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MARINER DRUG CASES: A REPORT TO CONGRESS

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FOREWORD

The Gulf Coast Mariners Association represents the interests and concerns of thousands of õlower-levelö mariners who work aboard commercial towing vessels, offshore supply vessels, and small passenger vessels. Most of our members are not represented by strong labor unions that are capable of protecting them against some of the abuses of the drug testing system mentioned below. While belonging to a union carries important benefits with it, highest among our marinersø concerns are those that revolve around having and maintaining a safe workplace in an environment where drug and alcohol use must be completely eliminated.

Our Association has gone out of its way to support the Coast Guardøs existing drug-testing program whose stated intent is to remove drugs from the workplace. The program itself is well explained in a manual titled Marine Employers Drug Testing Guidance prepared by the Drug and Alcohol Program Director, Mr. Robert Schoening,at U.S. Coast Guard Headquarters in June 2005. Unfortunately, we only recently learned of this publication which was prepared fifteen years after the program started. Through their actions, and as demonstrated by a major case in progress in the Eighth Coast Guard District that we will add to subsequent revisions of this report, we believe that some of the õemployersö the book addresses have never read or paid close attention to this book.

We recall when Mr. Schoening entered the program as Coast Guard õDrug Czarö around 2002 and that he was strongly recommended to us by Dr. Walter Vogl of the Department of Health and Human Services. We support Mr. Schoeningøs work as explained in his manual describing how the Coast Guardøs drug testing program should work.

Unfortunately, we discovered that the Coast Guardøs drug program, although õaliveö is õnot in good health.ö While the program seeks to root out drug abuse, its enforcement tactics have seriously damaged confidence in the Coast Guard as a law enforcement agency and its administration of the program undermined the confidence of the maritime workforce. Although in a visit to Washington in 2005, Directors and members of our Association won the complete and unqualified support of Congressman Charles Melancon (D, La) who put us in touch with senior DEA officials in our area, we received significantly less support from local Coast Guard officials.

Our mariners have had a series of experiences in dealing with the Coast Guardøs drug-testing program from 2000 to the present that we believe must be brought to the immediate attention of the Congressional committees that oversee Coast Guard activities. This report is the vehicle for doing so.

DRUG TESTING IN THE WORKPLACE: THE UNION DIFFERENCE

Federal laws and regulations require that workers in transportation be subjected to various forms of drug testing for safety reasons. For workers in non-union companies, this means the employer will implement a drug testing policy that is supposed to comply with the procedures spelled out in CFR Title 49, Volume 1, Part 40.

When there is a union contract in place, the implementation of a drug testing policy is a mandatory subject of bargaining. This means that workers represented by a union have an opportunity to ensure that a drug testing policy is fair, uniform and strictly in compliance with federal procedures. Additionally, many maritime unions ensure that workers with addiction diseases have an opportunity to participate in nocost or reasonable-cost treatment programs with the opportunity to return to work upon successful completion. Union medical insurance plans often cover the costs of such recovery programs. Unions work for a safe workplace. This means a drug-free and alcohol-free vessel. But unions also defend the right of workers. And that means making sure that any drug testing program is fair to employees and executed in a manner that the rights of the worker are respected.

Unfortunately, this may not be the case when mariners do not have the protection offered by a strong union. It turns out that some employers are part of the problem rather than part of the solution. It also turns out that the Coast Guard has treated a number of mariners subject to drug testing unfairly during the process of investigating and processing their cases. This story is just now being revealed in court documents.

Key Points In Federal Procedures for Transportation Workplace Drug and Alcohol Testing Programs

Workers have several basic rights in the process of being tested for drug and alcohol use. These are outlined in 49 CFR Part 40.[1] The procedures are a regulatory attempt by the Department of Transportation[2] (DOT) to balance safety concerns with protection for employees from unfair consequences of the process. *[[1] Federal Register; Vol. 65, No 244; Dec. 19, 2000, pgs. 79462 – 79579. [2] Although the Coast Guard moved from the Department of Transportation to the Department of Homeland Security, the existing DOT regulations still apply to all modes of transportation – air, marine, highway and rail.]*

Here are some key points that you should know.

Form. The Federal Drug Testing Custody and Control Form (CCF) must be used to document every urine collection required by the DOT drug testing program. The CCF must be a five-part carbonless manifold form. You may view this form on the Department's web site (http://www.dot.gov/ost/dapc) or the HHS web site (http://www.health.org/workpl.htm).

Collection When Injured. These are the directions given to the specimen collector: If an employee needs medical attention (e.g., an injured employee in an emergency medical facility who is required to have a post-accident test), the collector should not delay his treatment to collect a specimen.

Employee Must Wash Hands Before Providing Urine Specimen. The collector must instruct the employee to wash and dry his or her hands before the employee provides a urine specimen. The collector must tell the employee not to wash his or her hands again until after delivering the specimen to the collector.

Split Specimen. All collections under DOT agency drug testing regulations must be split specimen collections. The employee must initial the bottle seals for the purpose of certifying that the bottles contain the specimens he or she provided.

Laboratories. Only drug testing laboratories in the U.S. that are certified by the Department of Health and Human Services (HHS) under the National Laboratory Certification Program (NLCP) may conduct DOT drug testing. One problem GCMA learned about is that some employers pay for non-DOT screening tests to warn them of employees on drugs. Employers can use this information to their own advantage ó often holding it over their employers to reduce wages or to excuse behavior that deserves treatment as mariners on drugs place the lives of others at risk. We were told that pre-testing is illegal. We understand that it undermines the entire Coast Guardøs drug-testing program.

Retaining the Specimen. A laboratory testing the primary specimen must retain a specimen that was reported with positive, adulterated, substituted or invalid results for a minimum of one year.

Keeping Records. A laboratory must retain all records pertaining to each employee urine specimen for a minimum of two years.

Notification of Positive Result. When the Medical Review Officer (MRO) receives a confirmed positive, adulterated, substituted or invalid test result from a laboratory, the MRO must contact the employee directly (i.e., actually talk to the employee), on a confidential basis to determine whether the employee wants to discuss the test result. In making this contact, the MRO must explain to the employee that, if he or she declines to discuss the result, the MRO will verify the test as positive or as õrefusal to test because of adulteration or substitution,ö if applicable. The MRO's staff may make the initial contact with the employee to establish a time to speak with the MRO. The MRO must make a reasonable effort to reach the employee at the day and evening telephone numbers listed on the CCF. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period.

How to Request a Test of a Split Specimen. As an employee, when the MRO has notified you that you have a verified positive drug test or refusal to test because of adulteration or substitution, **you only have 72 hours from the time of notification to request a test of the split specimen**. The request may be verbal or in writing. If you make this request to the MRO within 72 hours, you trigger the requirements of this section for a test of the split specimen.

For a complete copy of the Department of Transportation regulations on drug testing, consult 49 CFR Part 40 and 46 CFR Part 16. For alcohol testing regulations, refer to 33 CFR Part 95.

MARINER DRUG CASES TRACKED BY GCMA

GCMA is a mariner membership association of õlower-levelö licensed and unlicensed mariners who serve on tugs, towboats, offshore support vessels, and small passenger vessels primarily within the Eighth Coast Guard District.

Six (6) cases in this document are noteworthy because they have little to do with actual drug use. These stories are about how the Coast Guardøs bureaucracy provided a very questionable level of õjusticeö for õlower-levelö mariners.

We publish these accounts to warn mariners not to use drugs or alcohol in the transportation workplace. These accounts will illustrate the effort and resources the Coast

Guard is willing to spend to punish offending mariners. Unfortunately, the Coast Guard appears to be willing to turn a blind eye to some mariners who conscienteously report drug violations to authorities or to employers who sabotage the system by pretesting and warning mariners of õrandomö tests in advance in order to avoid the task of trying to recruit drug-free employees.

CASE #1: THE CONSEQUENCES OF REFUSING TO TAKE A DRUG TEST

*[**Source**: GCMA Newsletter Article MNL27.3X]*

GCMA participated in and reported on several significant drug cases since its founding in April 1999. In each case, we participated because we thought a marinerøs case had merit. Each case taught us important lessons that we brought to our readersøattention.

