system within the Chicago metropolitan area. The water collected and held in the canal is released downstream at the Lockport Dam where it plunges over 40 feet and flows southward into the Des Plaines River. A very limited amount of fresh water can be drawn from Lake Michigan and but all be accounted for.

When it rains in the Chicago metropolitan area, the regulated water from its watershed is directed south through the Chicago Sanitary and Ship Canal and over the Lockport Dam.

Joliet, in Will County south of Chicago, lies below the Lockport Lock and Dam in a larger 1,500+ square mile watershed of the Des Plaines River basin. An unregulated portion of that water from the Des Plaines River basin also flows "downhill" into the Illinois Waterway a mile or so below the Lockport Dam. By "regulated" we mean that the gates at the Lockport Dam control the flow of water and measure that flow in cubic feet per second (CFS). Unregulated water from the Des Plaines River joins the regulated flow a mile or so below the Lockport Lock and Dam and pools behind the Brandon Road Lock and Dam downstream of Joliet. Our story takes place between these two locks.

A heavy rain in Chicago can turn the waters of the Illinois Waterway into a raging torrent that cannot be navigated. Consequently, the safety of navigation in the Joliet area depends upon sensibly and reasonably regulating the flow of water from the Lockport Dam since the water from the Des Plaines River is neither regulated nor monitored (i.e., measured).

The Pilot who assembled his 15-barge tow on the Canal above the Lockport Locks on May 2, 2003 relied upon the Lockmaster to report the water flow over the dam before he assessed the risk of undertaking his voyage. The "typical" regulated flow from the Lockport Dam is about 1,000 CFS. The flow on the day of the accident had dropped from 20,000 CFS (where navigation is impossible and no locking takes place) to a reasonable 2,600 CFS that the Pilot and the Master of the 3,600 horsepower towboat LAURA

ELIZABETH deemed through his experience in the area to be a safe flow to kick off his southbound voyage with 9 empty and 6 loaded barges.

Pilots are expected to be knowledgeable of river conditions including currents, depth of water, weather conditions based upon their past experience. At the time, in spite of previous accidents in the area, there were no special Coast Guard regulations covering his passage through Joliet Harbor.

The Accident

The Pilot had considerable previous experience with the Illinois Waterway and with pushing 15-barge tows, the largest on the waterway. In fact, the Pilot, as "second in command" had considerably more experience than the Master of the vessel in that particular area. In the hours awaiting their downbound lockage, the Pilot willingly agreed to come to the pilothouse and ***advise*** the Master on how to make the passage when the vessel moved into the locks. He even agreed to break-off his afternoon watch early and turned in for several hours of sleep-time as the M/V LAURA ELIZABETH, owned by Southern Towing, Company, waited its turn to descend at the Lockport Lock.

The Master summoned the Pilot as the tow exited the locks and reformed below the locks **at 20:15 hours.** In fact, the Pilot stepped up to the pilothouse and prepared to pour a cup of coffee and become oriented. However, instead of "advising" the Master, the Pilot was asked to get "between the sticks" and take control of the tow. He accepted the assignment without question and the Master remained with him in the pilothouse. This simple acceptance of control of the tow would be one of the things the Pilot would soon regret. Nevertheless, it was done in the spirit of mutual cooperation that expresses one mariner's willingness to help another – and was to his credit.

As he assumed control of the tow, the Pilot asked the Master what water flow the lock reported. The Master said that the Lock had not announced any change in the water flow from the 2,600 CFS rate announced earlier in the day and, in fact as testimony later revealed, the flow remained at that rate as they departed.

The route below the locks through Joliet Harbor is characterized as being "difficult to navigate" and involves considerable risk that could arise from a number of different sources. The channel width through this urban area is limited by a number of drawbridges to 150 feet wide. In addition, the bridges are not aligned in a straight line but contain several bends that restrict the movement of a long tow and prolong its movement through the city. The total length of the tow was 1120 feet long by 105 feet wide. In fact, the tow was longer than the distance between two bridges, a fact that would play a prominent role in the events that followed. Specifically, the distance between the upstream Cass Street Bridge and the Jefferson Street Bridge where the allision would take place is 984 feet and is considerably less than the 1120-foot tow.

The flotilla of 15 barges moved slowly, at clutch speed, southbound from the locks through the EJ&E railroad bridge to the Ruby Street Bridge where construction equipment on the bridge had to be removed to allow both leaves of the bascule bridge to open for the large tow.

Next, the nine empty barges followed by six loaded barges were in the process of moving through the Cass Street Bridge and into a bend to starboard without a problem and maintaining a steady clearance of approximately eight (8) feet from the Cass Street fender works. Lookouts were posted on the port and starboard corners of the lead barges with VHF radios and made regular reports to the pilothouse. A third deckhand was coiling lines on deck; the Pilot was between the sticks; and the Master was watching the vessel's progress as the flotilla proceeded slowly through the Cass Street bridge at a "slow walk." Suddenly, and unpredictably, the after starboard corner of the last barge slid to the right and rubbed the fender works causing no damage.

The pilot immediately went from dead slow ahead to full astern on both main engines to try to stop the tow with the 3,600 horsepower at his command. Nevertheless, the tow "flattened out" and the lead barge, an empty rake barge riding high in the water swung to starboard, ramming into the unprotected draw works on the right descending leaf of the Jefferson Street Bridge.

The starboard string of barges stopped dead in the water as a result of the allision snapping all couplings and the center and port strings proceeded another 200 feet until stopped by the thrust of the towboat's engines.

State and federal authorities were notified immediately. The Pilot then re-established his tow with soft couplings and proceeded downstream safely and without further incident to drop the damaged barge and await the Coast Guard boarding.

Although the damage did not appear serious at the time, the 74-year old Jefferson Street Bridge, one of the major crossings in downtown Joliet, was sufficiently damaged so that the Illinois Department of Transportation closed it to vehicular traffic for six months as a result of the accident. The accident reportedly resulted in a repair bill of approximately $300,000 that the towing company and its insurer would eventually be expected to pay and economic damages to the community that may never be recovered.

Our Association – Mariners Helping Mariners

On July 29, 2003, several months after the allision, the Pilot of the M/V LAURA ELIZABETH contacted our Association to seek advice about the formal "complaint" filed against his license by the Coast Guard Marine Safety Office in Chicago charging him with "negligence" and alleging that he "was negligent…by committing an act or failing to perform an act that contributed to an allision between (the tow of the M/V LAURA ELIZABETH and (the) Jefferson Street Bridge, in that you as the Master[(1)] failed to safely navigate your vessel and struck the Jefferson Street Bridge, a well charted and fixed object." In that complaint, the Coast Guard proposed a settlement agreement of "3 months outright suspension, in accordance with 46 CFR Table 5.569." *[[(1)]Actually while serving as pilot of the vessel and not as its Master. No complaint was filed against the Master although he was the "front watch" watchstander at the time.]*

The Pilot explained his case carefully and in considerable detail stating that he did not believe that he had been negligent in any way. The story that started to emerge from the "bare bones" story detailed above turned out to be interesting, complex, and believable – and in retrospect, was entirely borne out by 587 pages of testimony in court transcripts.

Because the Pilot denied the factual allegations supporting the charge of negligence, he had to select a future hearing date when he would appear before an Administrative Law Judge.

Since he had never had a chargeable offense before, his question to our Association was basic: "What do I do?"

While the Coast Guard usually makes its "best offer" in a "settlement agreement" in an attempt to save time, effort and taxpayer expense, ***it is not reasonable to willingly accept a ruling that you were "negligent" when you know that you did everything possible to avoid an accident***. In this case, the Pilot as second in command, offered to take the risk of moving the tow downstream in an area that everybody agreed was "difficult to navigate" and even altered his watch schedule to do so. He did this because he had considerably more experience in running the Des Plaines River and Joliet Harbor than did the Master of the vessel.

[NMA Comment: The towing company should have checked to determine whether the Master of the vessel was adequately "posted" through service on that portion of the waterway before assigning him to work this assignment with a very large tow.]

The first basic question we asked was whether the towing company was willing to defend the Pilot as an employee or whether he would have to hire his own lawyer? At that time the Pilot told us that the Company had said nothing about defending him and, in fact, had not called him back to work in the three months following the accident. Consequently, at the time he believed that he was "on his own", could not afford to hire a lawyer, and did not have "license insurance."

Since our Association does not provide legal services, the only help we could offer was to look into the case and help him accumulate the facts that he would have to use to defend himself at the hearing before the Administrative Law Judge. We proceeded to do this on a tight schedule.

We contacted three Masters with extensive experience in the Joliet Harbor area of the Illinois Waterway – Captain David Whitehurst, Captain Ray Ashford and Captain Reid Stewart to provide a comprehensive picture of this complex waterway and its principal features. We also called upon the U.S. Army Corps of Engineers, Rock Island District, the Metropolitan Water Reclamation District, and the Coast Guard Marine Safety Office for information.

Our Association Develops its Position on Oversized Tows

On Aug. 25, 2003, Captain David Whitehurst, as a member of our Association's Board of Directors, wrote the following letter on behalf of the Association to Captain Raymond Seebald, Commanding Officer of the Chicago Marine Safety Office. Captain Seebald never responded to the letter and, to the best of our knowledge, its contents never were added to the Ninth Coast Guard District Docket for Temporary Rulemaking as requested:

Dear Captain Seebald,

I am a member of the Board of Directors of an association that represents the interests and concerns of several hundred "lower-level" mariners working on tugs, towboats, small passenger vessels and offshore supply vessels, primarily in the Eighth Coast Guard District.

I am a heavy tow pilot and have worked on towing vessels since 1965. I received my first towing license on inland waters and western rivers in 1973 and made my first trip up the Illinois Waterway, the Des Plaines River and the Chicago Sanitary and Ship Canal to Lemont, IL, in 1975.

The first tow I piloted on this waterway was a two-barge tow (300-feet long by 54-feet wide) pushed by the 1200-horsepower M/V Luby Guidry owned by Spanier Marine in Harvey, La. I have navigated this waterway with 15-barge tows for American Commercial Barge Lines (ACBL), SCF/Brown Water Towing, Steel City Marine as well as others. Fortunately, I have never had any trouble at any of the bridges or locks on the waterway.

In response to the attached article, in my opinion, piloting a 15-barge tow 1,000 feet long by 105 foot wide through the Joliet Bridges is asking for trouble. The towboat Pilot has only five feet of clearance in some places. Now, I ask you to think about the requirement of pushing a tow of the size of three football fields through the Joliet Bridges without touching a fender. According to 46 CFR §4.05-1(a)(1) I must report to your office "...whenever (my) vessel is involved in a marine casualty consisting in...an unintended strike of (allision with) a bridge..." Such a report could, at the very least, bring a letter of warning or an administrative suspension or revocation of my license. Piloting is my profession; it is where I make my living. I have an obligation to feed my family. I cannot do this if my license is taken away from me. However, ***the choice is not really mine***. It belongs to my employer who issues the orders I must follow.

Trying to thread a 105-foot wide tow through a series of bridges that are not aligned in a straight line without touching a fender wall it is next to impossible. However, if the company I am working for instructs me to move a 15-barge tow to or from Lockport, I have the experience to do so without damage as long as nothing unexpected happens. Unfortunately, the "unexpected" may take many forms.

As a contract pilot, if I refuse to take the job of moving the 15-barge tow, the company will find another pilot to do so. As long as it is not illegal to move the tow, and it will physically fit in the waterway, somebody will do it. Consequently, I fully support the Coast Guard's "temporary navigation rules" as briefly mentioned in the attached article and urge that tow-size restrictions be made permanent. Since our office does not have a copy of the new rules, here is what I suggest:

- That there should be no more than a six-barge tows measuring no more than 600-feet long by 70-feet wide from the Interstate 80 bridge north. Present practice breaks 15-barge tows at mile 292 just above the Lockport lock. I really can't see why these large tows can't be broken five miles away at mile 287 to protect all the bridges in the Joliet area. I can't understand why this was not done years ago.
- That smaller tows could traverse the bridges quickly and easily with less damage to the infrastructure and reduce the delays for highway traffic caused by the time large tows often must spend shaping up for the bridges.
- That towboat pilots would welcome the change because it would put much less strain on us and reduce our exposure to loss of license and appearances before Administrative Law Judges. A number of years ago, Captain John Sutton as President of the American Inland Mariners Association made a survey in which the lifespan of the average towboat pilot was only 57 years. Collectively, as a group, we do not need, want, or seek the stress of piloting 15-barge tows through downtown Joliet.

In closing, as (our Association's) Senior River Pilot, I

would like to point out that on the Gulf Intracoastal Waterway (GIWW), a waterway comparable to the Illinois waterway in many ways, the Coast Guard requires "double-wide" (i.e., 70' wide) tows to obtain Coast Guard permits to proceed since these tows take up more than half of the 125-foot width of the waterway.

In reviewing the winners and losers resulting from pushing the canal beyond its design limits, only gain accrues to the carriers and only if the tow reaches its destination with no damage. There is no gain to the general public when road traffic is brought to gridlock. There is no gain for the Pilot involved in the accident. There is no gain for the Pilot from facing hours of stress knowing that his license and livelihood is at stake even if he rubs fenders and creates no lasting damage other than fair wear and tear to the infrastructure. The months spent repairing the damaged bridge will never pay a dime to the inconvenienced residents of Joliet and will merely restore the bridge to its condition prior to the accident.

As expressed in the newspaper article, the Joliet City Manager is right to expect a pilot to know the waterway. Proper manning is a responsibility of the towing company while licensing is a Coast Guard responsibility. However, in the accident at Jefferson Street on May 2nd, the most qualified person on the vessel with many years of pertinent experience was called out after his watch had ended to "make the bridges."

I request that this letter be added to the Docket for the "temporary" rulemaking mentioned in the newspaper article. Sincerely, s/Capt. David Whitehurst, Master of Towing Vessels, 7th Issue, Member, Board of Directors, GCMA. ☸

Government Bungling Revealed

A key to understanding why the starboard corner of the aftermost barge slid into the Cass Street fender works, flattening the tow and sending the lead barge into the draw works of the Jefferson Street Bridge precipitating the accident was the fact that ***the Lockport Dam doubled the flow of water from 2,600 CFS to 5,200 CFS without providing any notification to the vessels in the pool below***. ***The Pilot only learned about the increased release of water several hours after the accident. The increased flow was introduced shortly after the tow had finished locking and started to move through Joliet Harbor.***

Through his past experience in the area, the Pilot knew that the Corps of Engineers Lockmaster at the Lockport Lock broadcast the changes in water flow released from the nearby Lockport Dam. Unfortunately, the Metropolitan Water Reclamation District (MWRD), a local governmental agency, actually controls the flow from the Lockport Dam while the U.S. Army Corps of Engineers, a federal agency, operates the Lockport Lock. These are two separate and distinct government agencies that have not always worked in coordination with each other according to testimony recorded at the Pilot's license hearing in December 2003.

Our Association first confirmed the existence of a problem in our conversation with Mr. Sergio Serafino, ***Chief Engineer of the Metropolitan Water Reclamation District (MWRD) who told us in essence that they don't have any radios and don't talk to the boats***. The Lockmaster and a number of other local parties in interest are supposed to be notified by phone by MWRD personnel whenever they change the flow of water into Joliet Harbor. When he receives this information, the Lockmaster can provide it to vessels waiting above and traveling below the locks "…**as a courtesy."** However, Rick Granados, the U.S. Army Corps of Engineers Operations Manager for the Illinois Waterway for the Rock Island District provided this last tidbit of information in the hearing. He stated: "My organization (USACE) is not making the gate changes (on the dam), so I am not going to be held responsible for notification" (of the towboats).[(1)] ***The Pilot did not know this at the time, had no reason to question existing practices, and expected timely notification of flow changes***. *[(1) Transcript, p.332.]*

On cross-examination by the Coast Guard prosecutor, Mr. Granados acknowledged that the discrepancies in the communications and notification system of announcements are were known not only to MWRD, the Corps of Engineers as well as to the Illinois River Carriers Association ***and that the problem existed for at least a year and a half and had never been resolved***.[(1)] ***It was not clear whether the Coast Guard had ever been brought into the discussions. What is clear is that too many cooks were left to stir the pot with no single agency left accepting responsibility for its actions and no regulations effectively governing the waterway***. *[(1) Transcript, p.333.]*

[NMA Comment: For the safety of the citizens of Joliet and of the mariners navigating the Des Plaines River, Congress should designate one Federal agency to regulate the flow of water and adequately notify every vessel in the pool of releases of water that could pose problems for waterway users. To the best of our knowledge, no such action has been taken to date.]

Both the Pilot and our group of mariners familiar with the Illinois Waterway agree that they would never risk entering the area down river of Lockport L&D with a southbound tow with an initial flow rate of 5,200 cubic feet per second. However, when you are underway in the waterway you have no choice except to work with the cards you are dealt.

History of Recurring Accidents at the Jefferson St. Bridge

Several years earlier on Oct. 22, 1998 the M/V THRUSTON B. MORTON owned by American Commercial Barge Line southbound with 7 loads and 8 empty barges arranged in 3 strings of 5 barges had its starboard lead barge come in contact with the right descending pier of the Jefferson Street Bridge. The very sketchy report on form CG 2692 includes this vague statement: "Damage to the bridge should be obtained by the owners/operators." If anyone learned a lesson from this accident, it is not in the file we received from the Coast Guard under FOIA. Unfortunately, this incomplete reporting of accidents is quite common as supported by Department of Homeland Security Inspector General's report #08-51 re-printed for our membership as our Report #R-429-M.

On Feb. 22, 2001 the MSO Chicago Investigations Team responded to a bridge allision between the tow of the M/V JANE G. HUFFMAN owned by American Commercial Barge Lines and the Jefferson Street drawbridge in downtown Joliet, Illinois Waterway mile 287.9. The vessel was heading

southbound with 15 barges (3 strings of 5 barges) including 5 empty red-flag barges and 10 hopper barges.

The tow struck the Jefferson Street Bridge on the northwest corner of the draw and seriously damaged the track girder rendering the bridge inoperable. The bridge remained open to marine traffic but closed to vehicular traffic. The Bridge Engineer on the scene estimated the total damage to be between $300,000 and $400,000 and would take between two to four months to repair. "Tow length – 1125 feet; width 105 feet; draft 9 feet. Clear visibility. No current."[1] *[[1]Source: USCG Accident Report obtained under FOIA.]*

The "factual allegations" of negligence (46 CFR §5.29) in the Coast Guard's complaint in the M/V JANE HUFFMAN accident should be of particular interest to our mariners:

- First Specification: In that you while operating under the authority of (your license) did on or about Feb. 21, 2001 wrongfully strike the Jefferson Street Bridge near MM 287.9 on the Des Plaines River while operating the M/V JANE G. HUFFMAN.
- Second Specification: In that you while operating under the authority of (your license) did on or about Feb. 21, 2001 **engage in an unsafe industry practice *by pushing an excessive tow length in the Des Plaines River through Joliet Illinois*.**

[NMA Comment: The Coast Guard recognized that this tow length represented an "*unsafe industry practice*" yet took no steps to use either its authority to control waterway traffic or the rulemaking process to regulate this unsafe practice. The Coast Guard clearly demonstrated its lack of leadership and failed to take effective action following the 2001 accident. Had they done so, the 2003 accident might never have occurred.]

The Coast Guard "proposed" that the Master's license be suspended for 15 months. However, the Master of the M/V JANE G. HUFFMAN on the advice of counsel accepted a "settlement agreement" offered by the Coast Guard. The Coast Guard thereby avoided the point that is now clear to many of our mariners as well as to the citizens of Joliet that pushing an excessive number of barges is indeed **"an unsafe industry practice."** Pushing a 1,120 by 105-foot tow through this narrow waterway is a risky business.

Instead of taking effective action to eliminate the root cause of the problem, the Coast Guard took the easy way out by ***blaming the Master*** of the vessel who was just performing the task his employer assigned to him. The mariner and his license is a much easier target than a large towing company with considerable political clout in the nation's capitol.

The Master of the M/V JANE G. HUFFMAN accepted the Coast Guard's settlement agreement on advice of counsel that stated in part: "In light of the Respondent's cooperative attitude and good faith efforts to reach compliance, a mitigated penalty of 12 months suspension: 2 months outright with 10 months remitted on probation will be assessed."

Other terms of the settlement agreement are also significant: "If the respondent fails to satisfactorily complete these conditions by committing acts resulting in additional Suspension and Revocation proceedings then the respondent's license will be suspended for the full 12 months plus any additional assessment awarded as a result of new charges."

Even More Bureaucratic Bungling

Southern Towing Company generously agreed to provide a skilled maritime attorney to defend the Pilot of the M/V LAURA ELIZABETH.

Robert Nienhuis, Esq., carefully examined the background of previous accidents and discovered that following the HUFFMAN accident that the Illinois Department of Transportation (IDOT) working with the Illinois River Carriers Association prepared plans and drawings to build a cell to protect the vulnerable portion of the Jefferson Street Bridge. Formal plans had to be submitted, reviewed by all parties including the Coast Guard Bridge Administration Branch in St. Louis, and reworked after the proposed cell was found to unnecessarily narrow the width of the waterway. At that point the matter of funding construction of the cell had to be arranged with IDOT Headquarters in the state capital at Springfield. Final plans then had to be submitted to and approved by the Coast Guard. However, the process became bogged down within the IDOT bureaucracy when the Coast Guard's Bridge Administration Branch did not push the issue with any sense of urgency. Consequently, this project that was obviously necessary for the safety of the excessively large tows passing through Joliet Harbor, never saw the light of day by the time of the LAURA ELIZABETH allision. However, shortly after the accident, the Coast Guard finally **ordered the bridge owner** (IDOT) to construct the protective cell. It was a textbook case of slamming the barn door after the cow escapes.

All the attorney's efforts, in pointing out another governmental screw-up came to naught. The Administrative Law Judge in his Decision and Order[1] pointed out that "These arguments are essentially that of contributory negligence. In a Coast Guard suspension and revocation proceeding, the only issue is the negligence of the licensee charged. Contributory negligence is not a defense. *Appeal Decision 2380 (Hall)*[2] I must, therefore, reject the contributory negligence defense of (the) respondent." This is one of those nasty surprises that the existing Administrative Law System can deliver to a reasonable defense. *[[1]Decision and Order, p.10. [2] Commandant Decisions on Appeal #2380.]*

Justifiable Public Outrage

On May 21, 2003, several weeks after the LAURA ELIZABETH accident, the Coast Guard's Ninth Coast Guard District announced a "Temporary Final Rule" establishing a Regulated Navigation Area on the Des Plaines River requiring all southbound tows in the vicinity of the Jefferson Street Bridge over 89 feet wide and 800 feet long to use an assist tug. Some regulation was long overdue and was another textbook example of the Coast Guard ineptly slamming the barn door after the cow ran away.

The Coast Guard also "encouraged comments" on whether a Regulated Navigation Area (RNA) was the appropriate tool to provide for the safe navigation of tows transiting through the Jefferson Street Bridge.

