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DRUG TESTING: REFUSAL TO TEST"

[***Editorial note:*** *This report is part of a series on mariner drug testing. Other reports include #R-315, Urine Specimen Collection and #R-315A Medical Review Officer and the Verification Process and Split Specimen Tests.]*

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INTRODUCTION

ñI never use drugs; I never touch the stuff.ò At GCMA we have heard these words or their equivalent from mariners we know, from mariners we have never met and, most distressingly, from mariners we thought we knew. While we would like to believe that our mariners know the risks involved with drug use as a health issue, our practical concerns center on the illegal drug use that pervades the transportation workplace.

By working in the transportation industry, and specifically as a merchant mariner, you must be ready to prove you are ñdrug freeò at any time of day or night. The only way to do this is through submitting to drug testing. In doing this, you must first understand the process. One purpose of this series of papers is to familiarize you with regulations you may never have seen before or have never taken the time to read or understand. Drug testing starts with a pre-employment test and lasts as long as you remain in the industry.

There are many rules that govern drug testing. Since your job, possibly your career, and certainly your reputation are at stake, we urge you to learn and understand the rules before you find yourself in a situation where the rules turn against you.

If you ñrefuse to testò you do not throw a monkey wrench into the gears of the system. The system is well prepared to accept ñrefusalsò in any shape and size and at any time of day or night. By refusing to take a test if you **do not** use drugs, you will destroy any chance of proving you are innocent. ñrefusal to testò may take a number of different forms that are best described in the following regulation that not only applies to all merchant mariners but also to every person in the transportation industry including airplane pilots, truck drivers, subway motormen, railroad engineers, bus drivers etc.

THE "REFUSAL TO TEST" REGULATION

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; 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 an additional drug test the employer or collector has directed you to take (see, for instance, §40.197(b));
(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.
[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001; 68 FR 31624, May 28, 2003]

WHEN A BAD SITUATION EASILY COULD BECOME WORSE

A towboat Master I know well as a person who is not a drug user called me one evening. He was serving as a trip pilot on the Ohio River when the Port Captain representing his current employer showed up on the boat as it tied up at a dock between tows and announced a drug test.

As I understood it, the Port Captain produced a number of collection kits and announced that he was authorized to serve as the company collection agent for urine specimens. He proceeded to tell the crewmembers that this gave him the authority to hire and fire including taking away the licenses of any one that gave him a hard time.

The Master called me by cell phone. He was outraged by the Port Captainôs conduct and wanted to talk the situation over with me. He had a genuine fear that this Port Captain could cause him to lose his license. Yet, he was unwilling to submit to what both he and I considered to be outrageous conduct. He said he intended to go ñuptownò to the local hospital in the next 5 minutes and pay for his own drug test that he knew would be ñhonestò and conducted the ñright way.ò

I urged him to calm down. By walking off the boat he would, in effect, be giving his obnoxious Port Captain a ñrefusal to test.ò As soon as this ñrefusalò was entered on the form the marinerôs license would be in danger. Any test the hospital could give him would come after he first refused to take the test.

I then urged him not to challenge the ñcollectorò in any manner and to cooperate fully in the test. To stand at the collection site as the specimen was decanted into two bottles and watch those two bottles sealed and properly signed and to keep his eyes on his specimens and every other specimen offered for collection. We then covered other aspects of the test procedure that he had undergone countless times before.

The results of the test were ñnegative.ò In effect, the Master relied on safeguards built into ñthe systemò and the system worked as it was designed to work.

The Master took the next opportunity to speak with his employer about the actions of the Port Captain that were in violation of drug testing procedures. The employer was shaken to the point where he discharged the Port Captain.

If you **are not** a drug user, itôs not the test you have to fear, itôs the test you refuse to take that will nail you!

If you **"do**ò drugs, you have a choice of either failing the test outright or failing the test by refusing to take it. Your choice!

THE CONSEQUENCES OF REFUSING TO TAKE A DRUG TEST

*[**Source**: Edited from GCMA Newsletter #27, Dec. 2004]*

GCMA reported on several significant drug cases since its founding in April 1999. We covered two important cases in **GCMA Report #R-323** (available on the internet) Each case taught us important lessons that we brought to our readersô attention.