On Thursday, December 2, 2004, the Coast Guard notified GCMA that 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 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 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 ó 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 õdirty tricksö 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 õevidenceö 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 õProblems in Drug Testing.ö When the collector discovered the problem, he told the Mate that he would have to provide another specimen õunder observationö ó 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 õunder observation.ö 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 ó 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 õOperations Manual.ö

When a mariner goes to work for this company (e.g., just about any company) at his õorientationö he is required to sign a statement that he has read and presumably understands the Company policies he must abide by ó 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 wasnøt 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 õhuman behavior that violates some formal, duly established rule í such as statutes, regulations, common law, the general maritime law, **a ship's regulation or order** í (or) similar source.ö The warning to <u>all our mariners</u> is clear: You work for an employer who probably publishes his version of an õOperations Manual.ö On a towing vessel, it might be your Companyøs version of the AWOøs <u>Responsible Carrier Program</u> (RCP) or, something you will hear a great deal more about in the days to come, a õSafety Management Systemö 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 õChemical Testingö (i.e., drug tests) appear at 46 CFR Part 16. 46 CFR §16.105 states that õRefuse 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 õrefusal.ö 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 Guardøs Drug Program Director (õDrug Czarö) at Coast Guard Headquarters in 2002. However, to summarize it quickly, one subsection states: õAs 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.ö 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 õnever did drugsö 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 õrequired.ö 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 Mateøs 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 Mateøs 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 õAdministrative Clemencyö 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, t<u>he Government has the burden of proving a person is guilty in light of the preponderance of the evidence</u>. This is not as high a standard as proving guilt õbeyond a reasonable doubt.ö 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 1980øs 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 ó in this case, license revocation. The point the Government must prove guilt by the preponderance of the evidence presented that a mariner õ**refused to submit**ö to a legitimate drug or test following DOT and SAMSHA guidelines and **not** that he was õdoing drugs.ö This is why the Mateøs protests that he õdid not do drugsö fell on deaf ears. Whether he õdid drugsö was no longer an issue. <u>The only issue was his refusal to test</u>.

The USCG Can't Take Your License Without Due Process

The Coast Guard cannot õtake awayö 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 õSweeneyö agreement in a drug case and a õsettlement agreementö 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 õSweeney agreementö 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 õopen and shutö (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 licenseí 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. This occurred in spite of the fact that the Coast Guard leases and fully equips a courtroom in the office building that houses the Marine Safety Office in Morgan City ó 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.

Our 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-315A** at the suggestion of the Coast Guard and **GCMA Report #R-315B** on our own volition. We 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 <u>understand</u> every single step of the drug-testing procedure. You must live with this procedure in any job you take in the transportation industry. GCMA will do all it can to help you understand the regulations **before** you find yourself in hot water.

CASE #2: ALJ REVOKES MARINER'S LICENSE FOR "REFUSAL TO TEST"

***[Source**: MNL22.3K]*

Introduction

On Tuesday January 6, 2004, I first learned from his attorney that one of our mariners, Captain 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 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 õlessons learnedö from a full day of testimony.

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 vesseløs 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 ó 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 was the senior captain on the vessel, was õin chargeö of the vessel, and received slightly higher pay as a result of his position. On conclusion of his tour of duty, Captain øs õmateö was scheduled to step up to the top slot as the õrelief masterö 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 over the speakerphone while the companyøs 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 vesseløs 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 (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 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 spoke with the charterer of the vessel (i.e., the õcompany manö), 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., õmateö) testified by speakerphone that he was an experienced mariner with 21 years service and a masterøs 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 õcoverö the additional 90 minutes until his relief mate arrived. All of this planning was routine and represented a customary practice ó 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 Callaisø human resources duty clerk showed up on the vessel at about the same time. The relief captain called Captain at home and informed him of the random drug and alcohol test.

The companyøs 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 ó that we will call 1) õUnexcused Absenceö and 2) õRefusal to Testö:

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 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 emergencyí 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 øs name and social security number and stated that he had õrefusedö 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 õrefusedö to be tested, the urine collector filled out a blank form, put Captain øs name on it with the word õrefusedö 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 õrefusal to testö report was ever filed against him.

The following morning, Captain returned to the boat. At that point, he heard from a crewmember that the õrelief captainö 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 ó even though there were no plans for the vessel to leave port and there was no emergency. The õrelief captain,ö who now serves as the vesseløs master, testified telephonically from the pilothouse of the same boat as it was underway in the Gulf of Mexico that he was õnot properly relieved.ö While this might have been technically correct, it appeared as a fragile, transparent and self-serving technicality.

Nevertheless, before Captain øs attorney could summarize his testimony in a closing statement, Judge Fitzpatrick said that Captain had made a very serious error and that he õdid not buyö that he was properly relieved. However, this effectively stifled the argument that the vesseløs 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 øs license in their safe until such time as he could decide the matter of what õsanctionö (penalty) to apply to Captain øs õRefusal to Test.ö

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 Guardøs õDrug Czarö we prepared **GCMA Report #R-315A** titled Drug Testing: Urine Specimen Collection. We announced this report in our newsletter and posted it on our website. Here is what the rules say and what we said about õRefusal to Test.ö

49 CFR §40.191 What Is A Refusal To Take A DOT Drug Test, And What Are The Consequences?
*[**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).]*

(a) As an employee, you have refused[1] 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; *[[1]**GCMA Comment:** The reference is to USCG "Chemical Testing" regulations in 46 CFR Part 16 or 33 CFR Part 95.]*

(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 õRefusal to testö at the trial although he stated that the charge was õProven.ö He commented that this part of the case was õtragic.ö He pointed out that one serious error, Captain øs 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 õsuspensionö) of Captain øs license and z-card.

Judge Fitzpatrick ordered the Coast Guard to hold the marinerøs license and z-card. He asked both the Coast Guard Investigating Officer and Captain øs attorney to research case law to find how other judges handled similar cases of õRefusal to Testö 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 õlicense insuranceö to cover attorney fees in case some unforeseen event forces you to defend your license or z-card either within the Coast Guardø Administrative Law system or in civil court ó 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 yearøs 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 hourøs worth of a maritime lawyerøs 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 businessí we donøt make a dime ó 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 ó 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 õsettlement agreementö the Coast Guard is willing to dish out as an alternative to appearing before an Administrative Law Judge. Unfortunately, this case may dictate future õsettlement agreementsö 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 Guardøs existing Administrative Law system. Freely translated, this means that you may have trouble even finding a lawyer to defend you.

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

It is very difficult, if not impossible, to avoid being crushed by õthe system.ö It is particularly troubling for another mariner to watch events like this unfoldí as I watched them occur over the past four years. As a mariner, you must learn õthe rules of the gameö in much the same way as you learned the õrules of the road.ö 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 õrules of the gameö in every single newsletter and GCMA Report. This information is all available for the asking ó but it does require you to **read**! It may not be interesting or exciting reading, but without the knowledge of the õrules of the game,ö 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 õthe law.ö The law consists of Acts of Congress and many more detailed õrules and regulationsö 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 Guardøs way of doing business. While they are not õlawö or õregulationö 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 Companyøs õOperations Manualö 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 õoral instructionsö as well. That assures both the Coast Guard and your employer a winning hand. *[(1)GCMA Report #R-223]*

Captain øs 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 õon-dutyö versus õoff-dutyö 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 ó rather than with playing company politics.

The Sanction: Revocation

The Coast Guard presented its arguments to revoke Captain øs license and z-card within the required time period. These arguments were summarized in a õConclusionö 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 õFirst Captainö and his Coast Guard license, because he was using drugs. There is "doubt" ó we donøt 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 ó 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 ó although time consuming and expensive ó 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 õdoubtö 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 ALJøs decision to revoke credentials, despite clean records:

É In 1996 concerning a post incident drug test refusal (Callahan).

É In 2000 concerning a reasonable cause drug test refusal (Downs); and

É 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 õrefuseö to take a drug test for any reason. The õlessonö is now set in stone! The lesson is donøt 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 õRefusal to Test.ö 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 õcut him some slack.ö 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 company like Abdon Callais was displeased with Captain 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 õgoing homeö 6 hours early they chose not to consider that he left their boat under the capable control of another person with a masterøs license and with 20-years experience. In fact, the company turned around and promoted the mate ó who was also a licensed master ó the following day.

The mate apparently found nothing wrong with Captain øs 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 õlow blowö, 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 õunexcused absenceö 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!

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 õcompany rules.ö From the beginning, they chose to escalate this problem beyond the company level and dropped it into the Coast Guardøs 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 õhuman affairsö 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 øs career and disrupt his and his wifeøs domestic life over a matter that could and should have been handled within the company at a much lower level.