Comments returned to the Coast Guard indicated that the rule was flawed because it did not indicate whether the 800 foot tow length included the length of the towboat or not – a remarkable oversight in the eyes of our mariners. The Coast Guard's "assist tug" concept also had its own flaws.

Two classes of comments poured in to the Coast Guard – in favor of (pro) and against (con) the Coast Guard proposal

for a permanent regulated navigation area. In any event, the **temporary regulation with its flaws and adjustments simply expired on Mar. 1, 2004 and was not renewed** according to a call placed with the MSO Operations Office on Apr. 28, 2004.

[NMA Comment: Without a reasonable Regulated Navigation Area in effect and with no bridge protection cell in place, it does not appear that the interests of the citizens of Joliet have any more protection now than on the day(s) of the two bridge allisions.]

Pro: According to letters in the Coast Guard's Rulemaking Docket,[(1)] the Chamber of Commerce commented in part: "The disabling of the Jefferson Street Bridge …has resulted in a devastating negative economic impact on the Joliet business community. While businesses throughout the city suffer significantly as a result of this incident, businesses located in Joliet City Center are suffering overwhelming losses because of the chaotic traffic situation getting into and out of the City Center due to traffic reconfiguration resulting from the barge accident. Two new businesses that just opened prior to the barge damaging the bridge are facing probable failure simply because they will not be able to survive until the…reopening of the Jefferson Street Bridge…Knowing that the bridges in this section of river through Joliet have been damaged by barge traffic in three of the past five years, we strongly urge you to move these restrictions from temporary to permanent status …" In a separate letter, IDOT concurred with making a permanently-regulated navigation area in Joliet. *[(1) CGD09-03-214.]*

The Joliet City Partnership, a division of the Joliet/Will County Center for Economic Development made these points:

- Joliet is the County Seat of Will County where thousands of county residents transact their business with government officials.
- On (June 9, 2003) at noon both the Ruby and Jefferson Street bridges were closed for repair. At the noon hour, southbound tows closed two other bridges at Cass Street and Jackson Street for one-half hour each meaning that none of the downtown bridges were available for use.
- Since the Ruby Street bridge is also vulnerable to heavy tows, the Regulated Navigation Area should be extended farther north. (Letters from the Joliet City Manager and from IDOT, the bridge owner, concurred.)
- No 3x5 barge configuration should be allowed in either direction through Joliet.
- The narrow area does not allow an assist tug to be secured on the side of the barges to direct them through the area. A letter from IDOT agreed with this point because of the limited (150-foot) opening between bridge piers. The Joliet City Manager also pointed out that: "An assist tug in such a 3x5 configuration is in and of itself creating a dangerous condition" – a thought that clearly escaped the Coast Guard rule makers who are well paid to know about these things!
- The Illinois Department of Transportation also stated: "Even after the proposed pier cell is constructed at the northwest corner of the Jefferson Street Bridge, there will remain little maneuvering room for large tows.

The Joliet Police Chief pointed out that: "Each time a lift bridge is put out of commission, public safety is negatively affected by more difficult and restricted police response to emergencies. This negative effect is not just caused when a bridge is hit and put out of commission but it is also affected year-round when three-by-five barges move through the area. The reason for this year-round effect is the **extended length of time** it takes for a three-by-five barge (flotilla) to slowly attempt to navigate through the City of Joliet.

Con. A letter from the Chairman of the River Industry Executive Task Force stated: "This Regulated Navigation Area is a significant regulatory action and does place financial pressures on the industry. It is estimated that this action will increase the tows and costs by over 20%. This is an unacceptable shift of financial burden from those who have responsibility for the bridge, IDOT, to an industry that transits congressionally authorized commercial waterways …."

"RIETF and other industry groups are disappointed that MSO Chicago has neglected the government/industry partnership that industry has tried to foster and issued such a heavy-handed RNA without sufficient dialogue with all stakeholders, including the towing industry…"

[NMA Comment: The "dialog" between the Coast Guard and the towing industry fails to adequately consider the views of the citizens or of our mariners placed at risk by pushing these oversized tows.]

The Illinois River Carriers Association (IRCA) stated in part: "…There have ***only*** been three (3) allisions between tows transiting the Joliet Harbor and the Jefferson Street Bridge over the past ten (10) years. While the percentage of allisions is low, the industry feels that even these could have been preventable had the IDOT been pro-active in the installation of the protective cell. With the establishment of this RNA, the towing industry is taking on all of the burden for the additional time and cost while the industry continues to wait for the IDOT to react."

The Coast Guard prosecutors do not appear to have bought that argument because, during the Pilot's suspension and revocation hearing in December CWO Razney posed these questions to the Past President of the Illinois River Carriers Association (IRCA) who was acting as an expert witness for the pilot:

Q. The protection cell – the reason for not wanting to go with this Regulated Navigation Area is essentially that it … cost members of your association money?

A. That is correct.

Q. …IRCA would rather have the cost borne by the State putting in a protection cell[(1)] than there be any kind of a revenue increase cost to them?

A. That's one (aspect). The other is a safety factor. Any time you … place a tug on the head of a tow you are exposing the crewmembers to a (man) overboard situation and you've got a flotilla out ahead of your tow with a tug that contains crewmembers, and you have put them in harms way as far as I am concerned."[(2)] *[(1) Transcript p. 576. (2) Transcript p. 263]*

Congressional Interest. U.S Representative Jerry Weller representing Illinois 11th. Congressional District (and the Assistant House Majority Whip), while citing points previously mentioned, added this comment to the regulatory docket that should stand out as a warning to our mariners: "I also urge you to look into the licensing of barge pilots to determine if they are (sic) appropriate. It is my understanding the pilot of the barge who hit the bridge on

May 2, 2003 has been charged with negligence. One cannot help but wonder if this would happen if the license requirements were stricter and/or required additional testing or training. Many professionals are mandated to keep their skills updated with additional instruction."

[NMA Comment: In May 2001, the Coast Guard upgraded towing vessel officer licensing regulations. The root of this problem lies beyond the mariner's control. We cover the subject of oversized and overloaded tows in detail in (R-340).]

Months of Stress, Strain, and Harassment Takes its Toll on Mariners

Any mariner who is charged with any offense under the Coast Guard's Administrative Law system will invariably find himself under intense pressure from every quarter. This part of the report details these pressures:

As a mariner you must answer the Coast Guard's formal complaint in writing within 20 days. If you fail to provide an answer or fail to request an extension of time to reply or fail to attend any scheduled hearings, you may be found in default. This constitutes an admission of all alleged facts in the complaint and surrenders your right to a hearing. End of story.

The "complaint" for this accident was directed to the Pilot at the towing company's address in the form of a registered letter that arrived several weeks after the accident. The letter was forwarded to the Pilot at home and then to the company attorney in St. Louis.

The Coast Guard Marine Safety Office in Chicago, thirty miles from the accident scene, prepared the "complaint." Southern Towing Company's main office is in Memphis, TN. Goldstein and Price, the law firm that would handle the case, is located in St. Louis, MO. The Pilot lives in Alabama. The hearing was set at Joliet, IL. The Pilot had to look forward to paying significant travel and hotel expenses just to appear at the hearing.

Although the towing company and their insurance underwriters agreed that they "…should defend this administrative procedure" it took them some time to let the Pilot know that this meant they would defend him in this matter. It was while left in limbo at this point at the end of July 2003 when the Pilot contacted our Association. Desperately seeking assistance.

A boat owner or operating company is under no obligation to defend one of its employees at an ALJ hearing because a credential is granted to a mariner and not to his employer. It is up to the license holder to protect, defend, and if necessary surrender his license before the Coast Guard. Fortunately for the mariner in this case, the company decided it was in their best corporate interest to provide a skilled lawyer to defend the Pilot.

Our Association expressed its concern to the Pilot that his interests and the interests of the company might not be the same and that there might be some conflict of interest. However, since the Pilot stated that he could not afford to pay an attorney, our advice to him was limited to how he might best prepare himself for the hearing.

We advised the Pilot that defending himself adequately against the charges is best handled by an experienced maritime attorney. It is too late to buy license defense insurance after an accident!

Several weeks later after Southern Towing Company made Attorney Robert Nienhuis available to counsel the Pilot, our I contacted Mr. Nienhuis to discuss the issue of any possible conflict of interest and received his firm assurance that this would not be a problem. We then proceeded to share the information we gathered with him.

Throughout the ordeal of the hearing, as determined by our review of the entire 587-page transcript, attorney Robert Nienhuis did what we consider to be "the right thing" for the Pilot. We commend both Southern Towing Company and Robert Nienhuis, Esq.

The company footed thousands of dollars in legal fees that, considering the reported financial impact upon the mariner of $18,000 to $20,000 made the difference between personal bankruptcy and keeping his head above water. As it was, the pilot had to sell his recreational vehicle, a major piece of shop equipment, take out a loan on another vehicle and still continue to support his two children – a heavy price for just trying to do your job.

The Pilot passed on this advice to his fellow licensed Masters and Pilots after the trial, "***If you really love this type of work, you had better stash away a full 12-months' pay for the time when – NOT IF – the Coast Guard decides to get on your case!***"

The Pilot's written answer to the Coast Guard was to deny that he was guilty of "negligence" as charged because he did everything leading up to the accident "by the book" with the full knowledge and consent of the vessel's Master who was standing by him in the pilothouse at the time of the accident. He firmly believed that the accident was a result of forces that were completely beyond his control.

In the proposed settlement agreement the Coast Guard proposed three months outright suspension of the Pilot's license. That means the Pilot would be out of a job for the next 90 days the moment he signed on the dotted line – and that the suspension would go on his record that had been unblemished for over 20 years.

The definition of "negligence" is "the commission of an act which a reasonable and prudent person of the same station, under the same circumstances would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances would not fail to perform." ***This definition, along with the knowledge he discovered of the failure of three separate governmental agencies and a major industry association to control and safely manage traffic ond water flow on that segment of theIllinois Waterway reinforced the Pilot's determination to vigorously fight the charge against him***.

The Pilot, as a professional, was concerned that he would no longer have a job with a company that he thought highly of. He also was concerned about what the company thought of him. The fact is that he was not recalled to service in the six months after the accident and had to obtain another job to support his family and pay his bills.

Another point, and one not brought out at the hearing, was that the Master he worked under and who testified that he was not comfortable with or posted on that section of the Illinois Waterway, reportedly spread rumors that were malicious, prejudicial to the Pilot's reputation, and were untrue. This led the Pilot to question in his own mind why he did not let the Master steer the tow through the waterway and serve as his "advisor" as he originally agreed to do. (Later, at trial, the Pilot would receive professional exoneration of sorts when an expert witness, the ***Past***

President of the Illinois River Carriers Association (IRCA) stated: "He (i.e., the Pilot) probably did one of the best things that we teach down at the Seaman's Church Institute is to give the Captain of the vessel (the freedom to) determine who has the … more experience to go through that particular area.)"[(1)] *[(1) Transcript, p. 553.]*

As the case moved toward trial, the Coast Guard Prosecutors announced that the trial would be held at the Will County Courthouse at 14 West Jefferson Street in Joliet – several blocks away from the bridge that had been knocked out of commission. Considering the magnitude of the calamity that had befallen the downtown center of this city of 105,000, the many newspaper articles that appeared at the time of the accident, the involvement of politicians and civic leaders, all took a toll on the Pilot who was freely blamed for the disaster and every delay it had caused for the past six months. Every mariner needs to put himself in the place of this Pilot.

Add to this the roiling stomach acid the perverse pleasure that many mariners get from trashing other mariners on internet "chat boards." While seeking employment between June and December 2003 the Pilot found that several employers "knew all about the accident" by reading these "chat board" accounts and lectured him on why they would never hire him to work for their company. We suggest that a far more accurate account of this accident is rendered in the pages of the hearing transcript. This is one of many reasons why our Association does not operate – and will never operate – an online "chat board!"

Life would be much easier for Coast Guard prosecutors if every "respondent" would sign a "settlement agreement." This is because it takes a great deal of work and preparation to put on a full-blown hearing before an Administrative Law Judge (ALJ). Many prosecutors are not trial lawyers and some have only the most tenuous grasp of what is expected of them. In the courtroom they no longer face the mariner they can threaten, cajole and browbeat. They can't cut any deals and must now perform and be rated by superior officers on their performance. They now may have to face accomplished trial lawyers on one hand and an experienced Judge on the other hand.

The Hearing

Other Coast Guard officers, warrant officers and ratings as well as interested members of the public may attend a hearing. Most MSO Investigations Offices somehow manage to provide "interested observers" for, when the ALJ comes to town, this is their "big day." This particular Judge flew in from Seattle, WA, specifically for this trial, and as the trial proceeded, ***it was obvious that he had little knowledge of either the local area or of the towing industry that exists in mid-America on the 6,000 mile "Western Rivers" system – a significant shortcoming***. Even the "courtroom" was "borrowed" from county authorities. The local Coast Guard Marine Safety Office had to make all these arrangements and treat the Judge like visiting royalty.

When you are a mariner and see a number of blue uniforms in the room, they appear there to serve as moral support for the efforts of the prosecution. However, at least one officer will be there legitimately to rate the performance of the Prosecutor. ***The Pilot reported as most disconcerting was when this Coast Guard "cheering section" passed notes to the Prosecutor when he appeared at a loss for*** words, none of which appears in the cold pages of a hearing transcript.

By the time the trial got underway, the original charge of failing to safely navigate the vessel through the bridge and seeking 3 months license suspension was ***increased by two additional counts***, namely:

- failing to maintain a proper lookout (seeking 3 additional months suspension), and
- failing to maintain a safe speed (seeking 3 additional months for a total of 9 months suspension).

We see this as a gratuitously added penalty for inconveniencing the Coast Guard by not signing a "settlement agreement" and simply pleading guilty – and we see this tactic used often!

Whatever the Coast Guard's motivation for adding these counts, they had to be defended. This took time and effort on the part of the Pilot's attorney. The charge of failing to maintain a proper lookout was relatively easy to dispose of by showing the Pilot, the Master, the Mate and a deckhand were all watching the progress of the tow and reporting its progress directly to the Pilot by radio at all times the tow was underway in the Des Plaines River.

The question of "safe speed" took much more soul searching since it is wrapped in so much seagoing tradition and case law. However, the testimony that both engines were operating only at "clutch speed" (i.e., idle), that this degree of propulsion was necessary, and the tow was only making the speed of a "slow walk" finally disposed of that count. However, ***the transcript shows it took the trial lawyer's skill to successfully make these points with the Judge. A mariner without courtroom experience would not have had much of a chance***.

The Pilot characterized MSO Chicago's Investigations Branch to us after the trial as "the equivalent of Russia's infamous KGB." In reviewing the transcript, much of this heartburn comes from the opening statement by the prosecutor, LTJG Michael Reed, who had also boarded the vessel after the accident. The Pilot was particularly incensed at his opening remarks outlining the Coast Guard's case against him, specifically:

- The Pilot only had limited experience transiting the area. (Subsequent testimony showed approximately 50 trips. How much is enough?).
- It was dark. (That happens every day).
- The Joliet section of the river is difficult to navigate. (That's what the Pilot was paid to do.)
- The Pilot elected not to take any additional precautions. He could have easily solicited an assist tug to help him maneuvering his tow. (At the river flow as correctly reported to him by the Master standing at his side, he did not need assistance. An assist boat would be of limited and of questionable value and possibly a danger as later supported by expert testimony.)
- The Pilot could have broken his tow in half so it was more maneuverable and made two trips. (He already made the same trip a number of times safely and successfully. No regulation required him to do so. The expense of a significant transit delay, hiring a helper boat, and other financial constraints were beyond his control as a Pilot.)
- The Pilot could have delayed his transit until conditions were safer. (At 2,600 CFS flow, conditions *were* safe. However, the MWRD subsequently increased the flow without notification thereby unexpectedly introducing unsafe conditions.)
- The Pilot should have followed the example set by the

vessel's Captain and admitted he did not have the experience to safely transit the area. (The Captain asked him to do a job he had done many times before. He had the experience and demonstrated it clearly after the accident by recovering his tow and safely transiting three additional bridges.)

The Decision and Sanctions

The Judge's Decision and Order was issued on Mar. 23, 2004 almost 11 months after the accident and fill 18 pages.

Judge Edwin M. Bladen stated inter alia that, "It is well settled that a rebuttable presumption of negligence arises when a moving vessel strikes a fixed object…Without adequate rebuttal, the presumption permits an Administrative Law Judge to rely upon the presumption to find negligence in a suspension and revocation proceeding.

"I find the respondent has not adequately rebutted the presumption of negligence arising from the allision of the flotilla with the Jefferson Street Bridge. I must conclude the charge of negligence is proven.

"It is ordered (that) respondent's license is suspended for a period of four (4) months, two (2) months of which is remitted with six months of probation to follow. As conditions of probation

(1) Respondent shall take and successfully complete a bridge resource management course approved by the Coast Guard;

(2) Any violation of the rules, regulations or COLREGS by respondent during the probationary period shall subject respondent to an outright two (2) month suspension besides any further sanction warranted on account of the violation established after a hearing on the matter.

Our Views

The Coast Guard delivered the public a nice, neat package tied with a ribbon and a bow. The Pilot was found guilty of "negligence" after a show trial in downtown Joliet that the public and the media were welcome to attend if they chose to do so. The Pilot was found guilty of "negligence," lost his license and was ordered as part of his punishment to go back to school and take a course in "Bridge Resource Management." If the Coast Guard believes the problem is solved, we respectfully disagree.

We believe that:

- The indiscriminate release of water by the Metropolitan Water Reclamation District without providing adequate advance warning and time for navigation interests in the pool below remains an outstanding problem. The citizens of Joliet must understand that the ***lack of coordination between the MWRD and the Corps of Engineers is directly coupled to knocking out the Jefferson Street Bridge in this accident***. This is a local problem that local interests should address. Failing in that, Congress must delineate responsibilities between competing federal, state, and local government agencies.

[NMA Comment: We recommend that our mariners refuse any piloting assignment in the area between the Lockport and Brandon Road Locks until they have assurance from the Coast Guard that the indiscriminate water-release problem has been resolved and suitable water-flow regulations or guidelines are published.]

- Parts of this section of the waterway are over 70 years old and were not built for the size of some of the large tows that now use it. The only reason it can be utilized to move 15 barges in one tow is through the exceptional skill of the pilots that use the waterway. Once it was proven that a tow of this size could physically fit in the waterway, its use gradually became "routine" and accepted by the authorities who failed to establish reasonable governing regulations.
- The wisdom of continuing to use the existing waterway facilities to move oversized tows needs to be re-evaluated. Many legitimate concerns of the citizens of the local community need to be considered as well as the needs of the companies that continue to exploit the waterway.
- By allowing the temporary regulations restricting the size of tows through the area to lapse on Mar. 1, 2004, the Coast Guard ignored local concerns in favor of ***allowing unrestricted traffic to benefit a few large towing companies***. Mariners understand that the towing industry exercised considerable political clout in Washington for the past 40 years. This "partnership" is often detrimental to legitimate mariner safety interests. *[Refer to our Reports #R-276, #R-276-A, #R-276-B, and #R-340.]*
- The Pilot on the M/V LAURA ELIZABETH at the time of the accident was a fully trained professional river pilot with many years of experience that met all Coast Guard license requirements. The company he worked for is a highly regarded employer in the industry. The equipment he worked with was top of the line equipment in good mechanical order.

[NMA Comment: The Coast Guard's Chicago Marine Safety Office erred in its failure to recognize that poor management practices evidenced by the indiscriminate water releases by the MWRD and their failure to adequately notify tows in the pool below were the proximate causes of this "accident."]

[NMA Comment: Humiliating and denigrating experienced river pilots using Coast Guard prosecutors who lack comparable credentials, knowledge, or experience and then covering the problem with a legal mantle needlessly obscured a basic communication problem between several government agencies and waterway users. That problem could have been resolved for far less money than was spent on court proceedings.]

[NMA Comment: If the Coast Guard, Corps of Engineers and the MWRD cannot properly coordinate and regulate the water releases with existing marine interests today, how can they be expected to do so in the future if Congress authorizes extensive and expensive construction projects to improve the waterway?]

- The towing company erred in not assigning a Master to the vessel that was as well "posted" on local waterway operational conditions as the Pilot. Therefore, the Pilot who would have normally been "off-watch" at the time of the accident was called upon to undertake the most "risky" portion of the southbound voyage.
- Although he was provided with "compensatory time" off-watch, the fact that both the Pilot and the Master were together in the pilothouse at the same time for a considerable period conducting the southbound transit through the Lockport Lock and the Des Plaines River

technically violated the "12-Hour Rule" established by Congress at 46 U.S. Code §8104(h). The Coast Guard has an exceptionally poor record in regard to enforcing this statute. Consequently, mariner fatigue and exhaustion has played a role in a number of bridge allisions although not in this case. *[Refer to our Report #R-370-D, Rev. 6.]*

CHAPTER 18 – NMA SENDS REPORT TO CONGRESS ON INVESTIGATIONS

***[Source:** NMA Report #R-429]*

Our Association looked into the issues of "Investigation" and whether these efforts serve to bring "justice" to our lower-level mariners. We are not a union, and most of our "lower-level" mariners are not represented by a labor union.

In 1999, the Gulf Coast Mariners Association was formed by the AFL-CIO and four maritime labor unions to be the "voice for mariners." We were trained to be and remain today as an independent the voice for "lower-level" licensed and unlicensed mariners although without retaining any formal affiliation to or funding from organized labor. Unions must look after their own members – a very important part of the services that every union member pays for. With our limited budget, but without the burden of negotiating contracts and dealing directly with maritime employers, we carry on an important tradition of representing the views of lower-level mariners who do not have a union to stand by them in their dealings with government agencies.

Early on, our Association began to have serious doubts about the quality of the Coast Guard investigations we saw or studied. One of the first documents we were introduced to was one that we obtained from the Federal government and re-printed as Report #R-429-A for our members. This eye-opening report from 1994 showed that all was not well within the ranks of Coast Guard investigators throughout their investigative system. In this report, outside contractors viewed and commented upon what the Coast Guard was trying to accomplish with its investigations program.

Several years later, the Coast Guard prepared its own report that we reprinted as Report #R-429-B**.** In many ways this in-house report is even more revealing of how the Coast Guard operates its investigative system. This, of course, deals with ***administrative*** issues involving mariners' suspension and revocation (S&R) of mariner credentials.

There is also the Coast Guard Investigative Service, a separate and secretive outfit that deals with ***criminal*** wrongdoing. Their activities extend beyond the scope of this chapter.

A further report[(1)] is the result of a FOIA request that contains a Policy Letter describing the different levels of investigative effort that the Coast Guard applies to its inquiries and helps to better explain many of the over 800 accident reports our Association has collected in its files over the years – many as the result direct requests of our mariners. The Headquarters staff office responsible for this maintaining control of Coast Guard investigative activity and casualty statistics is the Office of Investigations and Casualty Analysis. Of course, everything at Headquarters is perpetually in a state of reorganization with personnel being shuffled hither and you. *[(1)Refer to our Report #R-429-C.]*

In July 2004 and again in January 2005 our Association asked the Coast Guard to collect and provide statistics on reports of towing vessel sinkings, flooding, capsizing. We cited the loss of four mariners on the towboat ELIZABETH M in the Ohio River below Pittsburgh on January 11, 2005 and the loss of another mariner in a towboat sinking in the New Orleans area shortly thereafter to expedite our request.