On Thursday, December 2, 2004 the Coast Guard notified GCMA that it had filed a complaint against the licensed Mate of a crew boat working for a local boat company for refusing to take a random drug test. The hearing before an Administrative Law Judge (ALJ) was set in the Federal Courtroom in Houma. 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 Massie presiding in the large, spacious, high-ceiling, well equipped but seldom-used courtroom. Approximately 16 persons were in attendance 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 Massie 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 Massie 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 ï as is expected of a Coast Guard officer. He was assisted by a Chief Warrant Officer Jason Boyer who was also well-prepared. There were no ñdirty tricksò of any sort in the proceedings. A court reporter went about her work competently and unobtrusively throughout the afternoon.

Judge Massie 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 ñevidenceò 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 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 ñProblems in Drug Testing.ò When the collector discovered the problem, he told the Mate that he would have to provide another specimen ñunder observationò ï a procedure also covered in the DOT regulations. At this point, both the collector and the Mate left the boat and 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 ñunder observation.ò 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 ï 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 ñOperations Manual.ò

When a mariner goes to work for this company (e.g., just about any company) at his ñorientationò he is required to sign a statement that he has read and presumably understands the Company policies he must abide by ï 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 wasnôt 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 signing his name that he had done 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 ñhuman behavior that violates some formal, duly established rule é such as statutes, regulations, common law, the general maritime law, **a ship's regulation or order** é (or) similar source.ò The warning to <u>all our mariners</u> is clear: You work for an employer who probably publishes his version of an ñOperations Manual.ò On a towing vessel, it might be your Companyôs version of the AWOôs <u>Responsible Carrier Program</u> (RCP) or, something you will hear a great deal more about in the days to come, a ñSafety Management Systemò as called for in recent legislation.

Every mariner needs to pay close attention to what your Company policies are. If you find that you cannot comply with any of these policies for any reason, you may want to either discuss or clarify these policies with the company or reconsider working for that company. The Coast Guard can 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 ñChemical Testingò (i.e., drug tests) appears at 46 CFR Part 16. 46 CFR §16.105 states that ñRefuse to Submit means you refused to take a drug test as set out in 49 CFR §40.191. Since all drug testing must follow U.S. Department of Transportation regulations in 49 CFR Part 40, there are really two separate sets of regulations in effect. As a licensed or certificated mariner, you should take the time

to read and understand these regulations so you can protect yourself.

49 CFR §40.191 goes into considerable detail about what constitutes ñrefusal.ò This should not be a mystery to any of our readers because we covered this in **GCMA Report #R-315**, Revision 1, May 2002 and posted it on our internet website. We published this report as a direct result of a meeting between approximately 10 GCMA licensed mariners and the Coast Guardôs Drug Program Director (ñDrug Czarò) at Coast Guard Headquarters in 2002. However, to summarize it quickly, one subsection states: ñAs 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.ò 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 ñnever did drugsò that simply was not the question at hand. By refusing to be tested, he lost his only opportunity to prove his innocence.

Judge Massie then called for closing statements, again stating that these statements were not treated as evidence and were not ñrequired.ò 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 Mateôs statement was followed by several minutes of silence as Judge Massie 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 Mateôs 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 ñAdministrative Clemencyò procedures.[(1)] *[(1) Refer to GCMA Report #R-377 & R-314.]*

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 ñbeyond a reasonable doubt.ò 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 1980ôs 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 ï in this case, license revocation. The point the Government must prove guilt by the preponderance of the evidence presented that a mariner ñ**refused to submit**ò to a legitimate drug or test following DOT and SAMSHA guidelines and **not** that he was ñdoing drugs.ò This is why the Mateôs protests that he ñdid not do drugsò fell on deaf ears. Whether he ñdid drugsò was no longer an issue. The only issue was his refusal to test.

The USCG Can't Take Your License Without Due Process

The Coast Guard cannot ñtake awayò your license. This can only be done by an Administrative Law Judge who follows a strict set of guidelines. Even a plea agreement (e.g., a ñSweeneyò agreement in a drug case and a ñsettlement agreementò 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 ñSweeney agreementò 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. GCMA advises most mariners who choose to appear before an ALJ to secure the services of a knowledgeable and experienced maritime attorney for representation. Since these services are not cheap, we also advise our mariners to protect their licenses by purchasing license insurance. This ensures that you will have the services of a knowledgeable maritime attorney available on the end of a phone line at the first sign of trouble and before you open your mouth.