The õHuman Resources Clerk,ö 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 øs 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 õpromotedö to õFirst Captain.ö

Captain õresignedö 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 øs õRefusal to Test.ö 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 õcompany manö who represented the vesseløs 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 õBrown Listö of employers.

CASE #3
THE CAPTAIN KEN CASE: THE COAST GUARD'S NEED TO WIN AT ANY COST

*[**Source**: Formerly numbered GCMA Report # R-323]*

Captain Ken (whose last name is withheld) waited for a company representative after docking his vessel. Just before, he had reported a minor allision between a barge in his tow and a docked ship that caused no reportable damage, only some scratched paint.

Tired of waiting for the port captain after several hours, Captain Ken went home. As a result, he was charged by the company with refusing to take a drug test and desertion, actions that spurred the Coast Guard to seek to revoke his license.

Represented by New Orleans-based attorney Robert Lansden, Captain Ken won an Administrative Law Judge decision in which the complaint alleging use of or addiction to the use of dangerous drugs and desertion were dismissed.

Prosecution or Persecution?
A USCG "Drug" Hearing

As Secretary of the Gulf Coast Mariners Association, I was asked to be an "expert witness" on behalf of one of our members. While I unequivocally support the goals of the U.S. Department of Transportation to eliminate drug use in the workplace, I was uncertain as to why I was considered an "expert"-and especially in a drug case. Drug abusers can find little sympathy in my outlook that can be summarized as: "If you do the crime, don't waste my time."

An expert witness is, among other things, a person who did not actually witness an event take place but has expertise in some particular area. I soon found that the area of expertise I was to be called on was in regard to the õ12-Hour Rule." After editing GCMA's book titled, Mariners Speak Out on Violations of the 12-Hour Work Day, based on personal experiences of 58 of our member mariners, I was confident that I could approach the matter with an adequate background in that area.

When I reviewed the paperwork provided me by our attorney, Captain Robert Lansden, I came across the following Coast Guard letter that was terse, direct, and to the point about one of the charges related to the alleged drug use:

"Dear Mr. ______ ,

Enclosed is a complaint and answer form regarding your March 4, 2000 refusal to submit (to) a drug test. Please read the complaint form carefully. You have twenty days to file the answer form. If the charges in the complaint are found proved, your Coast Guard license or Merchant Mariner's Document will be permanently revoked.

You have three options regarding this matter:

- Surrender your License or Merchant Mariner's Document outright to the Coast Guard. The hearing will be cancelled and your license or merchant mariner's document will be revoked. ***[Comment:** You can give up your license without having to hire a lawyer or face court proceedings. This is the cheapest route for the Coast Guard to follow because preparing for and conducting hearings is expensive for the Coast Guard in time and manpower. For a guilty mariner this may be the cheapest and easiest route to follow because lawyers that are willing to take cases of this nature are hard to find and are not cheap. Our member contacted approximately a dozen attorneys on his own but to no avail . However only after listening to the case carefully, our Association recommended Captain Robert Lansden, a highly qualified*

master mariner who is also an attorney . Captain Lansden is a member of the American Maritime Officers (AMO) and an unlimited deep-sea Master. If you are innocent, you are treated as if you are guilty and will find it hard to prove your innocence under the system the Coast Guard has in place. In a "drug" case, proving your innocence will require the testimony of medical experts who are not cheap, either.]

- You may contest the charges and present your case at a hearing before an Administrative Law Judge. To do this, mark the appropriate block of the answer form and follow the directions to file an answer. At the hearing, you must present all original Coast Guard licenses and documents that you hold to the Administrative Law Judge. ***[Comment:** Putting the check mark in the right spot is the easy part. Then, you must file your answer with the Coast Guard within 20 days. That appears deceptively easy to do. Yet, if you are innocent and plan to defend yourself you won't get to first base without a lawyer.]*
- Deposit your license or merchant mariner's document with this office and enter into a settlement agreement to prove cure from drugs. The hearing will be canceled and once all the requirements of the agreement are met, your license or merchant mariner's document will be returned and the case will be closed. *[Comment: The terms of the "settlement agreement" will keep you off the water for at least 1 to 1 1/2 years, require "rehabilitation" to prove your cure from drugs, involve weekly meetings, frequent drug tests, and the completion of a bundle of paperwork. Although the case "will be closed, " the record of it will remain even if you are successful in getting your license back. The costs related to your compliance with this "settlement agreement" can run into thousands of dollars. This "settlement" is particularly hard to take if you are innocent and do not need to be cured of addiction to anything or "rehabilitated" in any way, shape or form!]*

- If you chose to do nothing, the Judge will issue an order revoking your license or merchant mariner's document outright."

The Case

These, then, were the choices facing Captain Ken and have faced countless other mariners as well. Clearly, if you are guilty of drug use, you should be a man and take your punishment. You are wasting your time and the time of others who may be inclined to help you try to "beat the rap." Face it, you deserve nobody's sympathy when you dump serious problems you have created in someone else's lap!

In this particular case, Captain Ken, was the operator of a small 65 foot towboat employed as a fleet boat on the lower Mississippi River. Simply by being accused in a drug case, he will have to recover his damaged reputation from other mariners and employers who have heard tall tales through the grapevine and now may be biased against him as a drug abuser. This long process cannot be reversed by flashing a 20-page Decision and Order written by an Administrative Law Judge at your next job interview. *[Refer to Decision and Order, p. 9; Transcript p. 67.]*

Captain Ken was cited with refusing to take a drug test when ordered to do so by his employer after what was supposedly a "serious marine incident!" Administrative Law Judge Archie Boggs did not find the small amount of scratched paint fit the definition of a "serious marine incident" that appears in the regulations. Specifically, Coast Guard regulations at 46 CFR 4.06-5 require the marine employer to test all persons directly involved in a serious marine incident. However, a "serious marine incident" is defined in 46 CFR 4.03-2(a)(3) as damage to property in excess of $100.000.

The Coast Guard prosecutor, LCDR Andrew Norris, is a lawyer and should have been capable of reading and correctly interpreting this regulation. In addition, the prosecutor's main witness "...testified that several days after the incident he got word from a company representative that the damage was insignificant."" We ask: Why wasn't the case dropped then?

An employer can order you to take a drug test at any time. Such a test can be a pre-employment, random or post-accident drug test. Coast Guard regulations at 46 CFR 4.065(c) state: "No individual may be forcibly compelled to provide specimens for chemical tests required by this part; however, a refusal is considered a violation of regulation and could subject the individual to suspension and revocation proceedings under Part 5 of this chapter and removal from any duties which directly affect the safety of the vessel's navigation or operations." In brief, if you refuse to take a drug test your employer orders, you can lose your license.

In this case, Captain Ken's tow of two grain barges suddenly and accidentally parted a coupling and brushed alongside a moored tankship, the T/S CRUDESUN. Fortunately, and due in large measure to Captain Ken's long experience on a "sixth-issue" license and his skill as a boat handler, damage was limited to nothing more than scratched paint on the ship ó no indents, fractures, holes, spills, fires or other damage. After a brief inspection, the Master of the tankship saw no reason to even file an accident report. Indeed, Captain Ken's acting port captain, Michael Hebert of L & L Marine, saw no need to personally inspect the "damage" although it would have taken him less than 30 minutes to drive to the scene and do so. However, Hebert and his employer were willing to spend several days in court in an attempt to damage Captain Ken's career by having the Coast Guard take away his license!

In my opinion, the Coast Guard could have better spent its time and resources examining the records and equipment of the employer than in bringing trumped-up charges against the mariner. Perhaps the Coast Guard may even find that it must spend this time in light of the recent sinking of another vessel owned by the same company with loss of life!

According to company policy, Captain Ken notified his employer of the accident and truthfully stated there was no damage. Nevertheless, he was told that he would have to submit to a drug screen. According to court testimony, Captain Ken did not offer any objection or in any way refuse to take such a drug test.

The Long Wait

After re-coupling his barges and then dropping them off at their destination as required, Captain Ken safely moored his boat to a dock and waited for acting port captain Hebert to arrive. However, after tiring of waiting for him to arrive after a number of hours, he called a neighbor with a car, gathered his few personal belongings and was driven home. "Home" was located within 8 to 10 blocks of the company office and

was easily accessible to it.

For reasons that are quite common and understandable, when Captain Ken left the boat safely moored and with a deckhand on board, he also quit his job with the company.