Congress picked up this particular issue in a letter by Congressman James Oberstar to the Commandant in March 2005 citing the horrific numbers of sinkings, flooding, capsizings, fires, and explosions on towing vessels. Although the Office of Investigations and Analysis collected this raw data, they never bothered to analyze these figures. These figures remain to this day as raw data.

On Dec. 16, 2005 the House Committee on Transportation and Infrastructure requested the Inspector General of the Department of Homeland Security to "…conduct a study of the Coast Guard's marine casualty investigations program and to report to these Committees the findings and recommendations of that study not later than June 30, 2007.

"The Committee expect that the study and report shall examine the extent to which marine casualty investigations and reports result in information and recommendations that prevent similar casualties; minimize the effect of similar casualties, given that it has occurred; and maximize lives saved in similar casualties, given that the vessel has become uninhabitable.

"The Committees also suggest that the study include the following to promote the safety of all who work on or travel by water and to protect the marine environment:

- the adequacy of resources devoted to marine casualty investigations considering caseload, and duty assignment practices;
- training and experience of marine casualty investigators;
- investigation standards and methods, including a comparison of the formal and informal investigative processes;
- use of the best investigative practices considering transportation investigation practices used by other Federal agencies and foreign governments, including British Marine Accident Investigation Branch programs;
- usefulness of the marine casualty database for marine casualty prevention programs;
- the extent to which marine casualty data and information have been used to improve the survivability and habitability of vessels involved in marine casualties;
- any changes to current statutes that would clarify Coast Guard responsibilities for marine casualty investigations and report, and
- the extent to which the Coast Guard has reduced the frequency of formal investigations, or changed the types of incidents for which it has carried out a formal investigation process, in the past five years.

Our Association plans to publish the report that results from this inquiry when it is released to the public.

The report[(1)] was issued by the Department of Homeland Security on May 9, 2008. Our Association frequently requests copies of Coast Guard and NTSB marine casualty reports (over 810 to date) and is very familiar with many of the problems revealed by this scathing report critical of the Coast Guard's long-term, day to day performance of its casualty investigation and reporting duties. *[(1) Numbered OIG-08-51 and re-printed as our Report #R-429-M.]*

Our Association was informed of the original Congressional request and was contacted later by DHSOIG

field auditors from the Boston office. Thereafter, we furnished considerable data to the auditors. The Inspector General's concern stood out in stark contrast to the Coast Guard's policy of totally ignoring any input whatsoever from our nation's 126,000 merchant mariners who are licensed and documented to man vessels of up to 1,600 gross register tons.

A Congressional hearing was convened to discuss this topic on Tuesday May 20, 2008, only 11 days after the report was released to them. ***The "Casualty Investigations Program" is a critical part of the larger Coast Guard's Marine Safety program – a program that the House of Representatives voted 395 to 7 to revise from the ground up in H.R. 2830.*** Our Association reported on past problems with "Investigations" by reprinting two previous landmark reports on the internet.[(1)] The Coast Guard should have focused on and handled these problems as early as 14 years ago but was remiss in doing so. This should have been clear to Coast Guard leaders as their second report illustrates. *[(1) Refer to Reports #R-429-A and #R-429-B.]*

The shortcomings revealed in the latest Inspector General's report[(1)] were shocking. We believe that a number of senior Coast Guard officers now in comfortable retirement and some who have assumed elevated positions in industry based upon their past "connections" need to be identified and held accountable by Congress and the American People. These Coast Guard officers covered up problems that were well known at least 15 years ago, but during the intervening years, the Coast Guard did little if anything to correct the problems. Nevertheless, I believe these remarkable shortcomings are a serious departure from the way that Congress expected the Coast Guard to handle marine casualty investigations. Their handling of personnel accident reporting is far short of OSHA requirements for shoreside injuries. We believe these shortcomings are closely tied to the ALJ scandal revealed in the Baltimore Sun article (above) probed by Congress in July 2007. *[(1) Refer to our Report #R-429-M.]*

We want to congratulate the following Congressional leaders for requesting the DHS OIG investigation in 2005: Senators Ted Stevens and Daniel K. Inouye, Representatives James L. Oberstar and Don Young. We want to congratulate Rep. Elijah Cummings and Rep. Steven LaTourette for bringing this matter out in public view in the public. We also want to thank the Department of Homeland Security's Office of Inspector General, and especially Mr. Richard Johnson and Captain Joseph Stone, both seasoned professional mariners and his staff, including Captain Raymond Bollinger especially for his extensive work on personal injuries – part of the unpublished part of the final report that still needs to see the light of day. The Inspector General's office revealed the fraud and lack of attention to our unprotected merchant mariners by flawed and failed leadership within the Coast Guard.

Is It a Question of Resources or of Effort?

The Coast Guard traditionally presents itself to Congress as a "can do" outfit that accomplish just about any job imaginable at less expense because of its military organization. Congress, when presented with selective History tempered with ***astute public relations***, traditionally responds well to this approach. Events, like the Coast Guard's "can do" response to Hurricane Katrina, especially warmed hearts and loosened purse strings. The fact that Admiral Thad Allen was personally superbly trained and qualified for his task and was able to utilize the military organization of available forces in the emergency, in contrast to FEMA Director Brown, helped the Administration salvage its otherwise abysmal performance.

However, there are many growing questions surfacing around other "traditional" Coast Guard missions. Our Association in a recent report to Congress,[(1)] illustrated that the Coast Guard mismanaged merchant marine personnel, licensing and training. In fact, we went so far as to suggest that the Coast Guard be relieved of **all** its duties related to merchant marine personnel and much of its Marine Safety Mission along the lines outlined in Title XI, Marine Safety, in H.R. 2830 (110th. Congress). We reiterate that belief here! *[(1) Refer to our Reports #R-428-D & #R-428-D, Rev.1.]*

Like its involvement with Merchant Marine Personnel, it is clear that the Coast Guard placed relatively few resources into "Investigations." Quite stupidly on their part, the Coast Guard never encouraged mariners or their employers to keep accurate or organized records such as logbooks that could provide an investigator with clues, if not the answer, to the cause of many of the accidents that befall small vessels such as tugs, towboats, and small passenger vessels. In fact, the Coast Guard consistently did their best to kill our Association's initiatives to encourage accurate recordkeeping as recorded in one report our Association sent to Congress. *[Refer to our Report #R-429-G, Rev. 2.]*

Most deplorable of all is the Coast Guard's abject failure to protect the lives and health of our mariners in following up on personal accidents and injuries that befall our mariners.

All of the foregoing led us to release our report on Investigations[(1)] in August 2006 to the media and over 100 U.S. Senators and Congressmen. ***[(1) Refer to our Report #R-429.]***

CHAPTER 19 – THE COAST GUARD HATES WHISTLEBLOWERS: THE ERIC SHINE STORY

[Source: NMA Report #R-429-L]

[Disclaimer: Although I believe the Coast Guard has done a great injustice to Eric Shine, they have been unable to silence him. Eric Shine appears regularly on radio and television. With the background that is provided in this article, viewers can readily understand the frustration that he has endured in trying to deal with his Coast Guard tormenters. We want to make it clear that the material expressed in these programs are the personal views of Eric Shine, may extend beyond the material published in this book, and have not been reviewed by or necessarily reflect the views of the National Mariners Association.].

ROOM 5150, By Janet C. Phelan
October 2007

Eric Shine is having a bad day. Scheduled to appear before a military tribunal in Long Beach, California on October 23, 2007, he discovered upon arrival that his paperwork provided the incorrect address for the hearing. He is now scrambling to get the correct address to the media. As well as an address change, there has been a room change, and Eric Shine's case will now be heard in Room 5150.

The implications of that room number are not lost on some of the recipients of his eleventh hour phone calls. "5150" is police code for ***an involuntary mental detainment***. And in a bizarre twist of congruence, Eric Shine is being charged with... 'being depressed.' The 46-year-old former Merchant Marine officer and whistleblower is being hauled in front of a military tribunal and being charged with a state of mind, with no allegations of misconduct or negligence in his actions.

Some of the most horrific stories of human rights abuses in our modern times have come from political dissidents incarcerated in mental hospitals in Soviet Russia. The current (2007) regime in the United States of America has now adopted this method of targeting and removing "threats" to the regime. These stories are seldom, if ever, reported in the mainstream media.

The first such incarceration that came to my attention happened in the wake of Watergate, when Martha Mitchell, then the wife of U.S. Attorney General John Mitchell, was psychiatrically incarcerated in an effort to discredit her.

Eric Shine first caught the attention of the establishment while he was a midshipman at Kings Point, the U.S. Merchant Marine Academy on Long Island, New York. Shine was editor of the student newspaper at the Academy, and published documents, which were harshly critical of the academy at a time when policies were under fire at that institution. Because of the ensuing scandal, the Admiral resigned. Shine went on to graduate with various honors, with an engineer s license and a Naval Commission, and was serving on the SS COMET when he reported two events, which were to soon enmesh him in a series of legal retaliatory moves now endangering his very freedom.

Lt. Eric Shine, a merchant marine officer and federal employee under the Merchant Marine Act of 1936, ***attempted to prevent a boiler explosion before it occurred on the SS COMET*** in 2000, and ***tried to prevent dumping of hazardous materials at Alameda, California from the same vessel***. He then reported the violations to his immediate superior, the vessel s Chief Engineer. Subsequently, he filed a grievance through his federal officers association. ***When he attempted to report the matter to the Coast Guard, he was fired for so doing***.

Shine filed several lawsuits for tortuous breach of shipping articles and federal contracts, labor disputes, federal contracting violations and safety violations. Technically, Shine is a whistleblower and must be accorded the protections afforded in the Whistleblower Protection Act, shipping articles and other legislation.

The Coast Guard investigated the COMET and found that the explosion and the dumping had in fact, occurred. Coast Guard Lieutenant Chris Tribolet then, instead, turned the investigation against Eric Shine. Shine was investigated for misconduct and any possible infractions of law and was exonerated. When the Coast Guard could find no evidence of misconduct on the part of Shine, Tribolet then took back over the investigation and directed his efforts towards attacking Shine s competence. In an e-mail to LCDR Kristin Williams, Tribolet revealed his intent in the following statements:

"Misconduct is human behavior that violates some formal rule While it is difficult to define how Shine may have violated 33 or 46 CFR, his interference with proper and safe navigation of the ships is undeniably an issue. We may have to look to tort or admiralty precedents but **I m quite sure that we can frame the issue to show that there was misconduct."**

This email from Lt. Tribolet was sent May 29, 2002. Nearly six years later, LCDR Tribolet, who was unable to find any evidence of such misconduct, is now prosecuting Shine in a military tribunal under the banner of the Coast Guard, which is now part of Homeland Security.

The Coast Guard filed an Executive Branch Article II counter-complaint against Shine and literally yanked Eric Shine out of civil court into its Military Tribunal, detaining him in a minefield of military legal mumbo-jumbo proceedings for over 5 years. This was apparently done in order to stifle him and to cover up the magnitude of the corruption and the high-ranking levels of those involved.

The U.S. Coast Guard has always been "Civil Service" in a time of peace, as has the Merchant Marine. Both, however, come under the Department of Navy in a time of war. After 9/11 the Coast Guard was put under the umbrella of Homeland Security and is now declaring itself a separate and distinct "Branch of the Military. By attempting to adjudicate civilian affairs, as in the Eric Shine matter, ***this new branch of military has squashed the concept that civilian and military affairs are under separate jurisdiction***. Parenthetically, the Coast Guard has also recently promoted a Coast Guard cadet to Active Duty so that he could be charged under a Military Tribunal. Therefore, he was promoted so that he could be prosecuted.

The fact that Eric Shine was never a member of the Coast Guard does not seem to bother Coast Guard LCDR Christopher Tribolet, who in the interim went to law school and is now a practicing member of the bar. Unable to nail Shine for any breach of conduct, Tribolet is now focusing his efforts on Shine s mental status, and has requested that the Homeland Security aka the Coast Guard's Military Tribunal proceedings order him into a psychiatric evaluation. This request was granted in the Oct. 23, 2007 hearing, in Room 5150, at the federal building in Long Beach, California, in official Judge Advocate General (JAG) proceedings.

At home in Huntington Beach, California, Shine is beginning to show signs of wear and tear. Stripped of his means for gainful employment, he lost both his houses and was homeless for a period of time. A BOLO – Be On the Look-Out – was issued against him the very same sort of document that has been used in the past for terrorists and posted at the San Diego Coast Guard office and elsewhere.

Incredibly, his own officers association (union) has denied him independent legal counsel, and he is now doing battle with a military tribunal without legal support. While being prosecuted for being medically/mentally incompetent, and depressed, he is nevertheless expected to defend himself, without benefit of legal counsel.

His plight has caught the attention of the media. Air America, KPFK, American Radio Voice Network and other stations have run interviews with Shine. He is an outspoken critic of the war on Iraq, Republican war profiteering, and the privatizing of U.S. Treasury assets.

The continuing persecution of Eric Shine raises some troubling questions for us all. First, Eric Shine is being tried by a military tribunal when he is, in fact, being alleged to be a civilian on the one hand and a Federal Officer on the other. The government is ignoring his Naval Commission and attendance at Kings Point and is not allowing him his legal right to counsel, as a member of the military. Speaking out of both sides of the mouth, the government is nevertheless claiming that he is and remains a Federal Officer; while they refuse to pay him, provide him the medical attention and legal aid, which these Article II Military Tribunals mandate be offered to Federal Officers under the Uniform Code of Military Justice (UCMJ). And most tellingly, he is being tried for a state of mind, being depressed, rather than for any overt act or failure to act.

The Military Commissions Act of 2006 set precedent for civilians to be tried in Military Tribunals. This Act in itself signals a radical departure from our Constitutional protections. But ***nowhere does the Military Commissions Act dictate that a civilian in the United States of America can be tried under a military tribunal for an alleged state of mind.***

This method of targeting dissidents has been deployed against others under the current administration. Susan Lindauer, a former reporter and U.S. Congressional Aide, had been working as an asset for the CIA in the Iraqi Embassy, prior to the war. When President Bush established his Commission on pre-Iraqi War Intelligence, Lindauer contacted the commission to arrange to testify. Her testimony was to include evidence that the Administration was well aware that Iraq did not possess weapons of mass destruction (WMD) at the point of our going to war. Within twenty-four hours of contacting the Commission, Susan Lindauer was arrested as a spy for the Iraqi government. She was stripped of her right to a trial, adjudicated incompetent, and sent off to Carswell Federal Prison Mental Hospital. The government quickly filed motions to have her forcibly drugged. Public outcry, generated by a media campaign spearheaded by this reporter, resulted in Judge Michael Mukasey, now the Attorney General of the United States of America, dropping the charges like a red-hot potato. Lindauer is now a free woman.

Dr. Rebecca Carley, a court qualified expert in vaccine-induced diseases and a talk show host on the alternative media circuit ("What's Ailing America? /BBS radio/Republic Broadcast Network) was stripped of her license to practice medicine in the State of New York after she refused to undergo psychiatric "treatment" for her alleged "delusion of conspiracy", diagnosed by the NYS medical board following the airing of one of her more controversial shows. ***The Coast Guard is clearly deploying a similar tactic in going after Shine s professional Marine Engineer s license, which was granted by Congress***.

Others may not have been so lucky. Given the failure of mainstream media to cover ***psychiatric abuse and targeting***, there may be thousands of political prisoners now forcibly drugged and languishing in mental prisons. Nearly forty-five years ago, the Special Committee on the Termination of the National Emergency chose a state of dormancy rather than termination of the National Emergencies. We are now seeing the fallout from this, in state of mind tribunals, segueing to forcible drugging of political activists and whistleblowers.

In the Committee s report to the Senate, Justice Jackson was quoted as stating: "In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction. It appears that the step in the wrong direction has resulted in a headlong rush, since 9/11."

Back in the Soviet Union, the prevailing wisdom was that you had to be crazy to come up against the full force and power of that dictatorship. And as the twig is bent, so grows the tree. The young Kings Point newspaper editor has continued on his path of exposing corruption in the ranks. Eric Shine s story illuminates another corner of the room in which we all live – that ***our government will strive to protect its cobwebs, at any cost***. Eric tried to protect those on board the SS COMET, and he now needs our support. You may contact the following parties and inquire as to what they will do to stop the attacks on Eric Shine, whistleblower: U.S. Representative Elijah Cummings, D-Maryland, Chairman of the Subcommittee on the Coast Guard and Maritime Transportation (202) 225-4741; . U.S. Senator Sheldon Whitehouse, D-R.I., Judiciary Committee and Select Committee on Intelligence (202) 224-2921. U.S. Representative James Oberstar, D-Minnesota., Chairman of the Committee on Transportation and Infrastructure (202) 225-6211 ■

National Mariners Association Supports Embattled Merchant Marine Officer
By Richard A. Block

*[**Source:** Interviews, multiple telephone conversations, transcripts of hearings before Coast Guard USCG Administrative Law Judges McKenna and Brudzinski, and our Newsletter #51, Oct. 2007]*

Introduction

In 2001, Lt. Eric N. Shine, a merchant marine and naval reserve officer, stepped forward as an expert trained and educated as a marine engineer at government expense to report irregularities on maritime issues including safety violations, improper employment practices, federal contracting violations, civil defense and national security related concerns on the merchant marine, shipping, ports, port security and related matters. As a reward for his legitimate whistleblower activities, he was forced to become a ***defendant*** in an endless series of Coast Guard administrative proceedings seeking to strip him of his license, livelihood, and self-respect. Space limits us to only a small part of his story.

[NMA Comment: If our mariners turn their backs on this type of shabby treatment to an upper-level licensed merchant marine academy graduate and naval reserve officer, we must be prepared to experience this treatment ourselves. If you, as a licensed officer *do not dare* to "point out defects and imperfections known to (you) in matters subject to regulations and inspection" as r*equired* by 46 U.S. Code §3315(a) for fear of retribution, you are endangering your ship and shipmates. Our Association has requested Congress to strengthen whistleblower protection for our working mariners.] *[Refer to our Report #R-350, Rev. 5, Issue #L, Improve Whistleblower Protection for Merchant Mariners.]*

Mariner Penalized for Filing a Whistleblower Complaint with the Coast Guard

I recently reviewed and examined several thousand pages of documents from Eric Shine, a California resident, a 1991 U.S. Merchant Marine Academy graduate, and a naval reserve officer. Eric sailed deep sea as a third and second engineering officer. He was approved for testing for advancement to first assistant engineer before the Coast Guard suddenly launched unwarranted Suspension and Revocation (S&R) proceedings against him on March 6, 2003 and de-railed his open formal civil complaints.

Eric Shine, a merchant marine officer and federal employee under the Merchant Marine Act of 1936, reported that he tried to prevent a boiler explosion before it occurred onboard the SS COMET, a U.S. Government (MARAD) vessel. He also tried to prevent dumping of hazardous materials at Alameda, CA, from the same vessel.

Eric first reported the violations to his immediate superior, the vessel s Chief Engineer. Failing to carry the complaint forward onboard ship, he filed a grievance through his union. ***He then attempted to report the matter to the Coast Guard and was fired for doing so***. Eric eventually filed lawsuits against several former employers for breach of shipping articles, labor disputes, shipping and safety violations. That made him a whistleblower.

Before and after filing lawsuits, he continued to bring these matters to the Coast Guard s attention and pleaded with them conduct a full and timely investigation. Although the Coast Guard ***did*** conduct an investigation of one of his complaints lodged in Los Angeles, and forwarded to MSO San Francisco. When the ship arrived at Dutch Harbor, Alaska, the Coast Guard boarding party reportedly found nothing wrong with the vessel and then turned their investigation into a vendetta against the whistleblower that continues with a vengeance today six years after the events took place.

Coast Guard Lieutenant Chris Tribolet, an Investigating Officer in San Francisco, turned the investigation against Eric Shine and eventually brought license revocation proceedings against him. Having nothing more than hearsay evidence of a personal nature contributed by officers and unlicensed crewmembers on the APL PRESIDENT JACKSON who were unhappy to have their ship boarded in the middle of nowhere, these men who did not like Shine, then retaliated against him, a former fellow crewmember, branding him as a troublemaker on their happy ship.

Soon thereafter, Coast Guard MSO San Francisco, in the person of a Lieutenant Chris Tribolet, investigated Shine to determine whether he committed any act demonstrating misconduct. After finding no actionable misconduct, Tribolet lodged ***a nebulous charge of medical and mental incompetence*** against Eric. However, the Coast Guard was stymied in proving any alleged mental incapacity during the time Eric sailed. Lt. Tribolet even sent an e-mail to Coast Guard Headquarters that stated in pertinent part: "We may have to look to tort or admiralty precedents, but I am quite sure that ***we can frame the issue to show that there was misconduct***." Shine asserts that he, indeed, ***was "framed"*** in retaliation for his whistleblower activities. We support that assessment.

Before the Coast Guard turned on him, Eric Shine already had filed three lawsuits in Federal court against his former employers and his union for not supporting him. These issues were disturbing safety issues, and dumping of contaminated boiler water is pollution. Unfortunately, the Coast Guard proceedings effectively quashed these lawsuits and diverted attention from the shipping companies and his union to focus on the person of Eric Shine

We found disturbing similarities between this case and the DRESSER case that found its way into the Baltimore Sun and subsequently into the July 31, 2007 Congressional hearing.

To date, no evidence in hundreds of papers of court documents we reviewed suggested that Eric Shine committed any act of incompetence, misconduct, or negligence while acting under the authority of his license. While there obviously were people who disliked Eric, most of the evidence the Coast Guard offered at a pre-hearing settlement conference before ALJ Parlen McKenna on Aug. 26/27, 2003 was little more than hearsay and unsupported by live witnesses.

The Coast Guard's Complaint

The Coast Guard complaint filed on Mar. 6, 2003 stated: "The Coast Guard alleges that the Respondent is medically incompetent. Due to a major depressive disorder, or other psychiatric condition, the exact nature of which to be determined through the hearing process. ***It was clear that this would be a "fishing expedition***." That process has been ongoing for over four years for events that occurred 6 or 7 years earlier is appalling. He has been detained and held within the proceedings and not yet received anything like a due process hearing until June 2008 – a hearing after which our Association asked the Vice Commandant to review the trial transcript in its entirety. Since then, we carried an appeal directly to the Attorney General of the United States.

Eric has not worked at sea since the process started although the Coast Guard claimed until last year that he was still acting under the authority of his Federal license.

I am not sure what a mentally incompetent person sounds like over the telephone, but I can easily identify a situation in which I repeatedly consulted with a person who knows much more about a number of subjects than I do
and has the ability to prove it – if given the opportunity to do so. Many of these issues directly impact our lower-level mariners while others may not impact them as directly. Consequently, I picked those issues most significant to our target audience.