In this particular case, the matter was so ñopen and shutò (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 licenseé 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 court room. This occurred in spite of the

fact that the Coast Guard leases and fully equips a court room in the office building that houses the Marine Safety Office in Morgan City ï 35 miles west of Houma.

The Administrative Law Judge had to travel from New Orleans to conduct the hearing in a courthouse leased by the federal government (but is seldom used) for over a quarter of a million dollars a year. In a previous case reported earlier this year, an ALJ traveled from Norfolk, VA, to hear a case in Morgan City. Such travel is not unusual. That case, as reported in GCMA Newsletter #22, revolved around real issues of substance that directly affected and needed to be reported to our mariners.

Mariners Must Learn the Rules

It is unfortunate that drug (and alcohol) abuse continue to impact the transportation industry. Wringing our hands will not make them go away. GCMA supports the existing regulations that attempt to protect the public from a proven menace.

In order to inform our mariners, we prepared **GCMA Report #R-315** at the suggestion of the Coast Guard. We have also reported and will continue to report and publicly comment upon abuses of the system by a number of employers.

GCMA and a small number of dedicated attorneys have done our best to help mariners when the drug system mistakenly grinds them up in their gears as does happen on occasion. However, we offer this statement as a fair warning: Read the regulations in 46 CFR Part 16 and 49 CFR Part 40 so that you understand every single step of the drug-testing procedure. GCMA will do all it can to help you understand the regulations **before** you find yourself in hot water.

ALJ REVOKES MARINER'S LICENSE FOR "REFUSAL TO TEST"

*[**Source**, GCMA Newsletter #22, April 2004]*

Introduction. On Tuesday January 6, 2004 I first learned from his attorney that one of our mariners, Captain y'y'y' was scheduled to appear before Administrative Law Judge Peter Fitzpatrick the following day at MSO Morgan City, LA. He filled me in on essential details of the case.

I arrived in the courtroom at 0900 and met Captain y'y'y' and his wife. Judge Fitzpatrick arrived from Norfolk, VA, to handle the case. The purpose of this article is to discuss and pass on to our mariners some of the ñlessons learnedò from a full day of testimony.

Background. Captain y'y'y' was the master of a 99 GT, 145 foot, Offshore Supply Vessel, the M/V PETER CALLAIS operated by Abdon Callais Offshore. The vesselôs 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 ï May 20 and 21, 2003. Since the vessel is less than 100 gross tons, none of the unlicensed seaman was required to hold z-cards.

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 y'y'y' was the senior captain on the vessel, was ñin chargeò of the vessel, and received slightly higher pay as a result of his position. On conclusion of his tour of duty, Captain y'y'yôs ñmateò was scheduled to step up to the top slot as the ñrelief masterò and work for the next two weeks in command of the vessel. At the end of two weeks, Captain y'y'y' was scheduled to return to the vessel as master.

The company Human Resources Director testified over the speakerphone while the companyôs 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 vesselôs watch schedule that, for the period in question, was 12 hours on watch followed by 12 hours off watch. In fact, Captain y'y'y' 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 (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 on May 20, 2002. Captain y'y'y' stood his 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 y'y'y' spoke with the charterer of the vessel (i.e., the ñcompany manò), 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., ñmateò) testified by speakerphone that he was an experienced mariner with 21 years service and a masterôs 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 y'y'y' assumed that his relief would ñcoverò the additional 90 minutes until his relief mate arrived. All of this planning was routine and represented a customary practice ï and went exactly as planned.

The fly in the ointment. Unknown to Captain y'y'y' 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 Callaisô human resources duty clerk showed up on the vessel at about the same time. The relief captain called Captain y'y'y' at home and informed him of the random drug and alcohol test.

The companyôs 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 ï that we will call 1) ñUnexcused Absenceò and 2) ñRefusal to Testò:

Unexcused Absence

Captain y'y'y' 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 y'y'y' and his wife had several glasses of wine and went to bed. Captain y'y'y' 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 emergencyé 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 y'y'y' 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 y'y'y's name and social security number and stated that he had ñrefusedò 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 y'y'y' 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 ñrefusedò to be tested, the urine collector filled out a blank form, put Captain y'y'y's name on it with the word ñrefusedò 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 ñrefusal to testò report was ever filed against him.