Since Captain Ken was an "employee at will," as are all mariners that do not have the protection of a union contract, his employment could be terminated at will by his employer at any time and for any reason whatsoever. An interesting, fact brought out at trial was a clause that he signed when applying for a job with the company in 1997 stating that: "I understand that if employed, my employment will be for an indefinite period of time, and that I may terminate my employment at any time for any reason, and the company may do likewise..."" This is only fair, but it is also unusual for an employer to make such a clear and unequivocal statement. Exceptionally unusual in this case was the fact that the employer went on to claim that Captain Ken "deserted" the vessel. The Coast Guard prosecutor, LCDR Norris, went after him with renewed vigor to keep his case from collapsing in its entirety! *[Refer to Decision and Order, p.18]*

The very next day, Captain Ken found a new job that was more to his liking and, one day after that, took and passed a pre-employment drug test for his new employer with no problems. It should have been obvious to any reasonable Coast Guard prosecutor, including LCDR Norris, that Captain Ken was not a drug user. But, it is a well established precedent that the Coast Guard will not consider the result of any other recently-taken drug test. I learned that in an unrelated case when a mariner failed a drug test at 7:00 PM one day and passed a second test at 2:00 PM the following day-a difference of only 19 hours. Learn this lesson here and now: If you fail any drug test for any reason whatsoever, you are in big trouble!

Apparently, acting Port Captain Hebert was very upset that Captain Ken had quit his job without notice-and on a weekend and left him in the lurch while his immediate superior was enjoying the wonders of distant Disneyland. Several days later, he vindictively informed the Coast Guard investigators in the New Orleans Marine Safety Office that Captain Ken had both refused to take a drug test and had deserted the vessel.

The Coast Guard scooped that up, were hot on the trail, and subsequently served Captain Ken with a notice of a suspension and revocation hearing giving him the four options cited in the letter above, and throwing his life into a turmoil for an entire year. The Coast Guard's "wheels of justice" were grinding into motion and in the process assumed they would grind down Captain Ken.

However, the towing company failed to mention that Captain Ken had been on duty from 6:00 PM the previous day to 6:00 AM on the day of the accident and was still on duty at 1:00 PM because the company failed to provide him with a licensed relief officer to run the boat. Captain Ken remained on duty until the vessel was tied up at 1 p.m. on the day of the accident after safely delivering its tow of empty grain barges.

In court, acting port captain Hebert stated that he could not find a relief after the previous relief Captain and two deckhands quit at 6:00 PM the previous evening. Hebert stated that he expected Captain Ken to go back on duty at 6:00 PM the same evening, only 5 hours later. Having finished working approximately 19 hours in one 24-hour day, the company expected Captain Ken to follow this with another 12-hour hitch. This was an obvious attempt to coerce Captain Ken to violate the 12-Hour statute at 46 USC §8104(h) ó and as such is a common tactic in the poorly-regulated towing industry.

Acting Port Captain Hebert did not seem to be bright enough to understand that this practice was against the law! Apparently, his attorney hadn't bothered to clue him in ... nor did the Coast Guard prosecutor. As an observer in the courtroom, I considered LT Norris' inattention to the importance of the 12-hour statute reprehensible and insupportable as an attorney and a Coast Guard law enforcement officer and told him so to his face later in the presence of his Executive Officer and other officers at MSO New Orleans following the trial.

On the first day of the hearing, the Coast Guard attempted to offer the acting port captain's testimony by telephone. After the testimony started, Judge Archie Boggs learned that the acting port captain was present in his company attorney's office less than six blocks away from the court room. Thereupon, the Judge ordered acting port captain Hebert to come to the court room immediately and offer his testimony in person. He appeared on the scene a few minutes later.

The proceedings resumed but were interrupted after only a few minutes in the middle of acting port captain Hebert's testimony because the Coast Guard prosecutor failed to make arrangements to hire the court reporter for a session that would continue into the afternoon and, in fact, it dragged on for four separate sessions.

As a result, the court was adjourned for several weeks so that a mutually agreeable date to continue the hearing could be arranged. However, at that time, Judge Boggs returned Captain Ken's license to him. Thereupon, the Coast Guard investigating officer, LT Andrew Norris, presented Captain Ken with a district policy letter that told him, in effect, that he could not use his license even though he was in physical possession of it. As an observer, I viewed this as clearly a tactic of harassment and intimidation on the part of the Coast Guard. Even though the Coast Guard had possession of pertinent copies of the vessel logs, they were not even slightly interested in the fact that the employer plainly had caused Captain Ken to commit violations of the 12-hour rule. However, when confronted by an "expert witness" who had edited the Gulf Coast Mariners Association book on the subject, they attempted to have the Judge bar all "12-Hour Rule" testimony that would be offered as "irrelevant." Captain Bob Lansden, representing Captain Ken objected stating that this testimony was an important part of his client's defense. Subsequently, in another session, Captain Ken's attorney entered G-MOC Policy Letter #4-00 into evidence to "clarify" the 12-Hour rule over the continued objection of the Coast Guard investigating officers. Interesting as far as timing was concerned, was the fact that GCMA had received Policy Letter #4-00 only a few hours earlier after months of hard work ... and mailed over 5,000 copies of this letter to other "lower-level" mariners informing them of their rights and obligations under the 12-Hour rules.

Although working over 12 hours in a 24-hour period did not bother LCDR Norris, this Coast Guard policy clearly influenced Judge Boggs who in his Decision and Order accepted that "At the time of the allision on 4 March 2000 at 0720, Captain (Ken) ... had been on watch for over 13 hours" and "...that by 1300 hours 4 March, Captain (Ken) ... had

worked 18 hours with no relief." *[Refer to Decision and Order, p.13]*

The matter of "desertion" is an issue that most mariners know very little about because the Coast Guard requires them to know next to nothing on this subject in order to obtain a license. In reviewing the Coast Guard's deck examination databank with well over 10,000 questions, only one question on desertion appears in the entire data bank. Actually, desertion is far more significant than this simple question and answer would indicate. *[Refer to Norris, M.J. The Law of Seamen, 4" ed., 8:381*

The Coast Guard views the matter of walking off a vessel without notification as a very serious event-a point of view that we caution our mariners to take very seriously. If nothing else, quitting without giving notice certainly isn't a "professional" thing to do. But, in this industry, the employer always has the last word which often includes "blacklisting" the mariner. This tactic helps to explain the large turnover of "lower-level" mariners throughout the industry and is equally õunprofessional.ö

In this case, Captain Ken left the vessel safely moored to the dock with another crewmember on board. Judge Boggs' Decision and Order states: "On September 27, 2000, a rebuttal witness was brought forward, Mr. Gary Lerille, an employee of L & L Marine. The key facts presented in his testimony were the following: "1) The vessel was safely moored at Upper St. Rose Fleet. 2) Leaving one deckhand aboard was acceptable." So, when all is said and done, and in light of the employer's own testimony backed up by a signed statement on its own application blank, Captain Ken was free to quit at any time and availed himself of the opportunity. *[Decision and Order, p.20]*

However, things could have been quite different. Even though it has been a common practice for "lower-level" mariners to walk off a job when working conditions become intolerable as they had become for Captain Ken, and as an employee-at-will you can be fired for any reason at any time, be warned that if you hold a Coast Guard license you can be held responsible for any events that take place when you are not on the vessel at a time when your employer reasonably expects you to be there. Fortunately, nothing out of the ordinary happened while Captain Ken's vessel was safely moored. The deckhand that stayed on the boat was a new employee and pretty much an unknown quantity. Several months later, he could not even be located to serve as a witness to events that had taken place.

Legal Representation is the Key

In a meeting at MSO New Orleans following the trial but before Judge Boggs' decision was published, GCMA protested the actions of the Coast Guard prosecutor LCDR Andrew Norris. Norris pushed this case as if it was a "zero-tolerance drug case" with a vengeance using the full resources of the government.

Captain Ken had been too upset to work for weeks after the incident. He had beaten the bushes in an attempt to find a lawyer to handle the case until he turned to Penny Adams at GCMA for advice. The Coast Guard has the mariner over a barrel and can easily run up his legal expenses without batting an eye. At the time GCMA brought this up before a meeting of officers at MSO New Orleans, the legal expenses involved in appearances on four separate occasions approached an estimated $20,000. We asked how an average mariner like Captain Ken can afford "justice" on his salary with the prospect of better jobs in the future dashed after being falsely accused as a drug abuser. We pointed out that Captain Ken is a Vietnam veteran and that he was on the sixth issue of his license and is deserving of respect.