This mariner has joined a club of mariners whose lives are/were completely destroyed by the Coast Guard's bumbling, if not clearly corrupt Administrative Law system. However, it is quite plain from the Coast Guard's website that they are clearly acting more and more like a branch of the military, and their proceedings have become thinly disguised military tribunals of civilians. We are not pleased when this agency intends to place civilian affairs increasingly under the thumb of military authority. In concentrating on its security mission under the new Department of Homeland Security, the Coast Guard loosened its control over traditional areas of marine safety that includes as vessel inspections, ***investigations***, merchant marine licensing, and associated regulatory matters. Their shortcomings in these areas came home to roost in 2007 and 2008 in Congressional hearings and in a report prepared on Marine Safety by retired Vice Admiral James Card. *[Refer to our Report #R-401-E.]*

Summary Decision in Favor of the Coast Guard

Eric Shine was represented by Attorney Peter S. Forgie[(1)] at the Coast Guard's pre-hearing settlement conference[(2)] on Aug.26/27, 2003. Attorney Forgie, according to the 202-page court transcript we examined in its entirety, presented a number of compelling arguments on behalf of Eric Shine. Shine supplemented this with his own testimony presented to prevent ALJ McKenna from railroading him. In reading the transcript, it is crystal clear why Eric Shine took a number of rather unusual steps. In fact, he refused to be silent when it became necessary to protect his interests a fact that obviously aggravated ALJ McKenna, who, when I have seen him in the past is unquestionably in charge of his courtroom. *[(1)Attorney*

Forgie was provided by Eric's union and the shipping companies to represent Shine who was a defendant in a pre-existing civil complaint. Since Shine had previously sued his union over his legal representation, this led to conflicts that were evident in the hearing transcript since the union turned his legal counsel over to the shipping companies he had previously complained about. [(2)]This courtroom visit did not turnout to be a settlement conference and was not a hearing although the ALJ unsuccessfully attempted to turn it into one and unsuccessfully tried to force Shine to submit to a mental examination.]

Nevertheless, Attorney Forgie s arguments were supported by a well-worded motion against the Coast Guard aimed at moving the case to Federal District Court and to restrain the Coast Guard from depriving his client of his license and livelihood without due process under the Fifth Amendment of the Constitution, release him from detention and other unlawful procedures. Unfortunately, the motion was not successful.

Six months later on Feb. 20, 2004, ALJ Parlen McKenna, in spite of many genuinely disputed legal issue, issues of material fact, numerous disputed violations of due process, and contested issues of venue and jurisdiction, issued a Summary decision in favor of the Coast Guard but without holding the full adjudicative due process hearing Shine requested.

Shine's Appeal to the Commandant Dumped Judge McKenna s Decision

Judge McKenna s order of Feb. 20, 2004 was vacated on appeal ***almost three years later*** by Coast Guard Vice-Commandant Vice Admiral Vivien S. Crea. Admiral Crea ***remanded*** the case for a due-process hearing because the findings of the Administrative Law Judge did not have a legally-sufficient basis and the ALJ erred in denying Eric Shine a hearing. The date of the Vice-Commandant's decision was Dec. 27, 2006, ***and more than three years after the August 2003 pre-hearing settlement conference fiasco***. All of this is public information detailed in Commandant Decision on Appeal #2661 posted on the internet.

Eric Shine is ***not*** in the Coast Guard and never has been! The promised hearing was re-scheduled as a procedural hearing for Oct. 23, 2007 in Long Beach, CA. Subsequent to that hearing, another was scheduled for May 2008.

The Coast Guard's Power to Deny and Delay

Most of the mariners our Association deals with live from paycheck to paycheck. Consequently, suspending a license for one or more months can cost a mariner thousands of dollars in lost wages. In the case of one towboat master as reported the cost was $13,500 of lost wages for one month out of work. Imagine the cost to a licensed officer of being denied the use of his license for seven years!

[NMA Comment: Aside from not obtaining a fair hearing, the Coast Guard shows very little concern about the financial and personal toll that their procedural delays take upon any mariner. The DRESSER case, as a prime example, as mentioned in the Baltimore Sun article, triggered the current ALJ scandal, deprived Christopher Dresser of his license for more than 10 years. This is just another cause of the shortage of merchant mariners!]

BYOL (Bring Your Own Lawyer)

Eric Shine wanted to know if our Association could assist him by recommending an attorney. His union, that is paid by membership dues and the U.S. government through a Federal trust to provide legal counsel, and who Eric was forced to sue, reportedly refused to afford him further legal representation after the August 2003 pre-hearing settlement conference unless ordered to do so by the court. This never happened. ***Our mariners who are not union members know you must make your own arrangements to provide your own lawyer if you need representation in a Coast Guard Suspension and Revocation hearing.***. Without a lawyer, the Coast Guard will dispense its own brand of justice either before an Administrative Law Judge or directly with a settlement agreement. Consequently, Eric had to represent himself in making his appeal to the Commandant. And, even though Judge McKenna found him medically and mentally incompetent, his appeal to the Commandant was not stonewalled. The appeal resulted in a decision by the Vice-Commandant s to ***remand*** the case back to the ALJ. In the meantime, ALJ Parlen McKenna, for reasons not disclosed, recused (i.e., removed) himself from the case.

Enter Judge Walter J. Brudzinski

However, it is interesting to note that Chief Administrative Law Judge Joseph Ingolia assigned Judge Brudzinski of New York to hear this case in southern California following Judge McKenna recusal. You will recall the comments made by former ALJ Massey and her Affidavit (above) that is still at the center of the current and continuing ALJ controversy. Recall that ALJ Brudzinski told ALJ Massey that he would not rule against the Coast Guard for fear of losing his job. This is the person the Coast Guard lined up against Eric Shine in the procedural hearing scheduled for Oct. 23rd. 2007 in Long Beach. It is clear that this case had become a "***must win at any cost***" case both for the Coast Guard and ALJ Brudzinski. *[Refer to our Report #R-429-K.]*

[NMA Comment: By allowing Judge Brudzinski to still decide a case against *any* mariner, Commandant Thad Allen displays "the finger" to every working merchant mariner. This assignment and the manner in which the subsequent hearing was conducted (as described by Ms. Janine Sullada) rises beyond the appearance of impropriety and warrants immediate attention by Congress.]

Eric Shine was left to his own devices to form his own legal defense for the so-called "procedural hearing" whatever that was supposed to be on Oct. 23, 2007 and for whatever occurred thereafter. In addition, he was denied the opportunity to see any documentation against him that would show any ***acts of incompetence as a marine engineer*** or even to have the charges read into the record.[(2)] That makes it hard to defend yourself. As in other cases previously reported to our Association,[(1)] Eric reported ***he was blocked from and denied discovery at least five times***. In addition, no witnesses or affidavits supporting the Coast Guard's contentions were presented or entered in the August 2003 pre-hearing settlement conference. We note that *Captain* Greg Periman also was denied the discovery he requested. This appears to be part of the method the Coast Guard uses to discriminate against our mariners as revealed by former ALJ Massey (above). in court documents. *[Transcript, p. 202. [(1)]Refer to our Report #R-315-C, Rev. 1, Case #4.]*

Being driven into personal bankruptcy and out of work since the Coast Guard started its witch-hunt in March 2003 defines Eric s inability to pay an attorney to defend him. It is sad to realize that American taxpayers invested $320,000 in training him as a marine engineer and to obtain his license during his four years of schooling at Kings Point. Agents of our government conspired to muzzle him for seeking an investigation to look into allegations of wrongdoing. To our mariners, the matter has a very simple implication – ***never trust the Coast Guard!***

Judge Brudzinski traveled several thousand miles across the country from New York to Long Beach but, in an order issued Oct. 11th, limited Eric Shine to a 20-minute presentation of his case that has dragged along without resolution at enormous cost to the taxpayers and to Eric as well. He also limited (now) Lieutenant Commander Tribolet to 20 minutes. The judge considered this fair, fast, and impartial with the clear emphasis on "fast." In his order, the Judge quoted 33 CFR §20.309 stating that each written motion must comply with the requirements of subpart 20 for form, filing, and service.

In a separate order, he criticized a motion submitted by Eric Shine as follows: the cited paragraph is indicative of respondent s motion practice. Such writing, while clearly expressing Respondent's concern over the matter, obstructs the ability of [Judge Brudzinski] to make rulings on individual items within the motions. Respondent's motions are found to be dilatory, and repetitive ***and are denied*** In other words, if it is clear but the judge won t take the time to sort it out, then he will just trash it.

All of this indicates that Coast Guard Administrative Law Judges ***assume*** mariners have formal legal training in filing motions and other court-related paperwork.

[NMA Comment: Few if any lower-level mariners have even the most rudimentary legal training to represent themselves before the existing ALJ system. Our mariners represent a clear majority of all U.S. merchant mariners. Eric Shine had no formal legal training but did the best to learn on his own. The time has come to re-examine the entire basis of this ALJ system.]

How Unbridled Coast Guard Actions Can Destroy A Merchant Marine Officer

*[**Source:** Transcript from ALJ pre-hearing settlement conference of Aug 27, 2003, pages 95-9; 102-104. You can read the entire transcript at www.martiallaw911.com In this excerpt, Peter Forgie, Esq. is speaking in behalf of Eric Shine. We believe these excerpts on behalf of Eric Shine have great merit. Emphasis is ours.]*

MR. FORGIE: This is his life since January of 02 since he stopped working aboard vessels. They black listed him. ***His own union, who is his adversary, now, has glumly admitted that he was wrongfully discharged***. We submitted the arbitration release to you with our documents today, which they found, and which they assert and acknowledge, proves that he was wrongfully discharged from the APL JACKSON. He has neither gotten any remedy in a civil court, nor has he been able to arbitrate that wrongful discharge, despite the fact that even adversaries agree, and the case law agrees, that he was wrongfully discharged. What has happened since then?

He applied for ten other jobs on vessels between January and March or April of 2002. What did they do? They declared him to be disqualified for the jobs, including one where he was supposedly going to get on some ship that had some defense-related thing, and they told him because he didn't have small arms training on a boat. That's the reason why they didn't take him on the job.

Can you blame him for feeling the way he does? Now, he hasn't worked since then. He was making good money before. He hasn't worked at all. They've taken two houses. He's driving a car around that he's looking in the rearview mirror constantly (to see if) they re going to repossess him.

I was in his house for a while; the house he used to have, he doesn t have it anymore. He's essentially a homeless guy. The creditors were calling about every 20 minutes, and he didn't have anything to say to them, because he didn t have any money to pay them. That's his life now. He has no money. He has no family, really, to speak of, no real close friends. And to this day, he has been struggling at this rate and this intensity for 18 months[(1)] and he has not gotten a single sliver of a remedy or really even an acknowledgement. Because with each passing month, as he becomes more and more frustrated, the people push back even harder. *[(1)As of Aug. 2003]*

And I hate to see that happen; and yet, the Coast Guard jumps in, in March 2003, right at the time when …he has been out of work for a year and a half, and ***they add insult to injury, or vice versa, file this thing against him, kick him when he s down***. And then they turn around, and you look back at history.

Nothing happened on boats, but they say: Look at him now. Look at the guy. He just acts up. He just won t shut up. He's raging and everything. And they re using that it seems so bootstrapped to me, and it s so qualitatively incomplete, inconsistent with the other cases, which you've cited regarding competency and whether or not an act of incompetence is required. They've completely disregarded it and said; Look at this man at the 11th hour, 59th minute. He's a mess. ***Take his license. And we don t care about whether or not we can show that those things had anything to do with his ability as a marine engineer.*** Look at these documents, and you will see that the letters with the ha, ha, ha and the big bold letters and all that stuff, that isn't what he was writing when he was doing grievances about the MAUI and the COMET and the CAPE ISABEL and the JACKSON. He was writing very logical, linear thought patterns, and he had you may disagree with whether or not he was right about it, but it was good stuff, and he was serious about it. And throughout, he has felt that this LPB thing[(1)] was fundamental. And as to the grievance process, the important things needed to be taken care of, and he was running up against a stone wall. And that degree of frustration has gotten to the point, with no remedy and no one really listening to him, where he just is tearing his hair out. And I just personally think that that is totally unfair to jump on a guy in that kind of a condition. And that's what's happened here. *[(1)LPB = Licensed Personnel Board a feature listed among the benefits in his union contract.]*

Mr. Forgie: But the fact remains, he was working aboard vessels for – 13 years? 13 years, and right up until the time when he left those boats, right up until the time when his life, therefore, fell apart, he was acting as totally competent. ***These guys didn't like him, maybe, because he's a whistle-blower, and he was asserting his union rights and trying to get the grievance.*** But the fact is ERIC SHINE: The canary in the coal mine, like the whistle-blower analogy, if the canary is doing the job and telling the miners to get the hell out of the mine, there's a problem, you don't go over and beat the crap out of the canary, strangle it, throw it down and say, "Ah," and go back to work. You listen to the canary, and you find out what's going on, take care of the problem and correct it, and don't say, "Oh, the canary must have some kind of a problem today."

Mr. Forgie: What is at stake here is a guy's career, and what is at stake is his ability to make an income…i

The Die is Cast

This appears to be one of these cases where the Coast Guard will go to almost any length to win win at any cost destroying trained and experienced American merchant mariners and leaving American taxpayers to foot the bill.

In this case, the Investigating Officer, LT Tribolet (now promoted to Lieutenant Commander and acting as prosecutor), graduated from law school at the Coast Guard s expense, was promoted in rank to Lieutenant Commander and

moved up to the District Legal Office to continue the case against Eric Shine. He made all the right career moves. Apparently the Coast Guard gave their Investigating Officer and new lawyer free rein and plenty of time and a law school education to work on this case. He appears to be well motivated by his career goals to move the cesspool full of paperwork the case has generated and win at any cost.

[NMA Comment: The Coast Guard should be required to balance the *costs* of prosecuting cases of dubious merit and hold investigators and prosecutors accountable for their decisions. Congress recently requested the Government Accountability Office (GAO) to perform such an audit on the Coast Guard's ALJ Program. While our Association supported this request and submitted information on this and other ALJ cases to the GAO, we were disappointed in the results of that report and communicated our thoughts to the nine Congressional requestors who asked for the GAO report in late June 2009.]

[NMA Comment: By remanding the SHINE case for further hearings, Vice-Commandant Crea ensured that these Suspension and Revocation proceedings would drag on endlessly to the great disadvantage of the respondent. In 2001, we petitioned the Coast Guard to prevent them from appealing cases they failed to prove against our mariners. While the Coast Guard denied our petition, in 2008 Congress proposed moving such appeals from the Coast Guard to the independent National Transportation Safety Board.]

The Shine Case is Part of an Ongoing Controversy

Lt. Eric Shine was left with no options other than to do battle again with the Coast Guard in a new pre-hearing procedure before an obviously conflicted ALJ Brudzinski. However, judging by his orders , the goal of the Oct. 23, 2007 pre-hearing was to prevent fully adjudicating all of the issues Mr. Shine attempted to present. Judge Brudzinski from New York, as Chief Judge Ingolia s ***hatchet man,*** in the past was expected to kill the DRESSER case as alleged in retired Judge Massey s affidavit (above). I surmise that he may have been expected to perform the same duty again.

As the Congressional hearings in Washington on July 31 and Aug. 2, 2007 demonstrated, the time is long overdue to challenge the way the Coast Guard, as part of a military service, deals with the citizens that pay the taxes to support its programs. Coast Guard programs like Deepwater and ICGS are proving to be phenomenally expensive; others like the medical NVIC and the new TWIC cards are controversial, and antagonistic to working mariners. However, even more outstanding, the conduct of the ALJ program has proven to be absolutely inexcusable and intolerable.

Several things became very ***clear*** in speaking with Eric Shine. First, Eric Shine is a whistleblower that reported unsafe and illegal activities. The Coast Guard turned the investigative process against Eric Shine and sabotaged his naval commission and his career as a Merchant Marine Officer. To defend himself, Eric Shine had to focus his life on protecting his career and reputation on winning a protracted battle with the Coast Guard s bureaucracy. Eric was forced to become knowledgeable in a field far removed from marine engineering or deep-sea ship operations – the legal field. In the process, he revealed something very rotten in our government!

Shine identified certain Coast Guard junior officers set out to destroy his personal reputation by issuing a Be On the Look Out (BOLO) picture poster for him at military installations in his hometown of San Diego. Although the BOLO poster did not specify the charge, it did specify that Shine may be dangerous. Consider the connotation such a poster implies to a law enforcement officer! As a result, he encountered unfairness, conspiracy, and corruption and the knowledge that the Coast Guard would go to great lengths to ignore and discredit him to prevent him from bringing his case before the public. However, the complexity of this case extends far beyond the foregoing statements. The Coast Guard was determined to win this case at any cost.

July 2007 ALJ Hearings in Washington

Events like those do not occur in a vacuum. I will connect the dots as I see them:

July 31, 2007 was the date of the ALJ Hearing in Congress and the written testimony presented at that hearing appears in one of our reports, #R-429-K**.**

The Coast Guard was able to hold the Subcommittee to a stalemate because the U.S. Attorney in New Orleans forbade anyone involved in the DRESSER case including Commandant Thad Allen or Chief ALJ Ingolia from appearing before the Congressional committee.

Eric Shine's remanded hearing before Judge Brudzinski originally was scheduled for Sept. 25, 2007 although Shine maintains he never received proper notice. When he found out about it, the hearing was postponed at the last moment and a new hearing date, because it remained announced for many months, hung as a Sword of Damocles over Eric's head. The nature of the hearing remained in doubt and confused because the first encounter between ALJ Brudzinski had turned out to be a nebulous, biased pre-hearing conference rather than a full due process hearing.

In preparation for the delayed hearing, Eric Shine prepared a number of motions including a 54-page motion that he shared with our Association.

We are appalled that the Coast Guard can arbitrarily destroy any mariner s career and his ability to earn a living for years on end. Eric Shine has had to face a modern-day version of the equivalent to a medieval Trial by Ordeal against a government agency that appears determined to crush him absolutely without ever being called to account for doing so. They certainly have the resources to do so. Unfortunately, this is not the only case where our Association has watched this happen, and, frankly, we are quite sick of it. The Coast Guard obviously wants Eric Shine s head served to them on a platter. Some of its servants are willing to step up and hack his head from his body.

However, we see some clues that the winds of change are starting to ripple the Coast Guard s stagnant seas. We are delighted to see that knowledgeable Members of Congress with years of legal private behind them, recognize and understand the problems that surfaced with the current ALJ system. Initial measures were proposed in the 110th. Congress that we hope and believe will continue to develop and reach fruition in the 111th. Congress.

We are proud that J. Mac Morgan, Esq., an Attorney who stood up for our mariners in the past, is pushing forward in the DRESSER and case in New Orleans and that James Doherty, Esq. joined forces with him to assist Captain Murray Rogers. Our only regret is that Eric Shine is still not represented by legal counsel.

[NMA Comment: Eric Shine's argues that the continued operation of the Coast Guard's existing administrative law system and its ability to regulate and adjudicate the civilian affairs of our nation's approximately 210,000 merchant mariners using resources of the Judge Advocate General is a violation of the separation of powers. We join with him in urging Members of Congress, when approach making future changes to the ALJ system, to keep this in mind.]

Above all, our Association is extremely proud of retired ALJ Jeffie Massey and ALJ Rosemary Denson who stepped forward to testify at the July 31, 2007 hearings in Washington to expose shortcomings in the existing ALJ system and recommend meaningful changes.

The Coast Guard, by remanding his case for a new hearing, placed Eric Shine in an impossible situation he could not possibly extract himself from without adequate legal assistance. As 2008 approached, Coast Guard prosecutor LCDR Chris Tribolet and ALJ Walter J. Brudzinski appeared prepared to grind him into dust.

Observing ALJ Proceedings

My experience has been that ***very few mariners, except for those directly involved as a respondent or witness, ever attend ALJ hearings.*** Everything is quietly done behind the scene and out of public view – although, in reality, these hearings are open to the public. In attending these hearings as an "observer," I often find myself at a disadvantage because I am not a lawyer by profession. Rather, my chosen profession is Education. I am a teacher by profession and a licensed "lower-level" Master by trade.

As a teacher, I have taught courses in American History as part of a broad Social Studies curriculum including Civics. I know what I should be able to expect in court although every time I enter a courtroom it is a new experience. As an observer, my comments reflect upon how well I believe the legal system meets my expectations.

Although civilian observers at ALJ hearings are rare, their written comments on their observations are even rarer. However, in the SHINE case, two observers thought strongly enough about their observations to submit formal affidavits. Ms. Janine M. Sullada should be considered a trained courtroom observer and her affidavit given heightened credence. Both she and Mr. Adam Olabuenaga are friends or acquaintances of Eric Shine as stated.

However, I discovered that Vice-Admiral Crea, under whose orders the remanded hearing discussed below was held, is not a lawyer either. I find that disconcerting. However, it does not require any legal skill to observe the unfairness and abuses I found recorded on the transcript. These abuses in the transcript are plainly visible as I reported to VADM Crea when I subsequently asked for her to review the 1000-page transcript.

Ms. Janine M. Sullada, a personal friend of Mr. Shine, participated in this case from the outset. However, Ms. Sullada, with her training, is more than an just "observer." She has a great familiarity with the case as a professional paralegal with significant prior courtroom experience. Her work includes a familiarity with this case from its outset. She knows many of the people involved and has handled all of the papers, whose copies fill two drawers of our Association's file cabinets. Ms. Sullada is also a college graduate who majored in Psychology – facts that provide added credibility to her affidavit that comprises a significant part of this report.

Throughout his ordeal, ***it was clear that the Coast Guard was going to do the things that it always intended to do – to find Eric Shine "Guilty."*** The tactics they used are clear in the transcript – a bulky and time-consuming document. However, they are summarized and pertinent points extracted in Ms. Sullada's "Affidavit" that accompanied Eric Shine's appeal brief that, to our knowledge, has not yet been acted upon.

Unfortunately, we have little reason to believe that anyone in the Coast Guard will ever read, study, or act favorably on Eric Shine's appeal. There are too many issues the Coast Guard covered in our two reports that they would like to sweep under the rug. However, Ms. Sullada's "Affidavit" exposes the resulting lumps in the carpet that must serve as a warning to all our credentialed merchant mariners.

If these abuses in the Coast Guard's Administrative Law System are allowed to continue, our Association warns our mariners that your professional career is in jeopardy until Congress acts to further investigate allegations of abuse within the system.

Guilty as Charged

Eric Shine was found "Guilty" in the hearing conducted before Judge Walter J. Brudzinski of some sort of "mental disease" although never examined by a fully qualified medical professional. Instead, Captain Arthur French, who was the head of the Coast Guard's Medical Branch at the National Maritime Center sat in the courtroom and "diagnosed" this disease during the hearing before offering his testimony. ***As a Coast Guard officer in charge of the Medical Review Branch at the National Maritime Center, Dr. French was present in person to relay the news that he would never approve Eric Shine's license as a Second Assistant Engineer for renewal***. By flexing his authority to do so, he thereby ended Eric Shine's career that had started with his graduation from the U.S. Merchant Marine Academy in 1991.