The following morning, Captain y'y'y' returned to the boat. At that point, he heard from a crewmember that the ñrelief captainò had been promoted to senior captain. Captain y'y'y' 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 y'y'y' 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 ï even though there were no plans for the vessel to leave port and there was no emergency. The ñrelief captain,ò who now serves as the vesselôs master, testified telephonically from the pilothouse of the same boat as it was underway in the Gulf of Mexico that he was ñnot properly relieved.ò While this might have been technically correct, it appeared as a fragile, transparent and self-serving technicality.

Nevertheless, before Captain y'y'y's attorney could summarize his testimony in a closing statement, Judge Fitzpatrick said that Captain y'y'y' had made a very serious error and that he ñdid not buyò that he was properly relieved. However, this effectively stifled the argument that the vesselôs 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 y'y'y's license in their safe until such time as he could decide the matter of what ñsanctionò (penalty) to apply to Captain y'y'y's ñRefusal to Test.ò

Refusal To Test

Over the past four years, GCMA went 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. In May 2002, after a group of our mariners discussed drug problems with the Coast Guardôs ñDrug Czarò we prepared **GCMA Report #R-315** titled Drug Testing: Urine Specimen Collection. We announced this report in our newsletter and posted it on our website. You read the regulation at the beginning of this report. Please heed our warning!

*[**GCMA WARNING:** Be careful! 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. Dozens of failed legal opinions advanced by lawyers at great expense to mariners and decided years ago litter the landscape! 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).]*

The Judge did not resolve the matter of what sanctions to apply to the ñRefusal to testò at the trial although he stated that the charge was ñProven.ò He commented that this part of the case was ñtragic.ò He pointed out that one serious error, Captain y'y'y'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 ñsuspensionò) of Captain y'y'y's license and z-card.

Judge Fitzpatrick ordered the Coast Guard to hold the marinerôs license and z-card. He asked both the Coast Guard Investigating Officer and Captain y'y'y's attorney to research case law to find how other judges handled similar cases of ñRefusal to Testò and to report their findings back to him within two weeks.

License Insurance

From our earliest days as an Association, GCMA urged our mariners to set aside money to buy ñlicense insuranceò to cover attorney fees in case some unforeseen event forces you to defend your license or z-card either within the Coast Guardô Administrative Law system or in civil court ï and these are two very different things. As a service to our mariners, we prepared **GCMA Report #R-342** titled License Defense and Income Protection Insurance. The cost of a yearôs worth of basic license defense insurance to pay for a lawyer to defend you at a Coast Guard hearing is a little over $200. If you have to hire an attorney out-of pocket, $200 would probably cover one hourôs worth of a maritime lawyerôs time. Without

insurance, you must pay a lawyer to prepare your case, to meet you in court, to represent you through the court session and, in cases like this, to do any necessary legal research work the judge may order or to file an appeal on your behalf. GCMA is not in the insurance businessé we don't make a dime ï we just offer the information to our mariners!

Having license insurance, however, does not guarantee that you will win the case. However, without insurance, the cost of hiring an attorney can be prohibitively expensive, especially for a mariner who lives from paycheck to paycheck. In one case, an attorney had no choice but to return to court four times to successfully defend one of our mariners.(1) In fact, the legal fees were well in excess of $9,000. One attorney quoted a fee of $6,000 to defend a mariner in a drug case. These fees cover a great deal of work required to prepare a case. Not having license insurance to cover these costs alone, to say nothing about winning or losing, could lead to a personal financial disaster. *[(1)GCMA Report #R-323]*

Fighting The Government

Not only must your lawyer work hard to prepare your case, but 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 ï 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 ñsettlement agreementò the Coast Guard is willing to dish out as an alternative to appearing before an Administrative Law Judge. Unfortunately, this case may dictate future ñsettlement agreementsò 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 Guardôs existing Administrative Law system. Freely translated, this means that you may have trouble even finding a lawyer to defend you.

The Coast Guard ñownsò its own Administrative Law system with its background of over 2,600 cases available to view on the internet. Captain y'y'y' confided 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 y'y'y'ôs attorney ably defended him with reasonable and convincing arguments. Captain y'y'y' was forthright and clear in his testimony as were the Coast Guardôs witnesses.