Judge Boggs stated'" "...a prima facie case was not established and the complaint with regard to use of or addiction to the use of dangerous drugs was dismissed when the Investigating Officer rested the case." *[Refer to 'Decision and Order p. 9.]*

Judge Boggs went on to state: "It is important that the federal government's drug testing program be administered so as to eradicate the use of drugs in the American workplace. However, it goes without saying, the program must be administered with justice and fairness to each person tested, or directed to be tested. *[Emphasis ours.]*

"The employer's function in the drug testing procedure is a vital link. The laboratory's function is a vital link. The medical review officer's function is a vital link. All of the persons involved in the procedure must strictly abide by the regulations." *[Refer to Decision and Order p. 9. Emphasis ours.]*

The judge's order concluded: "The complaint alleging use of or addiction to the use of dangerous drugs and the desertion of the M/V Lillie Louise on 5 March 2000 is dismissed.

CASE #4
THE PERIMAN CASE: FRAUDLENT TESTING AND COAST GUARD INTRANSIGENCE

***[Source:** National Association of Maritime Educators]*

GCMA is opposed to drug and alcohol use by mariners that endangers the lives of fellow mariners and compromises the safety of a vessel's operation. GCMA is not opposed to drug testing if done strictly by procedures for drug and alcohol testing of transportation workers issued by the federal government. GCMA also supports the humane treatment of mariners with addiction diseases and believes that all who suffer from such an illness should have an opportunity to receive affordable treatment and a second chance at their careers.

Overview

Captain Gregory L. Periman took a drug test after a minor allision on the Upper Mississippi River in Illinois. According to the laboratory MRO, his employer and the U.S. Coast Guard, he tested positive for drug use.

Captain Periman knew he didn't use drugs and there must have been an error. This is the story of his three-year crusade to prove his innocence. Most recently aided by New Orleans-based attorney J. Mac Morgan, Captain Periman's fight is continuing in state court.

This story centers around a trial in St. Louis conducted by U.S. Coast Guard Administrative Law Judge Peter Fitzpatrick, a tired traveler from Norfolk, Virginia, who in early January 1999 wearily faced this mariner from northwest Arkansas who insisted he wasn't guilty and planned to argue the point with

the United States Coast Guard. What a crazy thought, what a lot of trouble for nothing ... just a license to run a towboat.

Where Does This Railroad End?

In a Decision and Order dated January 22, 2001 (DCOA #2621), the Vice Commandant of the Coast Guard remanded the Periman case on appeal involving alleged drug use back to the same Administrative Law Judge to "withdraw the original decision "..."reopen former proceedings on an expedited basis"..."In the interest of Justice and the integrity of the entire drug testing system." The judge was the Honorable Peter Fitzpatrick.

Any case that involves "the integrity of the entire drug testing system" is a very serious matter. I completely support the concept that drug abuse in any mode of transport-rail, highway, air, and marine-can have a dire impact on public safety and must be eliminated-but not by trampling the rights of individual mariners in the process. The myopic pursuit of individuals that may not be drug offenders should be a grave concern of each and every working mariner who takes a DOT drug test. If the Coast Guard can bring false or even questionable charges against one mariner, they can bring them against any mariner!

When the Coast Guard makes an error so grievous as to destroy a person's life and career, they not only should admit their mistake but also make restitution to the mariner. Mariners who are treated disrespectfully by the system quickly lose respect for it. The honesty and integrity of drug testing and enforcement always must be beyond reproach since every merchant mariner that stands a watch is subject to random drug testing throughout his employment.

Timely Reporting of the Accident

When I first heard details about this case in its earliest stages, I believed it had the potential to tarnish the Coast Guard's reputation. Having no desire to do this or to undermine the efforts to control the use of drugs in the marine industry, I wrote a personal note to Vice Admiral James Card on March 21, 2000 and stated: "I believe that something here is seriously out of place and needs to be brought to the attention of other mariners." My hope was that this mild cautionary note might alert the Admiral to look beneath the surface. I received a pleasant reply from Admiral Carmichael that apparently ended this futile effort. The train had left the station.

In all likelihood, our readers have never heard of Captain Greg Periman. Greg is a licensed mariner with twenty-two years of service on the western rivers and the Gulf Intracoastal Waterway and operates linehaul towboats. The chances are slim to none that you would ever learn about this case unless you read this article as the Coast Guard prefers to show the white glove rather than the iron fist when it deals with the public. The frightening thing is that what happened to Captain Periman could happen to any merchant mariner who earns his or her livelihood with a CoastGuard-issued license or merchant mariner document. What the Coast Guard giveth, the Coast Guard can take away-and will do with a vengeance.

On a foggy night in August 1998, Captain Periman serving as Pilot aboard the towing vessel STEVE T had a minor allision while heading upriver on the Mississippi River at Chester, Illinois. He reported his accident in an accurate and timely manner both to the Coast Guard and to his employer. Although there was only relatively minor damage to the comer of one barge, his employer instructed him to take a drug test when he reached St. Louis.

When Greg reached St. Louis, he submitted a urine specimen that was subsequently determined by LabOne, certified by the U.S. Department of Health and Human Services, and located in Lenexa, Kansas, to be positive for marijuana.

Captain Periman relates that he could not believe he had tested "positive" because he did not use dangerous drugs. Like hundreds of other mariners in his position, he was given the opportunity to admit to drug use and go through "rehabilitation" and, at its conclusion 12 to 18 months later, apply for the return of his license.

Knowing that the drug charges were false, he chose to appear before Administrative Law Judge Peter Fitzpatrick in St. Louis. Believing that some obvious mistake had been made, Greg chose to represent himself in court to refute the charges. This proved to be a serious mistake-and one that no mariner should ever make.

After the Coast Guard Investigating Officer LTJG Christopher O'Neil from the Coast Guard Marine Safety Office in St. Louis presented evidence from LabOne of the positive test, Greg's license was taken on January 7, 1999 at the trial and was formally revoked by a Decision and Order served on March 26, 1999.

Although Greg was given ample opportunity (to the point of harassment) to plead guilty to the charges and to agree to "rehabilitation," he had no intention of pleading guilty to a crime he never committed. After all, you are supposed to be presumed innocent until you are proven guilty!

Burden of Proof Placed on the Mariner

Mariners need to know that the burden of proof automatically falls upon you if the Coast Guard can prove it has a "prima facie" case. A "prima facie" case is one that is sufficient on its face, being supported by at least the required minimum amount of evidence. Such a case usually prevails in the absence of contradictory evidence. Establishing a prima facie case has become a very routine matter with all of the drug-testing rules that are in place today. These rules are spelled out in Title 46 CFR Part 16 and Title 49 CFR Part 40 and must be followed.

With recent changes in the regulations, most drug cases never go to trial. This change took a great burden off the Administrative Law Judges. So, it was the exception rather than the rule that brought Judge Fitzpatrick to St. Louis in early January 1999.

A mariner who tries to act as his own lawyer has a fool for a client. The trial was an unmitigated disaster for Captain Periman. Unless you understand exactly what you will be facing, it is very difficult to prepare for it. With no money, hiring a lawyer was out of the question. The Coast Guard does not furnish attorneys to indigent mariners. There are no public defenders available in Coast Guard Adminisrative law cases. Captain Periman was not a member of a labor union and could not call on them for legal representation or even referral to a competent maritime attorney.

The principal witness, the Vice President of Toxicology of LabOne that processed the urine specimen, Mr. Alan Earl Davis, appeared to have such impeccable credentials that even

the Administrative Law Judge was moved to comment upon them during the trial in glowing terms. Mr. Davis claimed in his testimony that he was formerly "the Armed Forces Chief Pathologist" in Washington. He described testing equipment as the "gold standard" for drug testing to the point that each urine specimen tested was virtually untouched by human hands with practically no possibility of a testing error.

Largely as a result of Davis' testimony and that of the Medical Review Officer, Dr. Patel, Captain Periman left the trial without a job, without his license, flat broke and without a future. He had not returned to work following the initial drug test while making ineffectual preparations for the trial. By the trial date he had been out of work for over four months. He lost his car, would lose his home, all his savings, and even more important in the river industry, his reputation as a reliable pilot. As a convicted drug user, he could not hold any job in the maritime industry. Nor did he really have a clue as to how he could have failed a drug test.