I point out as well that Captain French's controversial new "Medical NVIC" (NVIC 04-08) has similarly ended the career of a number of our merchant mariners. ***This case is controversial because it may serve as a terrible precedent to end careers of other merchant mariners for undiagnosed "mental diseases" that the Coast Guard may choose to allege in the future.***

Two Courtroom "Observers" File Affidavits About the Conduct of the Hearing

AFFIDAVIT OF JANINE M. SULLADA

I am not a party to this action and over the age of 18.

I have personal knowledge of the matters stated herein and that they are true of my own and personal knowledge and experience, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true as well.

Background Information

1. I have a B.A. in Psychology and a paralegal certificate. I have worked in the legal field for 18 years. In March of 2003, I was hired to perform contract paralegal work on Lt. Shine's case, USCG v. Eric Norman Shine, by attorney Frank Brucculeri, formerly of Haight, Brown & Bonesteel. This work ended several months later, after Brucculeri recused himself due to conflicts of interest expressed by Lt. Shine.

2. I was instructed to assist Lt. Shine ("Respondent" herein) in the organization of his files, which were at his home in Pacific Beach, San Diego, where Lt. Shine was still residing at that time. In the process of beginning to organize his documents, I reviewed hundreds of documents from three lawsuits Respondent had filed through various attorneys of record, against two different shipping companies, Shine v. Matson Navigation Co., Shine v. ASM, and a third lawsuit against his Union/Federal Officers Association, Shine v. MEBA.

3. Lt. Shine's position as an Officer in the U.S. Merchant Marine requires a Professional Engineering License and is tied directly to his Naval Commission that he received from Kings Point. As direct result of the Coast Guard's complaint filed against him, because he was prevented from working in his profession, and eventually as he waited for promises by MEBA and the shipping companies to be upheld regarding arbitration of the APL JACKSON disputes and others grievances, and the intentional delays created by MEBA and

counsel for shipping companies, it got to the point where he could not pay the mortgage on his two homes, or pay his attorneys who were handling his federal lawsuits. Eventually, there was no money for food, and the utilities were being shut off one by one.

4. Weeks after Brucculeri had been assigned by MEBA to Respondent Lt. Shine's S&R proceeding, Respondent discovered on the law firm website that attorney Frank Brucculeri advertised himself *as* a "Risk Manager" and "Defense Counsel" for the Shipping Companies and the Professional Liability and Indemnity Clubs "P&L" Numerous shipping companies were defendants in Lt. Shine's federal law suits. The "MEBA Plans" is a joint federal trust controlled by the shipping companies and Federal Officer's Association or "MEBA" (Union). Lt. Shine demanded that Brucculeri recuse himself, due to this conflict. A month or so after the charges were brought by the Coast Guard on March 6, 2003, Brucculeri moved to recuse himself, but stayed on while he found counsel who would substitute in, and Brucculeri continued to file documents on Lt. Shine's case. Brucculeri recommended to MEBA that attorney Peter Forgie takes over Lt. Shine's representation.

5. Respondent was adamant that Peter Forgie must not represent him either, because Forgie was not independent counsel chosen by him, and he was entitled to independent paid legal representation under the MEBA joint federal trust plans. Just after Frank Brucculeri recused himself, and prior to Forgie's first appearance, when Respondent was not represented by counsel, Lt. Tribolet and the first Adminstrative Law Judge in this matter, Parlen L. McKenna, called Lt. Shine at his home and held a *sua sponte* unrecorded and undocumented hearing. They harangued him for about an hour in an attempt to get him to voluntarily surrender his license. I was there at the time still going through documents on Respondent's case, and heard one side of the conversation. Even though he was only weeks away from being forced out of his home that had been repossessed, and he was trying to find a place to store his case documents, and was under insurmountable stress, Respondent had the presence of mind to state that he was not represented by counsel at that time, and that he wanted them to allow him time to retain counsel to replace Brucculeri, and he continually tried to end the conversation with them.

6. After just recently reading CFR Section 5.203, *Voluntary surrender to avoid hearing,* I was stunned to find out the ramifications of the decision that the ALJ and Lt. Tribolet were trying to force Lt. Shine to make. CFR Section 5.203 provides:

(a)Any holder may surrender a license, certificate or document to the Coast Guard in preference to appearing at a hearing.

(b)A holder voluntarily surrendering a license, certificate or document shall sign a written statement containing the stipulations that:

(1) The surrender is made voluntarily in preference to appearing at a hearing;

(2) All rights to the license, certificate or document surrendered are permanently relinquished; and,

(3) Any rights with respect to a hearing are waived.

(c) A voluntary surrender of a license, certificate or document to an investigating officer in preference to appearing at a hearing is not to be accepted by an investigating officer unless the investigating officer is convinced that the holder fully realizes the effect of such surrender. This *sua sponte* telephonic hearing occurred sometime in April of 2003, just prior to a proceeding that was carried on at the San Diego Coast Guard station in May of 2003, at which attorney Forgie made a special appearance for Lt. Shine.

7. After months of motions practice (Respondent was at that time and has been denied all his motions for discovery), attorney Forgie was ultimately unsuccessful in defeating the Coast Guard's Motion for Summary Judgment (that was granted without a due process hearing). MEBA then cut off any further monies from MEBA's federal legal trust fund and refused to pay for Lt. Shine's continuing legal representation to file an appeal of the final judgment. Lt. Shine was then forced to file his own appeal, and he did so in a timely fashion, even though the final judgment declared Lt. Shine was "medically and mentally incompetent" "unfit for duty" and he had recently become homeless.

8. The Coast Guard had just filed a complaint on March 6, 2003 against Respondent for the suspension and revocation of his Merchant Mariner's License, allegedly for "being depressed." The Coast Guard alleged that Respondent served under his license and documents and position between the months of March 6, 2001 and June 11, 2001 and between December 2, 2001 and January 5, 2002, and from January 5, 2002, until present (even now in 2008). The Coast Guard further alleged that Respondent "is incompetent due to a major depressive disorder, or other psychiatric condition, **the exact nature to be determined through the hearing process."**

9. The Coast Guard, a branch of military, alleged that Lt. Shine, an officer and a licensed professional marine engineer, was incompetent and suffering from some kind of mental illness. They obtained information in violation of Supreme Court case precedents, HIPPA Exemption 6 of 5 U.S.C. § 553(b)(6), and even falsified medical records in a document they filed, and has spent the past five years **"through the hearing process"** attempting to prove that Respondent is incompetent, all at the taxpayer's expense.

10. I think I now understand why the Coast Guard JAG prosecutor Lt. Cmdr. Tribolet's has continued to press on with the charge of incompetence against Respondent. ALJ Brudzinski asked him if wanted to continue with the charges against Respondent at the October 23, 2007 hearing, and he answered "yes, your honor" on the record. He could have dismissed the charges at that hearing if he wanted to, but he did not. Respondent stated on the record at the May 2008 hearing that Lt. Tribolet had been "stalking" him for 7 years. To clarify his statement, it is now 2008, and I believe Respondent stated that Lt. Tribolet was the original investigating officer who investigated the explosion that occurred onboard the SS COMET in October of the year 2000, when Lt. Shine had reported safety hazards, which included an explosion and dumping of contaminated boiler water into the San Francisco Bay to the MSO of the Coast Guard in San Francisco. A Marine Safety Incident Report form 2692 was filed by this vessel or company, but it was months after Lt. Tribolet's investigation, and even longer after first reported by Respondent and overlooked as to the violations on reporting and other infractions. After a review of official documents regarding the SS COMET, the APL JACKSON, the SS MAUI, and other vessels and owners as well, it became evident that a cover-up of the true facts had been conducted by the shipping companies and the Coast Guard involving the safety violation incidents on these two vessels, as well as disputes on the SS MAUI.

11. Respondent asserts that this matter is not properly before this administrative "kangaroo court," because the

constitutional issues raised in this administrative proceeding simply can not be adjudicated within this forum. The Coast Guard stated in their ***Memorandum of Points and Authorities*** pg. 3, lines 1-4, that under 46 CFR 5.65, "The decisions of the Commandant in cases of appeal or in review of decisions of Administrative Law Judges are officially noticed … and are binding upon all Administrative Law Judges, unless they are modified or rejected by competent authority." To my knowledge, the United State Supreme Court is competent authority, and is in fact controlling, and it disallows the Coast Guard from doing precisely what it is doing to Lt, Shine, and many other mariners and marine officers. They are being denied due process of the law and equal protection under the law. Criminals and alleged terrorists are seeing a fairer and faster day in court than our seamen and marine officers.

12. The Coast Guard should have brought any alleged charges for violations of 46 or 33 CFR against Respondent Lt. Shine in U.S, Federal District Court, where Respondent, who is a federal officer, already had 3 federal court cases against two former employers Matson and American Ship Management/ Patriot Contract Services/ Neptune Orient Lines, and MEBA. The United. States District Court had jurisdiction over cases brought against the United States or its agencies and its agents (federal officers), and admiralty and general maritime law.

13. The Coast Guard's complaint and their involvement in Lt. Shine's labor disputes and the Coast Guard's collusion with the defendant shipping companies prevented Lt. Shine's ability to prosecute his federal court cases, and even though the MEBA case was stayed by Judge Matz pending resolution of this S&R proceeding, that case was just now was recently dismissed due to "lack of prosecution" because Lt. Shine could no longer afford counsel.

14. Further, it is clear from a review of FOIA requests and other records that I have reviewed that Lt. Shine's Naval Commission ended as a direct result of the Coast Guard's report to the Navy. The Navy Discharge, which Lt. Shine disputes as improper and retaliatory, was allegedly issued prior to a meeting in of the FY-04 Naval Reserve Lieutenant Commander (Line) Promotion Selection Board, that was scheduled to convene May 5, 2003 and not ***as a*** resultant of action by the Board. In fact, Lt. Shine was actually up for a promotion to a Naval Reserve Lt. Commander, ***as*** stated in M.K. Brubaker, Department of Navy's letter dated December 27, 2002 to Mr. Shine. The Coast Guard brought **S&R** charges on March 6, 2003, and in May or June of 2003, allegedly the Navy sent a letter of honorable discharge to Lt. Shine two months after the Complaint filed by the Coast Guard. The alleged discharge from the Navy should never have been issued in the light of these circumstances.

15, At this hearing, five years after the charges were brought on March 06, 2003 and over eight years after some of the alleged events, although Lt. Shine is alleged to be incompetent by the USCG, Lt. Shine has not been afforded counsel, which is guaranteed in our Bill of Rights. Lt. Shine was a commissioned Naval Reserve Officer when charges were brought by the Coast Guard. I do not understand why Lt. Shine was not afforded Navy JAG Counsel, let alone denied counsel that the United States pays to the Federal Contractors to provide within these circumstances, as in the assignments of paid counsel, i.e: Brucculeri and Forgie.

16. The Coast Guard ALJ hearings are oceans away from any real adjudication or even remedial or informal resolution as outlined in the APA. The Coast Guard is superseding and overreaching its authority in all regards in attempting to deem a person incompetent due to an alleged mental disorder through the improper forum of a Coast Guard ALJ administrative **proceeding.** All the Coast Guard's arguments that Lt. Shine committed an alleged act of incompetence or simply was incompetent while he was "acting under the authority of his Merchant Mariner License" have simply run aground. 46 U.S.C. §7703 does not allow the Coast Guard to revoke a seaman's Merchant Mariner License where the alleged "acts" occurred long after the mariner had been discharged from the ship.

17. Further, if the Coast Guard disputes Respondent Lt. Shine's proper discharge, as Respondent does, from the SS COMET, and SS MAUI, and the MV JACKSON, Respondent should have been and should still be receiving compensation in the form of maintenance and cure for the past 8 years. Lt. Shine was entitled to compensation from the wrongful termination of his shipping articles aboard these vessels. His federal officers' association (MEBA) breached its duty of fair representation and wrongfully denied him paid legal counsel, which MEBA had a duty to pay for. MEBA has to pay for legal counsel against any action against his Merchant Mariner's License, as provided for under the Medical Plan.

18. In addition, the Coast Guard, to present, has not proved Lt. Shine's behavior has ever been a threat to marine safety. My review of the M/V JACKSON LOG and official records and correspondence indicates the ship Lt. Shine allegedly made "unseaworthy" sailed directly to Dutch Harbor, Alaska afterwards. A vessel cannot sail if it is unseaworthy. How could the vessel then immediately sail to Dutch Harbor, directly after it had been logged as unseaworthy?

19. It is apparent from a reading of the simple timeline or docket in Lt. Shine's three federal lawsuits, and the U.S.C.G docket, that the Coast Guard was assisting the shipping companies in defeating Lt. Shine's pre-existing lawsuits [see attached Notice of Related Cases]. Specifically, there is overwhelming documentary evidence that I have read that was obtained from responses to FOIA requests, that LCDR. Tribolet communicated directly with Archie Morgan at ASM, one of the defendants in Lt. Shine's lawsuits in district court, and exchanged Shine's personnel, personal, and medical files with ASM, in violation of Lt. Shine's constitutional rights and in violation of HIPPA. From my very basic understanding of HIPPA, the U.S. Supreme Court case of ***Jaffee v. Redmond***, 518 U.S. 1 (1996), legislation of all 50 States, even Executive Order in this regard, a defendant in a federal lawsuit does not have the right to plaintiff's private and privileged records without affirmative release from plaintiff, and to date, that does not exist.

20. Further, the defendants in Lt. Shine's federal lawsuits filed as an exhibit (to evidence why the lawsuits against them should be dismissed, and their summary judgment motions granted), Judge McKenna's final Order Granting Motion for Summary Judgment. This Order stated that Lt. Shine was medically and mentally incompetent and therefore he was unfit for duty, and that his Merchant Officer's License was revoked.

21. ALJ McKenna's Order was **vacated** by the Vice-Commandant's Decision on Appeal by Vice-Admiral Crea **two years later,** who then **ruled that this was a case of "first impression"** without much definition as to how or why, but remanded the case for a **due process hearing,** which Lt. Shine was denied before the first ALJ. The first ALJ Parlen L. McKenna granted the Coast Guard's Contingent Motion for Summary Judgment because Lt. Shine would not submit to a forced or compelled psychiatric examination by a

doctor of the Coast Guard's choosing to disprove the charges and prove his innocence.

22. The Coast Guard had not at that time and still has not met its burden of proof in determining that Lt. Shine had ever violated any rule of law or regulation or was ever a safety hazard to himself others, or carried out an act of [professional] incompetence while acting under the authority of his Merchant Mariner's License. In addition, the Coast Guard, to present, has still not proved that Lt. Shine's behavior ever posed or poses a danger or potential threat to marine safety, although the Coast Guard would like to have everyone believe that Lt. Shine is a clear and present danger.

23. In the summer of 2003, the Coast Guard actually even put out a BOLO "Be-On-the-Look-Out" wanted or warning poster of Lt. Shine and posted it at Coast Guard installations and even Naval installations, (as Lt. Shine was advised via an email communication from someone in the Navy), even though Lt. Shine has never violated any law, rule, or regulation. The BOLO stated that Lt. Shine was a "Disgruntled Mariner" who may be dangerous, and if you see him or encounter him to "contact the Coast Guard or the police." An official BOLO must state what the individual on the BOLO actually did or is accused of in order to be valid, amongst other requirements, which this BOLO failed to meet. This is just another glaring example of the Coast Guard's falsification of documents and defamation of Lt. Shine, when he has done absolutely nothing wrong. There is a term for what the Coast Guard has done to Lt. Shine. It is called "railroading."

Scheduling and Notice of Hearings

24. On May 20, 2008, I attended the alleged "due process" hearing in this matter. In fact, I attended all four days of the hearing. The notice indicated the hearing was for a one day hearing only, to commence at 9:30 a.m. on May 20, 2008. I later learned that very same day from Lt. Shine that he had just been advised by the court reporter that first day, that the hearing would in fact continue for at least four days. Because there was no proper or sufficient notice from the Court that the hearing would go longer than one day, most of the witnesses and others who came to support Lt. Shine planned for and only attended the first day of the hearing. A few weeks notice for a hearing that was actually to go four days is **not** sufficient notice. From my personal experience as a legal assistant, there is usually a trial setting conference between counsel and the judge, prior to setting a hearing or trial of any kind, although it was requested by Respondent numerous times, it was denied by ALJ Brudzinski. This actually created personal problems for me, because I had only taken two days off the week of the hearing – the day before and the day noticed for the hearing. I had to call in to work and tell them that the hearing was actually scheduled to go four days, and that I was going to be out all week, instead of missing only 2 days of work.

25. In addition, average notice for a regular state or federal court trial with thousands and thousands of documents like this matter, is at least 4-6 months, with the bare minimum of 100 days notice. Even top notch law firm with a large number of attorneys and paralegals would have had trouble doing what was expected of Lt. Shine, a *pro se* Respondent, given just a few weeks notice.

26. Although I understand discovery is often limited in administrative actions, the virtual landslide of binders and boxes and documents and exhibits that Lt. Shine was forced to carry in each day to the "hearing" is further evidence of the overly broad scope of time from which the Coast Guard obtained their discovery, in violation of prior ALJ McKenna's order limiting the scope of discovery. ALJ McKenna denied Respondent's four motions for discovery, although the Coast Guard was allowed to obtain just about every piece of personal and privileged information they regarding Lt. Shine.

May 20, 2007 – Day One of the Hearing

27. The Coast Guard and LCDR. Tribolet have a mission. They are attempting to determine Lt. Shine medically and mentally incompetent through an administrative hearing and this proceeding is being "administered" by members of the Coast Guard, which is a branch of military, to quote from LCDR. Tribolet directly. LCDR, Tribolet, in his Coast Guard JAG Officer uniform, began his opening statement, (which is not considered "testimony" according to the ALJ, overruling Lt. Shine's objections), by disclosing Lt. Shine's privileged and private information in violation of HIPPA and the U.S. Constitution, and 5 U.S.C. § 553(b)(6).

28. This "due process" hearing is a public hearing, and there were total strangers who came to see the first day of the hearing, and Lt. Shine's private information and other information was intentionally disclosed to them in this hearing by LCDR. Tribolet. Tribolet's behavior at the hearing (at one point he was red-faced and shouting at Lt. Shine) was not what I would expect of a gentleman who is a Lt. Commander in the Coast Guard or even an attorney *as* an officer of the court, for that matter.

Bias and Abuse of Discretion

29. This "administrative proceeding" before former and current military officers was so far and away from what can be construed as a due process hearing, it was absurd. The Coast Guard took away Lt. Shine's right to work and to earn a living in his industry by filing the complaint against him for the suspension and revocation of his Merchant Mariner License without a due process hearing, and denied him the real ability to afford him a proper defense.

30. At the first day of the hearing, and at all subsequent days, I was troubled most by the disposition of the Administrative Law Judge, Walter J. Brudzinski. ALJ Brudzinski was continually telling Lt. Shine to "***shut up and sit down***", denied every motion and request of Lt. Shine, and he overruled every single objection made by Lt. Shine to quote from LCDR. Tribolet directly. Although Lt. Shine's objections were logical and relevant to the question LCDR. Tribolet was asking, Lt. Shine is not an attorney. Lt. Shine requested repeatedly for these proceedings, for all proceedings to be videotaped, so all would be a matter of record. Lt. Shine was just trying to get his objections noted on the record, and the ALJ continually cut him off and overruled all of his objections.

31. As soon as Lt. Shine would stand up and begin to object, the ALJ would say "overruled," and then tell the Respondent repeatedly to "***shut up and sit down***" over and over again, often purposefully long after Lt. Shine had already sat down. It seemed to me the ALJ was trying to intentionally fill the record with his own long list of admonishments to Lt. Shine. Lt. Shine would always respond "Yes, your honor, thank you your honor" when he was told to sit down and shut up, and he would sit down. Lt. Shine did stress his points with ALJ Brudzinski, if he felt it necessary and an important point.

32. The ALI would not let Lt. Shine clarify his objections, even the though Lt. Shine was *a pro se* respondent without proper counsel or assistance, and the Coast Guard was trying to prove he was "incompetent". When Lt. Shine would

attempt to present legal arguments, ALJ Brudzinski would repeatedly threaten to call in security.

33. In fact, I had asked Amanda Withers, a work acquaintance of mine, who has a degree in finance, to come to the hearing. She was able to attend later in the day when she was available, to assist handling documents and exhibit binders. Amanda arrived and I asked her if she would help out and finish tabbing exhibit binders. She silently watched the proceedings for a while from a different point of view or perspective of the other witnesses *as* she was turned sideways at a 90 degree angle she was able to observe both ALJ/ LCDR. Brudzinski and LCDR. Tribolet at the very same time. She asked who LCDR. Tribolet was, and if he was an attorney, because he did not seem to know what he was doing. I told her he was the prosecuting officer and a JAG officer. She was the first one who noticed that the ALJ and Tribolet were "signaling" to each other, because of the angle at which she was sitting. She was amazed at what was occurring right in front of her, given the fact that she had some moot court training in the past, and the ALJ is not supposed to be silently communicating in any way, or advocating for one party over the other.

34. Amanda and I were not there as Lt. Shine's assistants, but there as friends who were trying to help him out as best we could. This was not a fair and impartial proceeding at all, as it was clear from the ALJ's demeanor and rulings that he was going to rule in favor of the Coast Guard -- no matter what evidence was presented on Lt. Shine's behalf. Further, when Lt. Shine tried to clarify his objection for the record and with ALJ Brudzinski, the ALJ would continually threaten to call in security and have him removed from the proceedings, and hold the proceeding without him in absentia.

35. Security was actually called in quite a few times by the Judge, and for no apparent reason other than the fact that Lt. Shine was trying to present legal arguments and objections to ALJ Brudzinski and kept reminding the ALJ that he had motioned for his recusal repeatedly and this ALJ should not be on his case and he should not have authority over the proceedings.

36. Lt. Shine was representing himself, and although he naturally has a very clear and loud speaking voice, he was not doing anything wrong and was not threatening anyone. He was just advocating his position. I could not understand why the ALJ would threaten to call security every time Respondent Lt. Shine would present a legal argument or factual discrepancy.

37. Also, at some point, when the witnesses were on the stand, the Judge even began to summarize the testimony of that witness for them and for the record. He did this, from my recollection, while Captain Arthur French, U.S.C.G, was testifying. There is simply no need for the judge to summarize testimony of a witness on the record when the witness is already on the stand. Some of the things Brudzinski said were not even statements of Captain French, which Lt. Shine properly objected to. It appears that this was redacted from the record or it is at least unknown what happened to this portion, but I do recall that it did happen, because Captain French had a strange expression on his face when the ALJ started summarizing, and I thought it was very odd. Personally, after observing ALJ Brudzinski for four days, I had serious doubts about his judicial competency.