It is very difficult, if not impossible, to avoid being crushed by ñthe system.ò It is particularly troubling for another mariner to watch events like this unfoldé as I watched them occur over the past four years. As a mariner, you must learn ñthe rules of the gameò in much the same way as you learned the ñrules of the road.ò Like the rules of the road, each word you read (as in the regulations cited above) means exactly what it says.

GCMA tries to tell its mariners about the ñrules of the gameò in every single newsletter and GCMA Report. This information is all available for the asking ï but it does require you to **read**! It may not be interesting or exciting reading, but without the knowledge of the ñrules of the game,ò your career on the water can come to a sudden and screeching halt practically without warning. Even worse, events like this can ruin your life. This case is a horrible example of what can happen. 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 ñthe law.ò The law consists of Acts of Congress and many more detailed ñrules and regulationsò promulgated by the Coast Guard to carry out the expressed wishes of Congress.(1) In addition to this are guidelines and policies that are not laws but simply outline the Coast Guardôs way of doing business. While they are not ñlawò or ñregulationò 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 Companyôs ñOperations Manualò 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, can enforce ñoral instructionsò as well. That assures both the Coast Guard and your employer a winning hand. *[(1)GCMA Report #R-223]*

Captain y'y'y'ôs attorney pointed out during the lunch break that this case would have never occurred if the captain were 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 ñon-dutyò versus ñoff-dutyò 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 ï rather than with playing company politics.

The Sanction: Revocation

The Coast Guard presented its arguments to revoke Captain y'y'y'ôs license and z-card within the required time period. These arguments were summarized in a ñConclusionò 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 y'y'y' 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 ñFirst Captainò and his Coast Guard license, because he was using drugs. There is "doubt" ï we donôt know because Captain y'y'y' 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 ï 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 ï although time consuming and expensive ï 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 ñdoubtò 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 ALJôs 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).

GCMA Brown Lists Company

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 ñrefuseò to take a drug test for any reason. The ñlessonò is now set in stone! The lesson is donôt ever refuse to take a drug test when your employer orders you to do so. Unfortunately, this is the same lesson that GCMA tried to put across to our members in GCMA Report #R-315, Drug Testing: Urine Specimen Collection, where, among other things, we recited the regulations on ñRefusal to Test.ò It is, however, only part of the story.

I am convinced in talking with Captain y'y'y' and his attorney that Captain y'y'y' 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 ñcut him some slack.ò The problem, however, is that his employer acted little more than a snake in the grass. What they did to destroy Captain y'y'y' 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 company like Abdon Callais was displeased with Captain y'y'y' for any reason, they 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 ñgoing homeò 6 hours early they chose not to consider that he left their boat under the capable control of another person with a masterôs license and with 20-years experience. In fact, the company turned around and promoted the mate ï who was also a licensed master ï the following day.

The mate apparently found nothing wrong with Captain y'y'y'ôs early departure and gave no sign of protest until he stated that he was not properly relieved over the speakerphone in the courtroom. If there ever was a ñlow blowò, 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 y'y'y' 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 ñunexcused absenceò if the company pushed the issue. In either case, short of a major accident, resorting to the Coast Guard to punish Captain y'y'y' is like shooting a squirrel with an elephant gun!

As a mariner, you must always remember that your license or z-card is an easy target because it is closely tied to your 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 ñcompany rules.ò From the beginning, they chose to escalate this problem beyond the company level and dropped it into the Coast Guardôs 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 reported the incident to the Coast Guard.

There appears to be little rapport between the company ñhuman affairsò 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 y'y'y'ôs career and disrupt his and

his wifeôs domestic life over a matter that could and should have been handled within the company at a much lower level.

The ñHuman Resources Clerk,ò 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 y´y´y´ôs 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 y´y´y´ got the message the next morning when he returned to the boat and found that his former mate had been ñpromotedò to ñFirst Captain.ò

Captain y´y´y´ ñresignedò 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 y´y´y´ôs ñRefusal to Test.ò It was this letter that the Coast Guard acted upon and set the wheels of revocation in motion.

Captain y´y´y´ 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 ñcompany manò who represented the vesselôs 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 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 nominate Abdon Callais Boat Rentals for GCMA to add to our ñBrown Listò of employers.