My first conversation with Greg Periman dealt with widely available literature that explained possible causes of the "false positive" tests that have occurred in a number of drug tests. While the literature was illuminating, nothing I furnished rang a bell. He reiterated time and again that he never had used illegal drugs and had, as a licensed officer, even reported crew members who used drugs on the boat to his employer. I answered his questions to the best of my ability as a layman and furnished him with copies of regulations and other material that dealt with the problem he now faced as he determined to appeal his conviction.

Captain Files an Appeal

While a significant number of mariners follow the appeal route, the Coast Guard internet site is littered with innumerable failures. Although the outlook was daunting, Greg filed an appeal on March 8, 2000 and, because he was broke, prepared it using his own resources. In the meantime, the Coast Guard furnished him with instructions on how to obtain "clemency"-which Greg trashed because, as he again insisted-"I don't do drugs."

Around this time, Greg had an inspiration. He knew that the Coast Guard's key witness had lied about his drug test and his test results ó but he didn't know how or why. What sort of a person would ruin the career of a person he never met-and why? What sort of a person, indeed! A liar, and a fraud, and a consummate con artist.

Greg consulted with friends and family, made some telephone calls, and wrote some letters. He discovered by contacting Dr. Jerry D. Spencer, MD, JD, the Chief Pathologist of the U.S. Armed Forces, Medical Examiners Office, that Mr. Alan Earl Davis, the Vice-President of Toxicology at LabOne, had never been Chief Pathologist of the Armed Forces as he testified in court. To hold this position, a person must be both a medical doctor and a specialist in pathology. Further calls revealed that Mr. Davis had attended college for less than one semester and was neither a medical doctor nor a toxicologist nor even a college graduate!

Greg then contacted the U.S. Department of Health and Human Services (DHHS), the government agency that certifies all the laboratories that perform drug tests required by the U.S. Department of Transportation for all transportation modes including tests given to merchant mariners. The result was immediate.

I spoke with Dr. Walter Vogl, the person responsible for certifying the lab, who indicated that Mr. Davis had obtained his job under false pretenses and that he had just been terminated by the owner of the laboratory when the fraud was revealed. Shortly thereafter, Dr. John M. Mitchell of the National Laboratory Certification Program checked out Lab One on May 23, 2000 on behalf of DHHS and found irregularities in procedures that could have adversely affected Greg's urine sample and potentially innumerable other samples as well. Dr. Mitchell also reported that Greg's urine specimen was discarded in violation of regulations. Since no split sample had been taken as a result of faulty advice provided by Dr. Patel, the Medical Review Officer (MRO), there was no way that Greg could have it retested at another lab. The evidence to clear him had been flushed down the plooper!

As Greg prepared to submit his formal appeal to the Commandant, he made a number of calls to the Coast Guard in St. Louis to inform them of his findings and to request additional documents. This clearly did not please the Investigation Office headed by LT Joe Rock with LTJG Christopher O'Neil who, served as the Eighth District's DAPI. In telephone discussions it became clear that the "conviction" that LTJG O'Neil had won before the Administrative Law Judge might be threatened by these new revelations. However, the next move reportedly made by LT Rock, showed how desperate the Coast Guard was becoming in its attempt to maintain its conviction. It also turned out to be a tactical blunder of the first magnitude.

USCG Investigative Service Joins the Act To Further Intimidate the Mariner

One late Spring afternoon, an agent of the Coast Guard Investigative Service, Charlie Davis (no relation to Alan Earl Davis previously mentioned), appeared on the farm in northwest Arkansas owned by Greg's parents. When he arrived, Greg and several of his parent's guests were in the living room. The Coast Guard Investigative Service deals exclusively with criminal matters. The agent's appearance and subsequent open discussion of the case in earshot of all present was a source of great embarassment and humiliation, and viewed as an attempt at intimidation. From that moment on the need to clear his own name became even more important as his family's reputation in the community was also at stake. Although Greg's dad does not have a maritime background, he served in World War II and clearly recognized that the conduct and tactics of a number of Coast Guard officers associated with this case had gone out of bounds and were clearly unbecoming commissioned officers in any branch of the service. Greg subsequently verified in a conversation with James A. Devino, head of the USCG investigative service's New Orleans office, that LT Rock of MSO St. Louis had ordered Agent Davis to visit Captain Periman.

Through subsequent calls Greg determined that the Investigative Service Agent from New Orleans had been requested by LT Rock and dispatched to the Arkansas farm 1,200 miles away because Greg was reported to be a threat to the Coast Guard. Perhaps there was a threat-but it was a threat to embarrass and shorten the careers of a number of Coast Guard officers that turned their dogs loose on the

wrong person and would not back off.

The matter does not stop here. The case against Captain Periman was hastily assembled when Greg refused to admit "guilt." Important papers were missing from the Coast guardøs files including Copy 2 of the Custody and Control form (CCF). Loss of this form meant that the chain of custody for the specimen was broken. Substitutes for this vital form were smoothly and convincingly offered into evidence by LTJG O'Neil and were accepted without comment by the judge. This was only one of a series of questionable actions taken by a number of Coast Guard officers and civilian employees in their conduct of this case. This is probably the most distressing part of what happened because the Coast Guard circled their wagons and vehemently denies any wrongdoing by any of their personnel. This is a matter that eventually will be settled by comparing the requirements of the Code of Federal Regulations that delimits the actions of both the Coast Guard and the mariner.

Come Into My Parlor Said the Spider to the Fly

Coast Guard Vice-Commandant T. H. Collins subsequently vacated the Administrative Law Judge's decision. This showed one of the first glimmers of fairness in this case. But, even that may be illusory. Remanding the case back to the same Administrative Law Judge who screwed it up in the first place was hardly reassuring. Under the circumstances, the Coast Guard would have complete control over the outcome of the trial. They had much more to lose here than they were willing to accept. They denied a mariner a number of his basic civil rights. That matter must be remedied.

The system the Coast Guard created was twisted and abused to arrive at conclusions it could not substantiate. Agents of the government as well as a number of private parties caused or contributed to Captain Periman's substantial economic losses and emotional stress. The driving force behind the investigation by MSO St. Louis can be characterized as: "if it doesn't fit, force it. If you happen to get caught, stonewall it."

Our Warning to All Mariners

If you are caught in the Coast Guard's Administrative Law system for any reason, be prepared to spend big bucks. Lawyers who are experienced in the system, or even those willing to deal with it, are few and far between. Some attorneys with limited experience may offer to learn at a mariner's expense. Since the Coast Guard doesn't provide lawyers for "indigent mariners," each mariner must bear the cost of his or her own defense.

If an accident or injury is involved, a mariner's personal interests and the interests of his employer may not be the same and the "company" lawyer will not be available. And, as Captain Penman discovered in this case, the Coast Guard has its own agenda, its own priorities, and dispenses its own brand of "justice."

In a 1994 report titled U.S. Coast Guard Marine Casualty Investigation and Reporting: Analysis and Recommendations for Improvement (GCMA Document #A-634-A), researchers from the Idaho National Engineering Laboratory under contract to the Coast Guard presented compelling information about the Coast Guard's investigative process that left considerable doubt as to the effectiveness of investigations conducted at the Marine Safety Office level. The Periman case reinforces many of these findings. In addition, there is a very basic question as to whether the Coast Guard should continue to have free rein to trample the rights of civilian merchant mariners.

Captain Periman allowed me to be privy to all of the details of this case, and I have had experience in reporting on the Coast Guard bureaucracy before.

Coast Guard Restores Captain Periman's License

Congress granted the U.S. Coast Guard broad powers to issue licenses and merchant mariner documents to commercial mariners. With this authority also comes an ability to damage, destroy, or injure individual licensed or certificated mariners by suspending or revoking their license or document. This power should only be used when a mariner demonstrates misconduct, negligence, incompetence, or violation of a dangerous drug law or addiction to dangerous drugs. [*Refer to 46 CFR 5.27, 5.29, 5.31, and 5.35.]*

In the case of Captain Gregory L. Penman, that broad authority was abused by a small group of junior officers whose zeal allowed them to dishonor the reputation of a licensed merchant marine officer with an unblemished twenty-two year record of service. Their mistakes were compounded by a bureaucracy that all too often turns a deaf ear and blind eye to problems that working mariners face. As a close-knit quasi-military organization, the Coast Guard compounded a number of their procedural errors. They expected and received monolithic support from officers throughout the service as well as from a small, cohesive administrative law office with Judges who claim to be "independent" yet are on the Coast Guard payroll. They were able to mobilize a pseudo-independent investigative service to intimidate Captain Penman and his family at their home in rural Arkansas. It is also a sad commentary that compliant government civilian employees from other government agencies such as the Department of Health and Human Services that administer the Department of Transportation's drug testing program find it necessary to cower behind a shield of government immunity and anonymity and refuse to testify in open court.