38. Even at the October 23, 2007 pre-hearing conference that I attended as a witness, I found ALJ Brudzinski's behavior biased against the Respondent, and recall describing ALJ Brudzinski to an acquaintance after the hearing as a "drama queen" because he got so upset at that hearing he ripped he off his robe and threw it down and said "this hearing is adjourned" and stormed out the back door. He may deny doing this, but I was there and I saw it. I also overheard him stating to someone off the record, perhaps it was the court reporter that he had sat on the 911 hearings and was used to dealing with emotionally charged hearings like the one he was at today.

39. ALJ Brudzinski also made objections for the prosecution during Lt. Shine's cross-examinations, <u>even when the prosecution did not object</u> to Lt. Shine's questions on cross-examination of the witness. ALJ Brudzinksi also began to ask questions of the witnesses on the Coast Guard's direct. At one point I got so frustrated by what the ALJ was doing. It was *as* if he was trying to take over the prosecution of the case and wear every hat. I threw my hands up, and apparently made an expression of disbelief. The ALJ told Lt. Shine to tell his "assistant" to "stop making faces at the Judge." I stated for the record that I was frustrated, because it was my understanding that the prosecution is to ask questions of their witnesses on direct examination, and not the Judge. The ALJ then yelled at me and said he was "in control of this proceeding, Not Mr. Shine, Not Mr. Tribolet." I replied that "I was confused." After having to spend four days while ALJ Brudzinski was in "control" of the proceeding, I came to the conclusion that ALJ Brudzinski should not be in a position of authority such as an administrative law judge. His personal bias against toward the Respondent was apparent, and he should have recused himself as a matter of honor, as he had been requested to do by Respondent.

40. ALJ Brudzinski does not seem capable of making unbiased decisions, even when the law requires him to do so. This may or may not be because he was a prosecutor and a retired Lt. Commander in the Coast Guard, as stated on the record by Lt. Shine, which ALJ Brudzinski admitted to on the record.

41. The Coast Guard ALT proceedings allows unrestrained railroading and abuses of mariners that has been reported to Congress, yet has still continued for years since the Coast Guard has been conducted S&R proceedings. It is my humble opinion that the ALJ system within the Coast Guard should have been permanently removed from the Coast Guard long ago, and must now be immediately removed, *as* there has been essentially no oversight, and the abuses and injustice within this system are a blight upon the very constructs of the U.S. Constitution, and is injuring our Merchant Officers and crew.

42. Further, a paradox exists wherein the Coast Guard, a branch of the military, is in charge of giving and taking civilian licenses. One does not need to be in the military to apply for a Merchant Mariner's License, yet currently, if an S&R proceeding is brought against a holder of such license, it is brought by members of the same agency who administered the test for the license, not an independent court or agency, but a Branch of the Military. For example, if you get a speeding ticket from the Police, and you get a notice that your license has been suspended or revoked unless you want to fight it, you do not go to a Police hearing to get your license back. You actually go before a civilian judge, who has limited jurisdiction, in state court. In Lt. Shine's case, which is a suspension and revocation proceeding against his Merchant Mariner's License, both

ALJ and prosecutor are current and/or former members of the Coast Guard, a branch of military.

43 Five years ago I spoke to a Naval Reserve Officer who had also graduated from Kings Point Merchant Marine Academy. He is an attorney at a prominent admiralty law firm in Long Beach. I spoke to him in person to ask him for a referral for legal counsel for Lt. Shine or even if he himself could assist. When I told him the Coast Guard had brought charges against Lt. Shine, he asked if Lt. Shine could move to another state, or country, or even change his name. I thought he was joking. He was not. As I learned several years later, the Coast Guard has a 97% conviction rate, a startling indication that the ALJ system within the Coast Guard is "fixed." This finding is further corroborated by former ALJ Massey's testimony before Congress in July of 2007 that I have read, and from what I have seen, read and experienced myself in regards to these proceedings.

Cecil Rey – Coast Guard's #1 Witness

44. The Coast Guard's first witness was Cecil Rey, an elderly white-haired and bearded man and retired First Assistant Engineer and relief Chief Engineer (hereinafter "C/E Rey"), who worked with Respondent Lt, Shine aboard the Matson Navigation vessel the SS MAUI [see pre-existing civil complaints]. [Note: Respondent was not advised as to which witnesses Coast Guard would call, and in what order, until the time they were actually called.] In addition, the prior ALJ McKenna denied three motions for discovery by Respondent, so witness testimony on direct was new testimony, not something taken five years ago in any deposition. This means that someone would have to really be on their toes and take fast notes in order to conduct a cross examination of this same witness right after this new testimony was introduced. I confess that I do not see how a man who has been alleged to be medically and mentally incompetent by the Coast Guard would be, or could be able to, or should be required to conduct such a cross-examination, yet Lt. Shine did a pretty good job, and he managed to address some of the following key issues.

45. Cecil Rey's testimony was that Lt. Shine was incompetent because he failed to "turn to." The Coast Guard alleged because he failed to turn to, he was therefore incompetent. Respondent already stood a four hour watch from 4-8 a.m., and according to his testimony, if this watch is performed and pointed out contract provisions where, the person gets four hours time back, which makes an 8 hour day. Respondent stated that he did not refuse to turn to. The next four hours would be overtime, because in essence, he had already worked his 8 hours by doing the 4 hour watch with the time back as per the contracts or Shipping Articles [46 U.S.C. 10302. However, C/E Rey did not agree, and sent a termination letter to the Respondent after the Respondent had already been discharged (paid off the vessel on June 9, 2001) for his last day of work (June 11, 2001) on this two-week long job. The Company later rescinded the termination. A letter that even the Coast Guard has a copy of and filed *as* one of its own Exhibits. When Respondent reminded C/E Rey that a higher authority, the company he worked for, had rescinded the termination, Mr. Rey stated "If you can't work an 8 hour shift, then you shouldn't be in this industry." Respondent stated he did not fail to "turn to." He said he would work, but he wanted overtime for any hours over the eight hours he had just worked, per his contract. Mr. Rey stated it was a safety hazard because there was a leaking boiler which Respondent had seen on his watch, and they could not sail without said repairs. C/E Rey admitted that they had sailed into port without a hitch, and were not scheduled to ship out that same morning, and he actually ended up calling in a rotary engineer from the union hall to make the repairs and relieve Respondent of this work, as it was called for as a two weeks job, and Respondent's work was over and completed on June 11, 2001.

46. This safety issue of a leaking boiler was not created by Lt. Shine, but in fact discovered by him and reported upon by him, and logged by him. Lt. Shine reported potential danger he observed on this watch, and he said he would stay and work to complete the repairs if he was paid overtime for that time past his 8 hours work that he had already worked, and signed back on *as* he had already been paid off and given his release in the form of his Federal Discharge document CG 719K. C/E Rey wanted Respondent to perform the boiler repair work and not receive his time back as per the contracts, and basically do it on his own time. Clearly this is a labor issue and has nothing to do with failure or inability to perform a duty. The Coast Guard is strictly forbidden from getting involved in, except when there is a clear violation of law or regulation or the safety of the vessel or its crew is in question, pursuant to 46 CFR 5.71.

Alan Hochstetler – Coast Guard's 2nd Witness

47. The Coast Guard's second witness was Alan Hochstetler. Mr. Hochstetler was a 1st Assistant Engineer (hereinafter 1st A/E Hochstetler) who worked with Lt. Shine aboard the MV JACKSON, an APL ship. Again, 1St A/E Hochstetler's testimony, was regarding a labor dispute, and the alleged fact that he and others aboard the MV JACKSON did not seem to like Mr. Shine. It is important to note Respondent had filed three federal lawsuits against these shipping companies, ASM/APL being one of them, prior to his employment aboard the MV JACKSON, and while onboard filed an anti-harassment complaint with the ship's Captain and asked for it to be sent to the CFO of ASM and entered into the ship's log. This was also a Coast Guard exhibit, as they were aware of it. The crew and captain seemed to be aware of these law suits, and invocation and claim by Lt. Shine under the posted onboard Anti-Harassment policies.

48. The crux of Hochstetler's testimony for ASM and MEBA and the Coast Guard [Hochstetler is an ASM Employee and MEBA member] regarding Respondent's behavior and how it somehow created a safety issue was regarding or focused around a "switch" turned on and off by Respondent, who was ordered not to turn on the switch, because 1St A/E Hochstetler did not know what the switch turned on and off. Respondent in fact, did know what the switch was for, and apparently showed 1St A/E Hochstetler, and that the switch could be turned on and off because it controlled the reserve bilge pump which was the only time that he turned it off and on. If there was internal leaking, then this pump must be activated to vacate the space it controlled.

49. Again, the issues aboard the MV PRESIDENT JACKSON were labor issues, or better yet safety issues as raised by Lt. Shine regarding the fuel oil trays and other issues. If Lt. Shine was truly creating a safety hazard and was a danger to himself and others, why didn't the 1st A/E call the Coast Guard and have the Respondent removed from the vessel? 1st A/E Hochstetler stated that he tried to give everyone a chance and always tried to "work it out" on the ship amongst themselves, which seems odd, and not in keeping with what they are supposed to do when someone is truly causing a ship to be unseaworthy.

50. Lt Shine reported many safety hazards and violations while he was aboard the MV PRESIDENT JACKSON, as were confirmed by the Company ASM ashore, by the Coast

Guard and by a third neutral investigative party. These safety hazards and violations appear to have been covered up by the Coast Guard and were not reported by the shipping company, which I only discovered from a review of the documents regarding the vessel that were obtained through the FOIA.

51. Further, and review of the MV JACKSON LOG and official records and correspondence from the FOIA documents indicate the ship that Lt. Shine allegedly made "unseaworthy" sailed directly to Dutch Harbor, Alaska immediately afterwards in January, 2002, in fact and instead in a rush to leave port. A vessel cannot sail if it is unseaworthy, nor can it "clear" itself and it requires minimally ABS or the Coast Guard to clear the ship, whether self-declared to be unseaworthy or by someone else. How could it then sail to Dutch Harbor, directly after Shine had allegedly made the vessel unseaworthy? There were also reports made in Dutch Harbor of just some of the problems found onboard as reported by Lt. Shine, like the leaking and improperly repaired fuel oil trays as detailed in a report and letter by the Respondent.

Captain Arthur French (USCG)

52. Captain French was the "medical expert" for the Coast Guard. He is the Chief Medical Officer for the National Maritime Center. According to his testimony, he has held this position for approximately two years. I feel it is important to note that Captain French is not a psychologist or psychiatrist, and he had never met Lt. Shine prior to his testimony at the day of the hearing or ever treated Lt Shine and was never Lt. Shine's health care provider. In short, Captain French can't make a diagnosis of any mental illness whatsoever, because he is not an expert, and his curriculum vitae has no indication that he has any training in the field of psychology, yet he is the Coast Guard's expert at this hearing, which is puzzling. Lt. Shine pointed this out in his cross-examination of Captain French, and Captain French admitted, that he could not make a diagnosis, but he could make a "recommendation."

53. Further, I do not believe Captain French is even published or peer reviewed in order to be considered an expert as a medical doctor, and does not meet the *Daubert* standard, although he testified that he is currently working in a collaborative effort with others on a new Medical NVIC. Captain French stated on the record that he had not seen a release signed by Lt. Shine within the records he reviewed for his testimony, nor did he ask to see one. The Coast Guard did not provide Respondent with a list of any and all documentation that Captain French reviewed to prepare for his testimony, which is required and was requested by Lt. Shine. We discovered during Captain French's testimony that he had reviewed, amongst other documents, a **defense IME** from one of Lt. Shine's district court suits [Shine v. ASK, by a doctor who had never treated Lt. Shine nor was she his medical provider, or health care provider.

54. ALJ Brudzinski allowed Captain French to remain and observe Lt. Shine while the Coast Guard put on their case, and Coast Guard witnesses testified on direct and then Lt. Shine's cross-examination of the witnesses, despite the fact that Lt. Shine had requested that Captain French be placed outside the hearing room with the door shut when other witnesses were testifying, invoking the rule on witnesses. However, Captain French was allowed to stay and observe and perform an "examination" of Lt. Shine's behavior, but left when Lt. Shine was set to present his own defense. Captain French was also working on a laptop computer while in the hearing room, which the ALJ said was "okay" over Lt. Shine's objection.

55. At the very end of Captain French's testimony, he spoke directly to Lt. Shine who was sitting at the table: ***"You have a disease Lt. Shine and you need to accept it and get treatment."*** Also, I was told by Lt. Shine mother that she had a conversation Captain French *as* he was leaving the hearing room. Captain French actually approached Lt. Shine's 80-year-old mother, who had been there every day of the proceeding, and told her that she needed to do an "intervention." I feel that Captain French's communication with Lt. Shine's mother was shameful, extremely biased, and showed a lack of professionalism, especially since he had never met, treated or seen Lt. Shine prior to his day of testimony. Again he is not Lt. Shine's medical health care provider. This communication between the witness and Lt. Shine's mother was in violation of ethical guidelines, and just common good judgment. It was just another attempt by the Coast Guard to "stir the cauldron."

56. One can only imagine the pressure and stress the Respondent Lt. Shine is and has been for the past five years, and was under at this hearing, because he had to represent himself because he can not afford an attorney, and all he is trying to do is to restore his license and right to work and his reputation, Naval Commission. I can attest from personal knowledge over a five year period that Lt. Shine's behavior before, during, and after such a hearing, is certainly not indicative of his every day personality and well being. Nonetheless, Captain French was allowed to observe Lt. Shine during this hearing and use it as "evidence against" him. In truth, it was a hearing that did not appear to comply with many rules in the Administrative Procedure Act.

57. Additionally, the Coast Guard's testimonial evidence given by the Coast Guard's witnesses C/E Cecil Rey, 1st A/E Alan Hochstetler, and Captain French, regarding Lt. Shine's behavior during employment disputes while he actually was onboard the MAUI and the APL Jackson, was not reliable, probative, or substantial.

58. To date, the Coast Guard has not met its burden of proof that Respondent's behavior over the past five years was ever a danger or potential danger to life or property at sea or that he ever was or still is incompetent. To the contrary, Respondent reported, even complained to his superiors when he was working aboard these vessels about actual safety hazards and violations of laws, rules and regulations, which include Shipping Articles codified at 46 U.S.C. 10302. Lt. Shine is a whistle blower, and the documentary evidence has shown that he has been retaliated against by the Coast Guard and his former employers for reporting violations and filing labor grievances.

59. It is clear this matter is not properly before this Court. The constitutional issues raised in this administrative proceeding simply can't be adjudicated within this forum. It is prohibited by the APA, and admitted by ALJ Brudzinski on the record. He cannot adjudicate labor disputes or constitutional issues, and by doing so, he exceeded his authority in his attempt to adjudicate the legal issues raised in this proceeding. More importantly, the Coast Guard ***as a*** Branch of Military is prohibited from becoming involved in any civilian affairs.

60. The Coast Guard does not get to pick and chose portions of Lt. Shine's labor disputes to support a charge of incompetence. Even if one is to suspend their disbelief and rely upon the Coast Guard's weak handful of administrative cases from the appellate decisions of the Commandant, there was no reliable or probative evidence showing of any of the

evidence or testimony presented by the Coast Guard to prove that Lt. Shine was incompetent in his duty or while attached to any ship. The only time the Coast Guard cites is when Lt. Shine was on the Maui and he was admittedly depressed because his father had passed away, which is a normal reaction for any person, and Cecil Rey denied him leave.

61. I have reviewed Lt. Shine's Shipping Articles and Shipping Rules that do provide requested leave to Lt. Shine, in addition to that granted under the FMLA. Mr. Rey's testimony and his obvious dislike for Lt. Shine was apparent during his testimony. Mr. Rey conveniently did not recall he had denied leave to Lt. Shine to attend to his father as he struggled for his life for 78 days, and subsequently denied leave to find out what had happened when Lt. Shine's father died unexpectedly, and then told him to "go" because he had it "all worked out." When Lt. Shine returned to the ship, he found he had been terminated and they had hired a replacement for him. This is all documented within the correspondence between Matson, MEBA, and Lt. Shine, and personnel aboard the MAUI, which I have read and is a matter of record.

62. ALI Brudzinski is exceeding his authority and abusing his discretion in the hearing of this matter. Several of the key legal issues presented are Constitutional in nature, and the ALT by his own admission, and under the APA, simply does not have the authority to adjudicate labor or constitutional matters which acts as a bar against proceeding.

63. In fact, the growing body of case law and testimonial evidence, which includes testimony presented by former Administrative Law Judges Massey and Denson to Congress on July 31, 2007, supports the opinion of the House of Representatives in H.R. 2830, that the ALJ system within the Coast Guard has gone awry, and its continual. abuses of discretion and authority, and the Coast Guard's long history of running roughshod over Mariners and destroying their careers and lives without any oversight whatsoever, is a cry for help to Congress to immediately shut down and remove the ALJ system from the Coast Guard.

64. The cases of DRESSER, ELSIK, ROGERS, KINNEARY, SHINE, and many others, all provide substantial evidence of the Coast Guard's Administrative Law Judges' continual violations of the rights of our seamen and marine officers in the adjudication of matters before them, and further indicate that the Coast Guard ALJs are unfit to perform their duty as fair and impartial hearing officers.

Standard of Proof – Preponderance of Evidence
APA *5* U.S.C. *§* 556(d)

65. A preponderance of the evidence requires the result or conclusion to be supported by a majority of the evidence in terms of weight. *APA §556(d)* requires that a decision be supported by "reliable, probative, and ***substantial*** evidence,"

66. It became apparent throughout the proceeding that the ALJ was going to continually obstruct any testimonial evidence from Lt. Shine, and was not going to let Lt. Shine get any substantial evidence in his defense on the record. In fact, the ALJ "terminated" the proceeding on the last day, after Lt. Shine had tried to submit numerous pieces of evidence on his behalf, but only got to submit several exhibits. One was an amicus brief by Amnesty International regarding military tribunals.

67. The Coast Guard's "consideration of the records" of a naval officer's or mariner's entire life – or at least a good 25 year chunk of it – to deem this person "medically and mentally incompetent" through an administrative proceeding without proper due process, and force them into a psychiatric evaluation in order to disprove or prove their case -- is quite simply not fair or proper or in accordance with the United States Constitution.

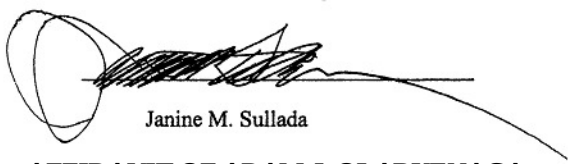
68. Also, the fact that this proceeding has dragged on for **five years,** and left Lt. Shine homeless and bankrupt shows the unfair nature of the administrative process. Few Members of Congress understand the competitive nature of the work in the maritime industry. If a mariner loses a 90 day job, it may be his last bid for a job for the next year. If a mariner is prevented from completing a 90 day job or denied the ability to take that work because his license is suspended on spurious charges, it will most likely destroy him financially, *as* in the case of Lt. Shine. Lt, Shine's case is proof that justice delayed is justice denied.

69. The entire four days of the proceeding seemed like a witch hunt against an allegedly incompetent naval officer and mariner, who has for many years now been loudly speaking out against the internal corruptions of both the shipping industry and the Coast Guard on his radio program, public speaking events, and on his public access television shows.

70. After attending the October 23, 2007 hearing with Lt. Shine, as a witness, and attending all four days of the May 2008 hearing, it is clear that ALJ suspension and revocation hearings within the Coast Guard are oceans away from any real adjudication or even remedial or informal resolution as outlined in the APA.

71. Respondent Lt. Shine was and was ultimately denied both procedural and substantive due process and was denied the ability to provide an effective defense for the following reasons, which include but are not limited to: (1) the lack of sufficient notice for the actual date of the hearing to allow adequate preparation, (2) the fact that it was noticed for only one day when it went four days, (3) the denial by ALJ Brudzinski of Respondent's request to hold an evidentiary hearing prior to this purported "due process" hearing (4) the ALJ's denial of Respondent's requested two-week continuance to prepare for the hearing and to properly prepare exhibits in a timely fashion, (5) the fact that the Respondent was unable to call any of his own witnesses due to lack of cooperation from the Coast Guard with respect to subpoenas, even though Lt. Shine requested the Coast Guard's assistance, (6) the ALJ's and LCDR. Tribolet's continual obstruction of Respondent's ability to get any evidence or testimony on the record, (7) the fact that Lt. Shine was a pro se respondent, (8) the fact that a branch of military is "administering" a civilian license and revocation proceeding, and (9) ALJ Brudzinki's abuse of discretion in his position of authority as noted above and throughout this affidavit with respect to:

(i) the committing of procedural errors *APA §* 706(2);
(ii) ALJ Brudzinski's violation of the Constitution *APA §* 706(2)(8);
(iii) the fact that ALT Brudzinksi exceeded his statutory authority APA §706(2)(C).