As previously recited, the Coast Guard revoked Captain Greg Periman's license on March 26, 1999 as the result of a "positive" drug test. Working with the help of friends, family, and moral support from the Gulf Coast Mariners Association (GCMA), Captain Periman filed a formal appeal with the Commandant on March 8, 2000 and a supplemental appeal on May 28, 2000 without the assistance of legal counsel. After considerable correspondence, the Vice Commandant issued a Decision on Appeal #2621 on January 21, 2001.

This decision on appeal attempted to remand the case to the same Administrative Law Judge, Hon. Peter Fitzpatrick, that fumbled the ball in the first place to hear "new evidence" claiming that the Coast Guard still had a "prima facie" case. In effect, this would have allowed the Coast Guard to continue placing a large financial burden on Captain Periman to prove his innocence.

Hire Competent Counsel

However, by this time, and now fully aware of the difficulty of defending oneself, Greg borrowed the money to hire a team of qualified lawyers in Washington, New Orleans, and St. Louis headed by Attorney J. Mac Morgan. He now clearly understood what many mariners still may not recognize: if you do not spend the money to hire competent counsel, a mariner can expect very little access to justice under the existing system.

When the Coast Guard revokes the license of a professional mariner, that decision has the power to destroy not only a career but also a person's life as well. "Life" includes the security offered by the pay check of a steady job and recognizes the rewards of seniority based on enhanced skill and abilities gained through years of service. "Life" includes the accumulation of wealth over time as a result of hard work in any form and the right to enjoy the fruits of your labor. "Life" includes your status in your residential and professional community. In the past and according to tradition of America's western rivers, a riverboat Captain was a person that the public looked up to ... in contrast to the treatment we have allowed too many Coast Guard civilian employees to employ that treats all mariners uniformly as boat trash. "Life" includes a mariner's enjoyment of his personal relationships with family and friends-among many other things.

Any working mariner like Captain Greg Periman who is confronted by a positive drug test, faces almost overwhelming odds to prove his or her innocence. First, because drug abuse has proven to be common and its effects in all transportation modes is so devastating, there is now an automatic assumption of guilt for any person who is accused. In fact, the government has all the evidence it needs to present a prima facie case the moment that an approved laboratory conducting an approved test has the results of that test certified by an approved medical review officer (MRO). All of this occurred in the case of Captain Periman.

After living with the consequences of his trial where he attempted to defend himself without a lawyer, Captain Periman sought and followed recommendations of the GCMA and hired attorney J. Mac Morgan of New Orleans. Mac, a licensed towboat Captain and attorney with considerable experience, assembled and headed Greg's defense team in three cities-Washington, St. Louis, and New Orleans.

Morgan and his associates first appealed the Commandant's decision to remand the case to Judge Fitzpatrick directly to the National Transportation Safety Board as allowed by 46 CFR 5.713 since he represented a "party adversely affected by the Commandant's decision." The Coast Guard, fully cognizant of the weight of the evidence and the large numbers of procedural errors that were made, incredibly continued to insist they had a prima facie case.

When the Coast Guard Vice-Commandant then tried to force Judge Fitzpatrick to schedule proceedings in St. Louis on May 22, 2001 on only a few very limited points, it looked as if Captain Periman was being "set-up" for another fall. This convinced Morgan and his Washington team to appeal for an immediate injunction to prevent this from happening directly to Judge Ricardo M. Urbina of the United States District Court for the District of Columbia.

By this time, Greg felt the full weight of the Coast Guard (now represented by the U.S. Department of Justice) was being used against him. Even Judge Fitzpatrick sought direction from the Commandant as to whether he even had jurisdiction to reopen the case!

Meanwhile, Greg's attorneys formally filed his lawsuit titled Gregory L. Periman vs United States Coast Guard and Vice Commandant T.H. Collins. For the first time in over 2 1/2 years, Greg felt he was on the road to obtaining a fair and impartial hearing in a court that was not under the thumb of the Coast Guard's administrative law system.

It was at this point that the Coast Guard prosecutor LT C.J. O'Neil filed his motion for dismissal that stated in part: "In preparation for the remanded hearing, the Coast Guard discovered further new evidence on April 5, 2001. The new evidence compels the Coast Guard, in the interest of justice, to request that the Administrative Law Judge dismiss the case before you now. The Coast Guard requests the order (to) state that the Coast Guard may not file a new complaint in this matter." In effect, the Coast Guard had dillied and dallied with the facts for almost a year and were still in a dither when the bottom fell out from under them.

The Story Doesn't End Here?

I seriously doubt that this story will end here. We all know and respect the Coast Guard for saving lives, rescuing mariners from the sea and in the pursuit of safety. But, this organization has not lived up to that reputation in the Periman case.

If Captain Periman's story ended here, it will never even have an opportunity to be buried in the back pages of any legitimate newspaper. Out of sight is out of mind-which is exactly where the Coast Guard would like to bury this smelly matter as quickly and quietly as possible. However, burying this story would leave Captain Periman's name and reputation forever under a cloud. If he returns to the river, he will have to argue his innocence again and again to employers and to other mariners. Meanwhile, the Coast Guard officials who persecuted him can excuse their mistreatment of Periman and other merchant mariners by opining that he "won on some technicality."

The Coast Guard's whole investigative system needs to be indicted for its violations of Greg's civil rights and correct the problems previously cited in public documents. Along these lines, the government's conduct of this case has been so egregious that it attracted the attention of the American Civil Liberties Union (ACLU) Drug Policy Division over a year ago and continues to attract their attention with the return of Greg's license.

Moral Indignation

Captain Periman is an outstanding example of how vulnerable a mariner can be when clad only in the armor of moral indignation coupled with a sure and certain knowledge that he has not "done drugs." This attitude led to his initial downfall.

On the other hand, "doing drugs" and then hiring a lawyer to bail you out does not work, either. The path leading away from countless "Commandant Decisions on Appeal" (CDOA) is littered with the remains of legal cases (and lawyers) that did not meet the test. All mariners need to note this important lesson. When it comes to winning "drug" cases, the Coast Guard has a no-tolerance policy, and they are prepared to do anything to win drug cases at any cost. In only a very few cases (such as this one) will the cost in terms of violating a mariner's civil rights be too great to overlook!

Over the years, the Coast Guard built an entire legal framework of decisions that virtually closed the door on mariners escaping punishment for violating the drug testing laws. There are few "end runs" that have not already been tried and failed the test. A lawyer cannot be expected to perform feats of magic for a guilty client.

As soon as the Coast Guard has a prima facie case, it wins-unless a mariner can prove that there is something wrong with the government's case. What this means is that the burden of proof (that means the expense of proving you are innocent) passes from the government to the "guilty" mariner. The Coast Guard has dealt with so many drug cases that any mariner's chances of winning without a lawyer are practically zero and not much better with one.

The three elements of establishing a prima facie drug case are: (1) That you were tested for a dangerous drug in accordance with the regulations in 46 CFR Part 16 and 49 CFR Part 40, (2) the test gave a "positive" result indicating drug use, and (3) that the test results were confirmed by a medical review officer.

Long before April 5, 2001, Captain Periman, with the help of family, friends, a former United States Attorney and several judges in his home state of Arkansas amassed cogent arguments that the Coast Guard's prosecutor, LTJG O'Neil, and Administrative Law Judge Fitzpatrick had violated a number of provisions of the Code of Federal Regulations at his trial and during the 2½2 years the Coast Guard withheld his license. At the risk of boredom, here is a partial list of federal regulations the Coast Guard appears to have bent, broken, trampled or misinterpreted so they could maintain their position that ultimately crumbled:

- 49 CFR 40.23(a)(1)(ii-iii).
- 46 CFR 5.543(b).
- 49 CFR 40.29(g)(3),(5).
- 49 CFR 40.27(a)(7).
- 49 CFR 40.29(h) affecting rights under 49 CFR
- 49 CFR 40.25 (f)(10)(E).
- 49 CFR 40.33(b)(3).
- 46 CFR 5.551.
- 49 CFR 40.33(f)(1).
- 49 CFR 40.25(b)(3).
- 46 CFR 5.601(a).
- 46 CFR 5.541(b).
- 46 CFR 5.305(b).
- 46 CFR 5.501(c)(3).
- 46 CFR 5.521(b).