AFFIDAVIT OF ADAM J. OLABUENAGA

I ADAM J. OLABUENAGA declare as follows:

1. I have personal knowledge of the facts, events and activities described herein, and if called as a witness can and will testify competently thereto.
2. I am 23 years old and not a party to this action.
3. I was a witness to events that occurred at the following place and time as cited in the following section #4.
4. On May 20, 2008, I attended a hearing in the case of the Dept of Homeland Security/ U.S. Coast Guard vs. Eric Shine.
5. I was informed of the proceedings by "Eric Shine" a casual acquaintance in the numerous conversations we have had over time and was invited to attend these proceedings to simply observe.
6. During Lt Shine's request of me to attend, he also informed me of the structure and purpose of the proceedings which piqued my curiosity.
7. I wanted to ascertain whether or not what Lt. Eric Shine had explained to me about the proceedings was true or not, as it seemed almost unbelievable.
8. I arrived at 9:15 am PST roughly at the Glen Anderson Federal Building, 501 W Ocean Boulevard, Long Beach CA, 90802 in Room 5150 on the 5th floor.
9. My attendance at the proceedings was between the hours of 9:15 am, when I first arrived, and 4:15 pm, when I finally left the proceedings.
10. I was witness to a (trial-like proceeding) that did not seem to fit with what I knew or understood with how normal court proceedings occur.
11. It appeared that even from the onset of the proceedings from what Lt. Eric Shine had explained to me was more of an understatement then I could have imagined.
12. Lt. Eric Shine had tried to educate me about the improper nature, construction, and purpose of these proceedings and how out of step they were with the system of law that we are accustomed to in this country.
13. The trial was clearly some form of "Military Court", which was evident in the number and type of Uniformed Military Officers in various positions within the courtroom. They appeared to all be uniformed members of the Coast Guard.
14. Most notably was the Prosecuting Officer a LCDR. Christopher Tribolet who was apparently a Judge Advocate General Officer in the U.S Coast Guard, as Lt. Eric Shine brought this up and the LCDR. did not deny this fact and in fact admitted to it.
15. It was also revealed in the trial during opening statements that the "Administrative Law Judge" (Walter J. Brudzinski) was also, at some point in time, a LCDR in the U.S. Coast Guard himself, as well, and was challenged on this fact by Lt. Eric Shine as being a clear conflict of interest, and had repeatedly requested for recusal of the ALJ or Military Law Judge and the Prosecutor as well.
16. In addition, I observed a Coast Guard Uniformed Officer named Dr. French, who was identified as the Medical Officer for the National Maritime Center who I observed working on his laptop computer during the entire proceedings. I later discovered this was improper for many reasons.
17. The proceedings were painfully one-sided in favor of the Coast Guard.
18. During my attendance, what bothered me the most throughout the proceedings was that ALJ LCDR. Brudzinski denied every request or motion from Lt. Eric Shine. A specific example was when the ALJ overruled every objection that Lt. Eric Shine presented regarding LCDR. Tribolet's questioning of his first witness, Cecil Ray.
19. The judge never ceased his unfair treatment of Lt. Shine.
20. I left before the proceedings where over because this was clearly not a fair or unbiased hearing, and I was angry. I have never witnessed anything like this in my life, and hope I never witness anything like this again.
21. It was my observation that there was a great deal of dispute over whether Lt. Shine is a Commissioned Naval Officer or not, or a civilian.
22. The various other parties were all Officers in the U.S. Coast Guard which seemed very strange, if not improper considering that within the trial the prosecution or its witnesses acknowledged that Lt. Eric Shine is a Naval Officer and not in the Coast Guard even though it is alleging somehow that he is a civilian.
23. The ALJ was clearly biased against Lt. Eric Shine and was showing great disfavor to Lt. Shine and showing overwhelming favor in all regards to the Coast Guard's positions and LCDR. Christopher Tribolet,.
24. Lt. Shine was required to stand up when he addressed the Court.
25. Whenever Lt. Shine said anything the ALJ would tell him to ***shut up, shut up***, and then sit down, sit down only to try and set the record against Lt. Shine and make it seem like he was being "disruptive."
26. It was clear that Lt. Eric Shine was not being disruptive, but just trying to defend himself somehow in an overwhelmingly biased and unfair proceeding.
27. Lt. Shine's objections were never honestly considered by the Court or the ALJ in my opinion.
28. ALJ/ LCDR. Brudzinski seemed to have his mind made up before Lt. Shine could finish stating his objections and often times cut him off before he could finish stating the objection, or even before he could state what the objection was.
29. I noticed LCDR. Tribolet, (prosecutor and JAG Officer for the Coast Guard) did not object often, instead the Judge would object for the Prosecutor.
30. It appeared the ALJ was also leading the prosecution in the form of either rephrasing the prosecutor's objections or making objections for the prosecution.
31. Several times the ALJ would provide the "answer" to the Coast Guard Prosecutor so he would know what to say or where to go.
32. There is a great deal more I can and will testify to in this regard and as to these proceedings, but it is clear to me that these proceedings were biased, and prejudiced and to a point that the Coast Guard and ALJ already' knew the outcome and guilt of the Respondent Lt. Eric Shine.
33. The Coast Guard, by sitting in all roles within the court, was attempting to do everything in their power, and outside of the confines of a fair proceeding in order to find the Lt. Eric N. Shine guilty of the improper if not unbelievable charges of [supposedly] "being depressed."

I declare that the foregoing is true and correct to the best of my personal knowledge and belief.
Executed this 27th day of May 2008.
s/ADAM J. OLABUENAGA

Eric N. Shine's Case Update

Vice-Commandant Sally Brice-O'Hara issued her Decision on Appeal #2689 on Eric N. Shine on Sept. 30, 2010 that affirmed ALJ Brudzinski's opinion rendered on Nov. 19, 2008. We found a number of disturbing points in this decision.

First, the Coast Guard conveniently lost track of the fact that Eric Shine was a "***whistleblower***" who alerted them to

unsafe working conditions aboard several ships.

Our Association works closely with mariners who choose to report safety violations to the authorities by trying to reduce the risk of being black listed and run out of the marine industry. For years, we urged changes in Federal legislation in that finally appeared in Section 611 of the Coast Guard Authorization Act of 2010 – "protection against discrimination." This Act removed adjudicating "whistleblower" cases out of the hands of Coast Guard officials and turns it over to the Occupational Safety and Health Administration (OSHA), which is part of the U.S. Department of Labor.

If ever there was a "labor" issue, it was the SHINE case. Eric reiterated time and again that the Coast Guard is a "branch of the military" and has no place in deciding "labor" issues. Even Coast Guard policies direct that the Agency not become embroiled in labor issues. It appears that Congress saw the light and took a major step in passing Section 611 in October 2010. The new features of this recent amendment still need to be tested but, unfortunately, they will not apply retroactively in Eric Shine's case.

After Eric filed several lawsuits in Federal District Courts against his former employers, his union put pressure on him to back off – but without success. ***It appeared that an easier path to silence his complaints was to use the Coast Guard as a tool to revoke his Engineer's license***. This dragged on for eight years and was successful only after VADM O'Hara affirmed Judge Brudzinski's ruling that Eric was "medically incompetent" to hold a merchant marine officer's credential.

There are a number of lessons that should concern our mariners. One lesson is to ***never take on the Federal government at any level without adequate legal counsel***. Of course, the Coast Guard's ALJ system provides no legal help. That fulfills the "low cost" part of the program's purpose! ***However, it is precisely at this point where the entire system falls apart.***

This case involves a mariner's entire career. Eric became "trapped" within the Coast Guard's Administrative Law system without the ability to use his license for years. This is a serious case involving hundreds of thousands of dollars of lost income coupled with the loss of all his possessions.

We assert that ANY mariner brought up on charges before an Administrative Law Judge deserves to be represented by competent counsel. If that mariner cannot afford to pay for counsel, then one ought to be provided. We also believe the Coast Guard should be represented by legal counsel and not by an Investigating Officer who may or may not have undergone formal legal training – a longstanding problem discussed in several of our Association's reports.(1) In this case, however, the Coast Guard investigating officer attended law school at the Coast Guard's expense. *[(1)Refer to NMA Reports #R-429-A, Rev. 1 (1994) and #R-429-B, Rev. 1 (1996).]*

The Vice Commandant pointed out that Eric didn't follow the rules when he submitted his formal appeal. But, since Eric is not a lawyer and never had any formal legal assistance, the Vice-Commandant accepted the appeal ***but set her own ground rules for handling it***.

The Coast Guard ruled out all "Constitutional" arguments(1) saying: "S&R proceedings have as the focus of their inquiry issues of ***compliance with statutes and regulations***. The constitutionality of statutes are the province of the Federal courts." If Eric (or any other mariner) thought the Coast Guard's Administrative Law system would protect his constitutional rights, consider that statement carefully. Eric brought up a number of "constitutional" issues that were simply dumped and forgotten. *[(1)TR p.11.]*

The Vice Commandant's legal staff apparently enjoyed having the opportunity to insult Eric in a number of places. For example,(1) they stated: "Respondent filed a motion in opposition to the ALJ's order, comprised of 67 pages of ***largely indecipherable arguments*** with an additional 100 pages of attachments." That sentence alone eliminated 10% of the 2,000 page appeal that they found was easier to dump than to read. In fact, the Coast Guard went to the trouble to "weigh" his appeal; it weighed in at 22 pounds. Simply handling this much paper took their staff two years to wade through at taxpayer's expense. Does this meet the criteria of "***low-cost" justice*** as one of the objectives of the Coast Guard's administrative law system? It would have been cheaper and much less controversial to provide a lawyer to advise and defend Eric because this case is far from simple and straightforward in spite of our best attempts to simplify it. *[(1)TR p.23.]*

Among other things, Eric refused to take a psychological examination ordered by the Coast Guard. We have a problem with the regulation at 46 CFR §5.67 that says: "Physician-patient privilege. ***For the purpose of these proceedings, the physician-patient privilege does not exist between a physician and a respondent***." The regulation was written in 1985. However, recent events including the stance of the Coast Guard's Medical Evaluation Branch at the National Maritime Center will ensure that the Coast Guard continues to have virtually unlimited access to every mariner's personal medical records and should serve as a wake-up call to every credentialed mariner. Is this really necessary?

Equally disturbing is the regulation at 33 CFR §20.1313(1) where the Coast Guard gets to choose the doctor who will examine you. In the ***absence*** of such a doctor, the Coast Guard pressed into service its own Doctor – CAPT Arthur French, MD. The Coast Guard doctor from the National Maritime Center never met with Eric and was not a psychiatrist. However, he diagnosed Eric "mental condition": after watching courtroom proceedings for several days. *[(1) TR p. 22.]*

Our Association knows Dr. French as the architect of the National Maritime Center's physical evaluation program.(1) He "sold" his program to two federal advisory committees, MERPAC(1) and TSAC. Yet his medical evaluation program was so flawed that it held up the issuance of thousands of credentials for merchant mariners for months at the NMC and caused considerable hardship. Just before his retirement, Dr. French traveled to Long Beach, CA to attend Eric's hearing. There he vetoed the return of Eric's license and conducted his "diagnosis" while observing the hearing in progress. *[(1)Dr. French advised MERPAC that a staff of 7 medical professionals would be sufficient to handle the flow of mariner medical evaluations at the NMC. This estimate was totally inaccurate and following a Congressional hearing, the planned size of the medical staff was boosted to 35. In June 2011, we were told there were 23 medical personnel on staff at the NMC. Dr. French's poor planning slowed the NMC's entire credentialing*

program to a standstill. Before he finally retired.]

This quote also disturbs us: "The applicable regulations do not require any type of "evidentiary" or "due process" hearing before the ALJ may require a Respondent to submit to a medical exam of any kind."[(1)] That's scary. We find it difficult to see how such a regulation safeguards the constitutional rights of our mariners? *[(1)TR p23).]*

Appeal to the NTSB

Following his unsuccessful appeal to the Vice Commandant, Eric gave notice required by 46 CFR §5.713 that he would appeal to the highest level of administrative appeal – the National Transportation Safety Board (NTSB).

The NTSB is an independent agency with its own set of appeal requirements at 49 CFR Part 825. The appeal took many months of hard work to prepare because there were serious constraints as to the length of the appeal document. However, Eric requested and was granted an extension of time to complete his appeal. In the meantime, we awaited the NTSB's consideration of Eric's appeal.

On Mar. 5, 2011 our Association wrote to Mrs. Deborah A.P. Hersman, Chairman of the NTSB and asked her to consider the role of her agency in reviewing decisions appealing Coast Guard Decisions on Appeal as follows:

"For almost a decade, our Association asked Congress to amend 46 U.S. Code §2114 to provide adequate protection for ***whistleblowers***. Finally, §611 of the Coast Guard Authorization Act of 2010 enacted on Oct. 15, 2010 made sweeping changes that finally put our mariners on an equal footing with other transportation workers in this country. Unfortunately, for mariners in the system, it is not retroactive.

"I am sure that you know that Congress, the Department of Homeland Security, and the Government Accountability Office have looked into the Coast Guard's ALJ system shortcomings. So has our Association in light of our concern for limited-tonnage mariners – the vast majority of all credentialed U.S. merchant mariners. Nevertheless, your Agency is part of that system at the "appeal" level. I respectfully request that you and your board familiarize yourselves with ***The Coast Guard Injustice Handbook*** (enclosed) and closely examine your role in the appeal process to determine whether the time and effort your Agency expends on this review serves a necessary function and offers a meaningful measure of justice to the program." In this letter, we refrained from any mention of the SHINE case.

The NTSB adopted its order #EM-203[(1)] in the SHINE case on July 20, 2011 with all Board members affirming the order. In their order they upheld the ALJ's finding that Eric Shine was incompetent to hold a certificate because of a major depressive disorder and a psychiatric condition. "After careful review of the entire record, we deny appellant's appeal." They reported reviewing more than 20,000 pages of pleadings, transcripts, and briefs in this case [(2)] *[(1)NTSB Docket #ME-185. (2)TR p. 2, footnote 6.]]*

The nameless government author(s) of this document clearly read VADM O'Hara's Vice Commandant's Decision on Appeal #2689. The author of the NTSB document prepared for the Board put the report in a form that ***NTSB Board members*** easily could understand without a formal legal background. Consequently, it was much "easier" to read this document than VADM O'Hara's Decision on Appeal. It also was clear that the NTSB author also explored several areas above and beyond what the Coast Guard did.

We found a major shortcoming, however. While our story extends back to the boiler flashback on the S/S Comet in 2000 that served as the basis of the "whistleblower" action, the NTSB reportedly did a "de novo" (i.e., completely new) review of the case, ***leaving out the entire "whistleblower" aspect of the case*** in its entirety. The NTSB framed their review differently and completely left out one of its most important details. This was significant because it directed any possible future review to overlook the entire "Whistleblower" aspect of the case.

Clearly, in recent years, Congress did not find the Coast Guard handled "Whistleblower" complaints in a satisfactory manner or they never would have moved handling of future whistleblower cases from the Coast Guard and given it to OSHA as they did in §611 of the Coast Guard Authorization Act of 2010. The fact is that Eric was a "***Whistleblower***" apparently escaped the NTSB because they failed to make this connection.

Learning "Law" the Hard Way

The NTSB in its report mentioned that in Dr. Arthur French's 24-year career with the Coast Guard he "worked extensively with psychological disorders as an emergency room doctor and as a flight surgeon." My knowledge of the man was gained from attending several MERPAC meetings where his influence on the Coast Guard's medical evaluation program initiated an ongoing disaster for many of our working mariners.

Dr. French noted that Eric's behavior at the hearing was consistent with his diagnosis that he completed while sitting in the courtroom as an "observer" and later as a witness and while also being observed working on his laptop computer during the hearing. Aside from that, as head of the Coast Guard's medical evaluation program, as CAPT French he was in a position as a medical administrator to deny Eric his license and took this opportunity to do just that! He stated in effect that he would never return Eric's license to him and held the administrative power to do so.[(1)] . Conveniently, Dr. French never mentioned that he was ending his tour at the National Maritime Center where had been in charge of the Coast Guard's Medical Evaluation Program and that he was in the process of retiring from the Coast Guard. *[(1)TR pgs. 5 & 6.]*

Eric's undoing lay in the fact that he was ***ordered*** by two different Administrative Law Judges, ALJ Parlen McKenna and ALJ Walter Brudzinski, to submit to a psychological examination.[(1)] Although Eric submitted findings from another psychologist because he believed he had good reason not to trust the Coast Guard-appointed doctor, this was in violation of the following regulation and damaged his case: *[(1) TR pgs. 7, 9, 22.]*

33 CFR §20.1313. Medical Examination of Respondents. In a proceeding in which the physical or mental condition of the respondent is relevant, the ALJ may order him or her to undergo a medical evaluation. Any examination ordered by the ALJ is conducted, at Federal expense, by a physician designated by the ALJ. ***If the respondent fails or refuses to undergo any such examination, the failure or refusal receives due weight and may be sufficient for the ALJ to infer that the results would have been adverse to the respondent.***

The existence of that regulation was enough to demolish a number of Eric's arguments. The idea that "...the Coast Guard issued lawful subpoenas for medical records..." perhaps demands rebuttal. However, Judge McKenna's "protective order" for medical records[1] tied a decorative bow to the package. *[(1) TR p.26 and footnote 32.]*

The Sixth Amendment to the Constitution provides: "In all ***criminal*** prosecutions, the accused shall…have the assistance of counsel for his defense."[1] Unfortunately, the basis of this hearing lies in Administrative Law and is ***not a criminal prosecution***. Reading too much into the Constitution or knowing too little about Administrative Law may explain why Eric and other mariners whose credentials are undergoing suspension or revocation proceedings have no constitutional right to representation by a court-appointed counsel (i.e., lawyer). Our mariners are left to find this out the hard way – often on their first day in the courtroom and often without adequate explanation. This is why our Association pushes our mariners to purchase License Defense Insurance[2]

Eric originally was furnished counsel as a result of his union membership, but that coverage was later withdrawn. And, license defense insurance may have some drawbacks. For example, at least one of our mariners discovered that his license defense insurance policy would not defend him in a "drug" case where the mariner in all probability was innocent.. *[(1)TR p.24, footnote 30). (2)Refer to NMA Report #R-204-C, Rev. 6.]*

The NTSB report stated: "The law judge also offered appellant (i.e., Eric) the opportunity to call witnesses…Instead of calling witnesses, the appellant argued that the law judge improperly refused to issue subpoenas to his witnesses." *[TR p.28.]*

Citing 33 CFR §20.608 and the rest of the discussion on this subject in the NTSB report probably clarifies the issue of asking a judge to subpoena witnesses. This is a topic most mariners know little to nothing about. To have the judge subpoena high profile personalities as U.S. Senators Dianne Feinstein and Barbara Boxer, Congressman Elijah Cummings, and the Commandant probably would have required extremely strong evidence that their testimony was crucial to the appellant to get any ALJ out on a limb. The pertinent regulation reads as follows:

33 CFR §20.608 – Subpoenas.

(a) Any party may ***request*** the ALJ to issue a subpoena for the attendance of a person, the giving of testimony, or the production of books, papers, documents, or any other relevant evidence during discovery or for any hearing. Any party seeking a subpoena from the ALJ shall request its issuance by motion.

(b) An ALJ may, ***for good cause shown, apply to the United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence***.

(c) A person serving a subpoena shall prepare a written statement setting forth either the date, time, and manner of service or the reason for failure of service. He or she shall swear to or affirm the statement, attach it to a copy of the subpoena, and return it to the ALJ who issued the subpoena.

(d) Coast Guard investigating officers have separate subpoena power in S&R proceedings under 46 CFR 5.301.

Appeals Follow a Format

The author of the NTSB report ultimately accepted by the entire Transportation Safety Board did not find that Eric's appeal brief fit the Agency's regulatory requirements[1] as it was supposed to. This was essentially the same problem VADM O'Hara experienced with Eric's earlier appeal to her office. Nevertheless, this is understandable in that Eric, like most mariners caught in the administrative law system, lacked formal legal training. *[(1)Refer to 49 CFR §§825.15 and 825.20.]*

The NTSB, like the Commandant, overlooked this shortcoming by wading through Eric's appeal and picked through "more than 20,000 pages of pleadings, transcripts, and briefs"[1] to identify eight (8) issues to expound upon whereas VADM O'Hara earlier had selected 12 issues. This allowed both VADM O'Hara and the NTSB to relegate other issues Eric brought up as "***immaterial, irrelevant, or unduly repetitious***." Although both Agencies "cherry-picked" individual issues, there ***were*** dozens of these issues throughout this ordeal that both agencies simply set aside and did not respond to. Nevertheless, the NTSB rolled over a number of these arguments in the transcript.[2] *[(1)TR p.2, footnote 6. (2)TR p. 18.]*

In reviewing the NTSB report, I cannot see how the NTSB could say that, "additionally, the law judge, considering appellant was pro se[1], spent two days of the hearing attempting to explain procedures to appellant and... trying to ***assist appellant*** in introducing his 178 exhibits." *[(1)**Vocabulary: Pro se** = representing himself in place of hiring a lawyer.]*

Either the Commandant or the NTSB never received or never considered the "Affidavit of Janine M. Sullada" as described in The Coast Guard "Injustice" Handbook[1] that described the overwhelming "secretarial" problems that this paralegal faced in preparing for the hearing. If nothing else, Ms. Sullada closely observed what transpired in the courtroom. I spoke with her during and after the hearing and only regret that I was unable to attend the hearing in Long Beach, CA. *[(1)See above pgs. 19-7 thru 19-15.]*

If Judge Brudzinski really wanted to "assist" Eric, he could have recessed the hearing for an hour or so to allow Eric and his assistants (Janine and Amanda), to properly assemble and organize ***copies of 178 exhibits run off in bulk by a local copy shop*** into the proper order for presentation. The NTSB report stated: "He (Eric) asserts the law judge erred in not giving him sufficient time to put together his exhibits..." While this is an understatement, it also helps to explain why Eric filed these exhibits in his appeal to the Commandant and later to the NTSB rather than introduce each one individually and allow the ALJ to rule on them individually and let them become part of the record.

Part of my regret in not being present with Ms. Sullada as a courtroom observer was that I might have been able to assist in organizing the 178 exhibits as I previously studied each of these documents and could recognize many of them by sight without having to re-read them. But trying to assemble these voluminous exhibits in open court posed a problem even to a well organized and motivated team. By crowding Eric and those who sought to help him, the ALJ gave him "the bum's rush" and damaged his ability to adequately present his case.

Eric's failure to introduce evidence later was used it as a basis to discredit him. Failing to enter their documentation

on the record during the four-day hearing left Eric no alternative but to present all this paperwork in subsequent appeals to both the Commandant and the NTSB and was used against him by both parties. *[TR pgs. 20, 23, 24, 27]*

We also question why the Master of the M/V President Jackson was not called as a witness to explain a logbook entry[(1)] years earlier using the terms "misconduct" and "unseaworthy condition" in reference to why he terminated Eric's service on his ship. These significant terms were used by the Coast Guard to encapsulate the testimony of two witnesses the Coast Guard did call. It is significant that the reasons why the shipping company later ***rescinded*** the termination notice were never probed. *[(1)TR p. 4, footnote 7.]*

The NTSB report remains oblivious to the fact that after years of being strung along by the Coast Guard's administrative law process that Eric had ***no money left*** to hire a lawyer or to obtain medical treatment. In its place appear these inane statements: "(He) chose not to retain additional counsel."[(1)] and "He refuses any treatment for these disorders."[(2)] *[(1)TR p. 18. (2)TR, p. 30.]*

NTSB "Clears" the ALJ's Conduct

The NTSB went to the point to "clear" the Coast Guard[(1)] in the conduct of the ALJ hearings. That helps to make the NTSB report a nice, neat, easy-to-read package. Our Association brought attention to the problems we found with the conduct of this hearing in a letter to the then Vice Commandant VADM Vivian Crea dated June 30, 2008 (Subject: Renewed Petition for Rulemaking on ALJ Decisions Adversely Affecting Our Mariners). .Later, we received Ms. Sullada's affidavit cited above that brings ALJ Brudzinski's conduct into question. *[(1) TR p. 16.]*

Did this aspect of the NTSB report show collusion between that agency and the Coast Guard? Unfortunately, the NTSB chose not to address the "whistleblower" aspect of Eric's case. The two agencies may argue about other "turf" items, but the NTSB clearly was not willing to stick its neck out here!

The NTSB found ***no evidence of actual bias*** or prejudgment During the timeframe in which the NTSB was drafting this report, the U.S. Department of Commerce was reconsidering its continued use under contract of Coast Guard Administrative Law Judges including both of those used in the SHINE case.

The Department of Commerce had a scandal on its hands that arose in part from its business practices as well as its reliance on Coast Guard ALJs. Over five thousand fishermen marched on Washington and made their complaints known to Congress. The Secretary appointed a Special Master to investigate 31 cases already examined by his own Inspector General. The result was a an apology, a return of over $600,000 in civil penalties, and termination of the use of Coast Guard ALJs as the following letter reveals. The Secretary of Commerce knew how to take the right steps to deal with the "***perception***" of unfairness of the department's discredited judicial process that brought attention to a $44,000,000 slush fund within the department.

Commerce Secretary Cancels Contract With Coast Guard ALJs
[Emphasis is Ours!!!]

The Secretary of Commerce
Washington, DC 20230
May 17, 2011

Secretarial Decision Memorandum

Subject: Decisions regarding Certain NOAA Fisheries Enforcement Cases Based on Special Master Swartwood's Report and Recommendations

On April 14, 2011 Special Master Swartwood[(1)] submitted to me his report and recommendations on 30 of the first 31[1] of the complaints I referred to him for review. These 30 complaints arise from those collected by the Department of Commerce Office of Inspector General (OIG) during its investigation into the enforcement practices of NOAA's Office of Law Enforcement (OLE) and General Counsel for Enforcement Litigation (GCEL). Eighteen of these complaints were specifically addressed in the OIG's September 23, 2010 Report; the remaining eleven are complaints that were submitted to the OIG but not discussed in the Report. *[(1)Judge Swartwood's full report is available as NMA Report #R-459.]*

(From Page 3):

These include plans for addressing what Judge Swartwood described as a perception (predominantly in the Northeast) that the Coast Guard Administrative Law Judges (ALJs) used by NOAA lack impartiality. Although Judge Swartwood did not find that any cases in which ALJs demonstrated actual bias, he does conclude that this perception has deterred the regulated community's pursuit of its due process rights. A strong and fair enforcement programs requires faith in the basic fairness of the process. ***Therefore, I have directed NOAA to terminate the Coast Guard ALJ contract*** in order to reset NOAA's relationship with the regulated community.

(From Page 15):

I hereby instruct all officers of the Department of Commerce and the National Oceanic and Atmospheric Administration to take all steps necessary to implement these decisions.

s/ Secretary Gary Locke

What is Next?

Unfortunately, nowhere in the entire NTSB package was there any clue as to how Eric, as an aggrieved mariner, might carry this case, which is now a Final Agency Action, into a Federal District Court or a Federal Appeals Court.

Although the Coast Guard and NTSB not only avoided the issue of ***whistleblower protection***, they also closed the door on the issue.

Clearly, a number of changes to the Coast Guard's administrative law system are necessary before mariners ever can trust it. If left unchanged, the ***perceived unfairness*** of the administrative law system will undermine the maritime industry.

CHAPTER 20 – MARINE SAFETY ENFORCEMENT DESTROYS ESTABLISHED FAMILY BUSINESS

"Marine Safety" is one of the Coast Guard's eleven (11) missions tracked annually by the Department of Homeland Security, the Coast Guard's parent agency. Generally included under the "Marine Safety" umbrella are Marine Investigation, Marine Inspection, and Merchant Marine Personnel. Merchant Marine Personnel serve under "credentials" issued by the National Maritime Center. Enforcement actions against mariners are initiated by local "Investigating Officers" who may attempt to reach a "settlement agreement" with a mariner or bring the case before an Administrative Law Judge.

In this remarkable case, the Coast Guard brought the case of Captain ■ before the Coast Guard's Chief Administrative Law Judge Joseph N. Ingolia in the Coast Guard's Conference Room in Philadelphia, PA on June 17, 1997.

Captain ■ (aka NMA Mariner #169)

Mariner #169 was a 100-ton licensed Master operating on the eighth issue of his license.[1] According to his wife's testimony, "…he's always been involved in this business since he was a child…and he was born into it" and "…had his license since he was 18."[2] Mariner #169 served as an enlisted man in the Coast Guard for six years between 1964 and 1970.[4] The Investigating Officer verified that he had no prior "record" with the Coast Guard.[5] His family business had a long and safe history for over 55 years.[3] The business was located in Cape May County in southern New Jersey and operated three small passenger vessels at the time. *[Source: Transcript (TR), Case #PA97000955, Docket #05-0063-JNI-97. [1]TR. p.207. [2]TR, p.206. [3]TR p.140. [4]TR p.206. [5]TR p.202.]*

At the time of the hearing, Mariner #169 and his wife ran the family business jointly and divided the principal duties between them with the husband taking care of anything dealing with the company's vessels and his wife dealing with customer relations, invoicing, preparations for managing customers, providing on board food services, arranging for hiring a band and other entertainment provided for the passengers.

The Company Vessel(s)

The LRS Renaissance was a two-deck passenger vessel formerly certificated to carry 368 passengers as a high-speed ferry between John F. Kennedy Airport in New York and Manhattan. Since the route chosen by the previous owner took the M/V Sea Jet II as it was then known, out into the Atlantic Ocean, the Coast Guard certificated the109-foot vessel to operate on a coastwise route 20 miles offshore between Montauk Point, New York and Cape May, New Jersey. The airport ferry service was not a financial success, and the boat was repossessed and put on the market for sale.

When Captain ■ purchased the boat for his small company, he had a very different future in mind for this unique vessel. He planned to use it not as a fast commuter ferry in busy New York Harbor but, rather, as a dinner cruise vessel in the Cape May area. The company owned two smaller vessels and found that the demand for cruises and dinner boats demanded a vessel with a greater capacity to fill the needs of the local market. A boat the size of the LRS Renaissance with two passenger decks, shallow draft and a capacity of over 300 passengers fit the bill and appealed to several out-of-town tour operators and local motels and civic groups the company worked with. Nevertheless, acquiring a vessel of this size represented a huge financial leap for a small company and required very close coordination to take advantage of a short seasonal window that extended from early May to just beyond Labor Day. The window of opportunity closes very soon after Labor Day when schools go back in session and interest in going to the beach to escape the summer heat diminishes.

Captain ■ knew the small passenger vessel industry. As far as boat building and boat repair for vessels of that size, Louisiana represented the center of the universe – and he spent considerable time checking out all the small passenger vessels available in Louisiana before he chose the vessel that would fit in his niche business in south Jersey. Because the main engines had been run to death by the previous owner's failed commuter service, Captain ■ decided to replace them and install smaller engines on the same engine beds. Since his business was essentially a "seasonal" business, the large new vessel would have to go into service immediately after repairs were completed and allow a short time and practice in handling during the delivery trip. All of this was scheduled to take place near the beginning of his short "busy" season in late Spring 1996. The project involved taking a significant financial risk and juggling the operation of his existing business in New Jersey. The job was "doable" as long as everything ran smoothly. With his considerable experience, background in the business, and initiative the future looked bright.

The Coast Guard Makes Simple Things Difficult

Captain ■ bought the LRS Renaissance in March 1996 and, "We applied for inspection on the vessel on ***April 6, 1996*** in Newport, Rhode Island at the Coast Guard there, and we supplied them all types of documents (and) stability data. At that time, we were changing engines and we supplied them with the data."[1] *[[1]TR, p. 162.]*

"We finally received a reply back about ***August 4, 1996*** from the Marine Safety Center in Washington. At that time, ***they said that the gentleman who was in charge of our project said that they had lost the data, and they had just found it. It was on the bottom of the pile***. At that time, we contacted the Philadelphia Office and asked for inspection." The period between April 6th and August 6th was four months, much of it at the height of the season. During this time the Coast Guard at the Marine Safety Center "lost" his paperwork.

The Coast Guard describes the Marine Safety Center (MSC) as follows: "The MSC supports the people and objectives of the Marine Safety, Security, and Environmental Protection programs through the verification of compliance with technical standards for the design, construction, alteration and repair of commercial vessels. The MSC is an independent Headquarters command that was established in 1986 by consolidating the Coast Guard Merchant Marine Technical offices located in New York, New Orleans, Cleveland and San Francisco. The MSC's primary mission is the review and approval of plans for the design, construction, alteration and repair of U.S. and

foreign flag commercial vessels subject to the U.S. laws, regulations and international standards."

Until the Marine Safety Center acted upon Captain ■'s request, there could be no vessel inspection. However, during this four-month wait, the company's operating capital was tied up in a vessel that could not operate, bills could not be paid, and credit dried up. In the meantime, Captain ■ and his wife tried to keep the business afloat while constantly prodding the Marine Safety Center to act. Only in August did Captain ■ first learn that his paperwork had been misplaced at this Headquarters unit – and he learned that admission by accident. We all know that the Coast Guard seldom admits its mistakes.

Worse than that, the Coast Guard showed little interest in the problems that faced Captain ■ as a small business owner and the crisis that their careless handling of his paperwork had brought about. This was the most important single event that brought about a whole string of events that would doom the company and bring disgrace upon its owners. The Coast Guard would emerge unscathed and, in fact, in an improved position to carry out its own agenda at the expense of Captain ■ and his wife's business enterprise.

"That was in August (1996). They finally did come down and did a walk through inspection, Mr. Knapp at the time, and somehow it was concluded that we were making – moving bulkheads and types of things like that. And I don't know where that (false information) came from, and that we would have to – the Marine Safety Center at that time said that we would have to have stability data done on the boat. We conversed back and forth with them at that time, and ***by that time we had lost the whole summer with the vessel***."[(1)] *[(1) TR p.163.]*

With the season lost for the new boat, Captain ■, "…talked to (CDR) Thaddeus Selinsky from the Marine Safety Center , and at that time asked him if possibly we could get the stability (approved) on a reduced route and a reduced number of passengers. (He) said there was a good possibility of that. He said we would need an architect to submit a letter to them stating that. So, which we did, finally in March (1997)."[(1)] *[(1)TR p.164.]*

Financial Collapse and Reorganization

Financially, the world came tumbling down on the boat company and its owners in November 1996 when Captain ■ and his wife filed for personal bankruptcy and attempted to reorganize under Chapter 13. "Also, in the meantime, on another matter, the Coast Guard had filed a ***civil penalty case*** against us for not being able to pay our user fee. And ***they said at the time that we should be made an example of and that the $5,000 fine should be upheld against us***. We replied that we had every intention to pay it, but we didn't have the money to pay it. And that case is still pending."[(1)] *[(1)TR p.164.]*

Obtaining a letter from the naval architect to operate on a less exposed route was easier said than done. Before the architect would write the letter the Marine Safety Center wanted, he demanded payment for previous services. That required Captain ■ to sell one of his company's other boats to raise the money. When that transaction was completed, the letter was sent to the Marine Safety Center. However, the letter was rejected and a dead weight survey was required.

In the meantime, to carry on business for the 1997 season, during the winter the company scheduled trips for various tour groups, working with local hotels and civic organizations in Cape May County they had dealt with for years. Nevertheless, it became evident that Coast Guard certification that was urgently needed would not be forthcoming before the first scheduled trip on May 5, 1997. The boat was insured and ready to go on its very first paying trip – all it needed was a Certificate of Inspection (COI).

Carrying Passengers For Hire?

Five tour buses disgorged approximately 150 passengers on the LRS Renaissance for a "Sunset Dinner and Dolphin Cruise" on May 5, 1977. Although Captain ■ and his wife may have disagreed on exactly how to handle the situation, the law did not allow the vessel to carry "passengers for hire" without a Certificate of Inspection (COI). The Coast Guard Marine Safety Office in Philadelphia – that had not been paid its "user fee" – chose to make an issue with the company by making it very difficult to obtain the vessel's Certificate of Inspection.

Beginning May 1, 1995, the Coast Guard began collecting user fees for performing various inspection services previously done for free. Essentially, this was a new program, but the Coast Guard experienced problems in collecting these fees which varied according to the size of the vessel. For the LRS Renaissance, a vessel of 109-feet, the fee was $975. The Civil Penalty for those who withheld payment for any reason was $5,000. Collecting user fees was a new program and Captain ■ apparently had fallen behind. The Coast Guard decided to make Captain ■ a "horrible example" of non-compliance. While he had applied for a vessel inspection a year ago, Captain ■ had good reason to believe his application was being processed. Unfortunately, he was mistaken.

Captain ■ wore two hats. First, he was Master of the LRS Renaissance, a small passenger vessel. Second, he and his wife owned a business and had obligations to the tour operators whose passengers were boarding his vessel. He knew his vessel was seaworthy and did not have any "stability" problems. After all, the vessel previously was certified for368 passengers on exposed waters (i.e., a coastwise route) but this dinner cruise was on waters of the Intracoastal Waterway, a much less exposed route.

Although he had applied for an inspection, the vessel had not been inspected. The moment was upon them, and the business obligations were upon the vessel owners, husband and wife. Captain ■ told his wife they would have to use "***Plan B***" (which we will examine later) and to notify "***everybody***" that the trip would be run as a "***free trip***."

Under "Plan B" the Captain would ***not*** operate the vessel under the authority of his Master's license. The dinner buffet, the cruise, and the entertainment would be provided at the company's expense that testimony would later show amounted to $1200.[(1)] Essentially, the season's first trip would be free to salvage the "good will" of the tour operators that were essential to future business. ***The fact of the matter was that no money was ever accepted for the trip, and money previously collected by the tour companies and motels was all refunde to the tour operators and, as court testimony revealed, was returned to each individual passenger.***. *[(1)TR. p.172.]*

Anonymous Phone Calls

The Coast Guard Marine Safety Office in Philadelphia received two anonymous telephone calls from the Cape May area. The first call said the LRS Renaissance was "icing up" and preparing to sail carrying passengers for hire without proper papers. The second call said the vessel was underway and that there had been an accident on board involving personal injury of a passenger. The Coast Guard ***immediately*** responded by alerting a boarding party on a 41-foot patrol boat in Cape May to board the vessel and determine the validity of the calls.

The LRS Renaissance, followed by the 41-foot Coast Guard patrol boat, pulled into a dock and was met by an ambulance operated by the local rescue squad and evacuated an 82-year old lady who had "tripped on lines on the dance floor"[(1)] and broke her hip. Following the evacuation, the Coast Guard patrol boat pulled alongside and began its formal boarding and started questioning the approximately 150 passengers on the vessel whose dinner cruise was held up awaiting the arrival of Investigating Officers from MSO Philadelphia who set out on the 60-mile drive in response to the anonymous calls. The investigating officers arrived somewhat later and built their case for "Misconduct" around Captain ■, as Master of the vessel, for… *[(1) TR p.80.]*

- Operating a vessel carrying passengers for hire without a valid Certificate of Inspection.
- The Master did not post his license.
- No passenger safety orientation was given.
- There was a personal injury on board that was not reported in writing within 5 working days as required.

As a result of these "Misconduct" charges, a formal hearing was scheduled at MSO Philadelphia on June 17, 1997 before Chief Administrative Law Judge Joseph Ingolia.

Between the aborted dinner cruise and the trial, the Coast Guard put forth a ***sudden effort*** to cooperate with Captain ■ to bring the LRS Renaissance into compliance with inspection regulations. The Marine Safety Office assigned Lieutenant Frank Hawthorne to lead the way in quickly settling the outstanding problems that had kept the LRS Renaissance out of service for the entire 1996 season and led to the business disaster on May 5, 1997. Essentially, the Coast Guard had brought about the bankruptcy of Captain ■ and his family-owned business. Astonishingly, all the necessary compliance documentation that hung fire for over a year was accomplished in eleven days with the assistance and guidance of LT Hawthorne. At the trial, Captain ■ stated: "Mr. Hawthorne did try to resolve all our concerns and took a very few days to get the certificate, and all of a sudden the Marine Safety Center within a couple of days approved our dead-weight survey, we did get a certificate in a very short time."[(1)] *[(1)TR p.192.]*

Captain ■'s Downfall

There is an old saying that a man who tries to represent himself in court has a fool for a client. A good maritime attorney might have helped, but it was already too late in the game because the Coast Guard already had an agenda. To hire a knowledgeable maritime attorney to appear at a Coast Guard Administrative Law trial costs somewhere around $5,000 and works its way up. Even if an attorney was available, by this time the money was not. Following their declaration of personal bankruptcy, attorney fees were simply out of the question.

The Coast Guard does not provide a "public defenders" for mariners in administrative law proceedings. Consequently, Captain ■ was left in the same position as every other mariner to "tell his story to the judge." First the Coast Guard investigating officers presents their opening statement to the judge followed by the mariner. This serves to outline the case.

Early in the trial, Judge Ingolia in addressing the Coast Guard posed this hypothetical: "Just assume there was no consideration (e.g., money) of any kind in any way, no case applicable to consider, there just wasn't any. Assume you proved that, would you agree that the other – that his statement that none of the charges would apply. Is that correct or not? The reply: "Yes, your Honor."

In other words, if no money changed hands, there would be no case! Agreed.

The Coast Guard outlined its case in its opening arguments charging, "Misconduct" and the specifications as listed above. The mariner denied the charges and specifications.[(1)] *[(1) TR. p.13.]*

Captain ■'s defense evolved around an assumption that he could operate his 109-foot vessel, at least temporarily, as an "uninspected" vessel because he was not carrying any paying passengers – i.e., a "passenger for hire" on the vessel. Captain ■ and his company ***never accepted*** a dime in payment for the trip, and in fact, spent $1,200 to maintain the good will of his clients that would have been disappointed if they had not received their expected "Sunset Dinner and Dolphin Cruise" they had already paid their tour companies for. Following the aborted cruise, the money was refunded back to the tour operators and on to the individual passengers as the testimony clearly recorded.

The Judge, after hearing the evidence, stated in part: "Given the facts relating to the payments made by people (e.g., "passengers") to the cruise people and the arrangements they had made with Captain ■, I believe its clear that certainly the people undertook to pay for this trip. The Agency took the pay for them on behalf of Captain ■, that is nobody until after the Coast Guard was involved became aware that this trip was going to be for free. And I, you know, the Captain's testimony that he intended for it to be free because he was aware that the boat – did not have a Certificate of Inspection and that he couldn't charge people."

"But, I find that to me, that's if that occurred that he at least had a duty to call the cruise people or the people who were scheduling this – these groups to come in that this was going to be the case. They should have told somebody."[(1)] *[(1) TR p.200]*

The wife's testimony verified that Captain ■, at the time of departure, instructed her to tell "everybody" that the trip was "free." Her role as business manager and person in charge of public relations conflicted with her role as cook and responsibility for cooking and overseeing the buffet meal for 150 passengers. In the short time left to her as the passengers came aboard, and because she did not want to unnecessarily alarm her customers, she did not make the notifications her husband requested. Captain ■ also testified that he made a verbal announcement on the dock before leaving.

The Coast Guard's "Agenda"

Although Captain ■ may not have been terribly well informed, he did ***not*** pull "***Plan B***" from thin air. Although the Coast Guard inspected Small Passenger Vessels ("T-boats') for almost 40 years (i.e., since 1958), there remained an entire class of vessels that were able to maneuver around the law by using a "bareboat charter." The Coast Guard tried to end that practice for many years and eventually made its point with Congress.

On Dec. 20, 1993, the President signed the Passenger Vessel Safety Act of 1993 (PVSA) that changed the "old rules" that might have allowed the operation of a vessel in a manner that was very close to Captain ■'s "***Plan B***." PVSA was a confusing law that came into effect on June 21, 1994. During that month, the Passenger Vessel Association published a lengthy article that attempted to explain the new law. Three months later, the Coast Guard published fifty-page NVIC 7-94, Guidance on the Passenger Vessel Safety Act of 1993. All of this paperwork virtually buried the subject under paper that most mariners simply ignored.[1] *[[1]Refer to NMA Report #R-382, Why Some Mariners Don't Get the Message.]*

Captain ■ testified that he had broached the subject of "free trips" to several Coast Guard officers when he first experienced problems obtaining Coast Guard certification. He complained that he was never able to get a straight answer. In retrospect, the background of the entire bareboat charter issue so complex and affected such a small sector of the industry that only a few officers probably understood it well enough to comment on it intelligently.

Nevertheless, a significant number of charter boats existed in the Cape May area, and this case was well designed to gain the maximum attention of that community as LCDR Crowley, the Investigating Officer, testified.[1] "…we don't want to give the appearance to the charter boat, head boat public that you can, if you don't get your COI for whatever reason, that you're going to be able to take people out without that insurance that the vessel is safe." *[[1] TR pgs. 203-204.]*

The hearing before their Chief ALJ served to advance the Coast Guard's long-term agenda to eliminate the abuse of bare boat chartering that had gone on for at least the past 30 years. An easy way to accomplish this was by making of Captain ■ and his business into a "horrible example" and hang it out to dry in full public view.

This case effectively closed the door on bypassing vessel inspection requirements even on a temporary or emergency basis. The safety aspects of carrying large numbers of passengers on uninspected passenger vessels was addressed in the complex Passenger Vessel Safety Act of 1993. While some large yachts could be temporarily pressed into service to view large regattas and other public events, even these vessels would come under regulation. However, small passenger vessels could no longer bypass brand new small passenger vessel inspection requirements after their own longstanding small passenger vessel requirements were largely replaced with a new set of final rules announced on January 10, 1996.

Captain ■ Was an Easy Target

Captain ■ happened to be an easy target because he had a Coast Guard license. Although he had been in the business for many years and was on the eighth issue of his license, he did not have a full grasp all of the new rules including "user fees," the Passenger Vessel Safety Act whose final rules were yet to be adopted, as well as the new generation of small passenger vessel regulations. Most of all, he was victimized by the faceless bureaucrats, a part of Coast Guard Headquarters.

Captain ■ stated: "Your Honor. I've been operating a boat since 1963. I've had a license. I was also in the Coast Guard for six years between 1964 and 1970. I think I've had a pretty safe career for many years, and I feel that especially in since you're here that this…as far as a safety issue has been alleviated.

"As I say, most – all of my boats have been certified through the years since…1969.

"I worked for the Coast Guard for many years, and had a very good personal relationship through the years. The Coast Guard's relationship with all the boat owners has changed to a more adversarial type of relationship, especially in the last few years. So it's been a little different situation where the OCMI would come down in the middle of summer and talk to you and ask if he could do anything. And you could always come into his office and without even being announced and go and speak to him.

"As I say, it's become very formal, and the letters are sent to you that if you don't do this in 30 days, you'll be fined a thousand dollars and that type of thing. So it's become very adversarial, and we've had many more regulations and many more costs in the last few years. And as I say, I've tried to work along with them….

"And as I say, I'm on my eighth issue of my license, and as I say, I do need my license to operate. If not, I'll have to hire somebody with a license to be on the vessel, you know. That's my only alternative because I have, you know, almost a million dollar invested here, and I have to pay for it, or sell it and go out of business. I have only two choices in this."[1] *[[1]TR. pgs 206-207.]*

The Coast Guard sought outright suspension of Captain ■'s license for one month followed by…"a long probation period which would cover next year's operating season since we're halfway through (this season). Something along the lines of a 16-month probation, which would cover the rest of this season, and the next season to let (him) know that, you know, if he's going to operate the vessel, and keep it certificated and follow regulations, he's going to have no problems with the Coast Guard. But, if he is, then there's evidence as the Court stated to him , the second time is not as pleasant as the first time….what the Coast Guard would recommend is some outright suspension, … a long probationary period…. With a four- or five-month proposed sanction attached to that …"
[[1] TR p.205.]

Summary

The Coast Guard advanced its agenda by turning this case into a "horrible example" of what could happen to a mariner who ran afoul of Coast Guard regulations. When Captain ■ tried to explain key points of his vessel's former inspection history and its proven stability in previous coastwise service, the judge silenced him for being argumentative.[1] When an opportunity arose to verify part of his by a telephone call to the Marine Safety Center, in Washington, he was not given the opportunity to make the call as representatives of the MSC were not listed as being