Based on the assumption that every person that fails a drug test is guilty, the Coast Guard developed an administrative system to handle the problem of drug addiction and give mariners "a second chance" under certain limited circumstances. The second chance involves signing a voluntary deposit agreement under the provisions of 46 CFR 5.201. Essentially, this involves admitting your guilt, voluntarily turning in your license and/or merchant mariner document, and participating in a rehabilitation program. If you provide written proof of rehabilitation you then can request that your license be returned.

For a mariner who is guilty of a drug offense, this program offers a valid and welcome opportunity to break a bad habit and a second chance to qualify to serve in the marine industry after rehabilitation. No valid purpose is served by speaking ill of this program or of any Employee Assistance Program (EAP) established pursuant to 46 CFR 16.401.

Enrolling in such a "rehab" program is a bitter pill for any mariner who knows that he has not "done drugs." Not only is it a bitter pill if you must admit guilt when you are innocent but you open yourself to constant brainwashing and reminders of your alleged failings and addictions during the process. "Rehab" is also expensive and time consuming, often taking between 12 and 18 months and can cost in excess of $10,000. However, for some mariners, this opportunity is more appealing than outright license revocation.

Since the suspension and revocation (S&R) regulations were revised, the Coast Guard pushed its Voluntary Deposit Agreement program vigorously as a fast and relatively painless way to dispose of a huge volume of drug cases in the least time and with the least expense possible. By assigning the cost of the program to employers, the program can float along with very little expense to the government. This allowed the Coast Guard to cut down on its drug case load and reduce the cost of prosecuting offenders significantly-to the point where administering the program no longer strains the system. While signing on the dotted line is all it takes to enroll a first-time drug offender, there is no such opportunity offered to second offenders!

Captain Periman was offered a Voluntary Deposit Agreement, not once but many times by an increasingly pushy prosecutor, LTJG O'Neil, the Eighth District's Drug and Alcohol Program Inspector (DAPI) in St. Louis. The harder LTJG O'Neil pushed, the harder Captain Periman resisted. Fending off repeated phone calls, Captain Periman couldn't seem to comprehend what it was about the word "NO!" that LTJG O'Neil didn't understand? After "preparing" for his day in court for over three months, Captain Periman was ready to "have at it."

USCG Has Powerful Weapons

In the game of "good cop-bad cop," the good Coast Guard had already offered Greg its generous voluntary deposit agreement that was rejected repeatedly. Now the bad Coast Guard, who had been forced to waste time and spend money on staging a court hearing, was not prepared to have its patience tested by a recalcitrant mariner who just didn't get the point that he was predestined to lose. The Coast Guard prepared to use their most powerful weapon and only alternative to the voluntary deposit agreement, outright license revocation.

As a riverboat captain, Greg was comfortable with situations where he was in charge, had to make important decisions, and knew his job cold. Like most "lower-level" mariners with an unblemished safety record, he was not intimately familiar with the marine investigation and personnel action regulations that appear in 46 CFR Part 5. Nor would he find studying these regulations without first watching them in action to be particularly enlightening.

Many mariners report that finding a lawyer to represent them at a Coast Guard administrative law hearing is very difficult. Such hearings are supposed to be "remedial" in nature. This mild terminology gives a false impression that these courtroom proceedings are really

not all that serious. The Coast Guard does not provide legal counsel for indigent mariners. From a practical standpoint, by the time of his trial, Captain Periman was forced to sell his personal belongings and was truly "indigent." He would soon lose his home, his vehicle, and see his personal life crumble as a direct result of the verdict.

Not only are lawyers expensive, but those who know Coast Guard administrative procedures and are familiar with the vast body of previous "Commandant Decisions on Appeal" are few and far between. One mariner in the Houston area reportedly sought representation by over 20 separate attorneys on an alleged drug case. When you live over eight hours driving time from the courtroom in St. Louis, finding a suitably experienced and well-positioned lawyer is particularly challenging and very expensive. In the end, the thought that "I'll just explain it to the judge" prevails by necessity.

The Coast Guard was so confident of the prima facie nature of its case that, instead of calling on one of their qualified Coast Guard attorneys with formal legal experience to represent their position, they simply used their investigations officer, LTJG O'Neil, to prosecute Captain Periman. LTJG O'Neil, now facing a mariner who would not quit and refused to sign his rights away on the dotted line, still had to rush to produce a few items of evidence to bring to court. How he obtained this evidence as well as the nature of this evidence are both questionable and highly suspect. Legal proceedings still to come in state court in St. Louis will probably provide definitive answers to many remaining questions outside the purview of the Coast Guard's administrative law system.

The Coast Guard goes to great lengths to stage its proceedings, even to the point of flying its own Administrative Law Judge (ALJ) from Norfolk, Virginia. This is the first clue that even the most obtuse mariner should pick up; the Coast Guard takes itself very seriously. Captain Periman was even treated to a "dry-run" when he had an opportunity to watch another mariner whose case was tried before him "bite the dust."

Was There A Company Policy?

The Coast Guard presented its paid witness including Greg's employer Mr. Vance Lawson. Remarkably to Greg, Lawson stated that his company had a formal written drug policy. But, if he did have one at the time, there were a number of employees including Greg who knew nothing about it and had found it virtually impossible to have Lawson remove drug abusers from the vessels he operated. However, the focus of Captain Periman's frustration was that both LTJG O'Neil and Judge Fitzpatrick artfully dodged his request to subpoena witnesses he wanted to testify on his behalf.

It was evident after a very smooth telephonic presentation by LabOne's Chief of Toxicology, Mr. Alan Earl Davis, from his drug lab in Kansas, that things were not going well for Greg. Davis described drug test procedures approved by SAMSHA and performed in flawless fashion on superb, expensive, state-of-the-art drug testing equipment. Davis calmly reiterated that nothing could possibly be wrong with the testing procedure that resulted in Greg's positive test. Testimony by the Medical Review Officer, Dr. Ashokkumar Patel, representing a prestigious medical clinic in St. Louis clinched the case. The fact that the specimen collector left the sample bouncing around in the trunk of her car for the weekend and that she had little knowledge of drug-testing regulations was blown off as inconsequential fluff.

Captain Periman left the courtroom feeling abused by the system for a number of other reasons. His opinion, backed by significant scholarly research, strongly indicates that the Coast Guard was willing to violate their own drug regulations on a distressing number of occasions. What should be chilling to every mariner is the fact that the Coast Guard's administrative law system is so flawed that it offers no assurance to mariners that they have any protection under existing law and regulation at any level in the Coast Guard-local, Eighth District, or national. Also, the more often a mariner tests, the greater the chance he has to come face to face with a glitch in the system.

Many of these facts showed that Captain Periman's trial in St. Louis was a mix of wrongly admitted exhibits, lying witnesses, incompetent witnesses, and a prosecutor and an Administrative Law Judge who either did not understand their duties or were willing to twist the Coast Guard's system of justice to their own desires. Although the Eighth Coast Guard District at first denied it, some allegations clearly called for a criminal investigation of their own officers.

Maintaining Composure

There is no doubt that these reverses frustrated Captain Periman who still does not have a clue as to why he had falsely tested "positive" for marijuana. Yet, almost 250 pages of court transcript does not reflect that he lost his temper. Remarkably, however, during a court recess Federal Marshals were called to accompany Captain Periman whenever he went in the Federal Building. From that moment on, Marshals sat on both sides of him until the hearing closed on the first day and throughout the second day. Sitting between a pair of Federal Marshals alone is enough to intimidate any mariner trying to present his own case and make him regret ever entering the court without a lawyer.

While drug testing may be necessary to control the drug crisis facing mariners and other transportation workers throughout the country, the program must be conducted correctly and honestly. Errors must be admitted and results must not be forced in a drug lab as appears to have been done here. Paperwork cannot be lost or forged as may have occurred in this case.

Junior Coast Guard officers must not disregard the civil rights of working mariners who reject voluntary deposit agreements because they have good reason to demand their day in court. Administrative Law Judges must treat mariners fairly in all regards, as clearly did not happen in this case. The Coast Guard must not allow its "investigative service" and administrative procedures to be used to intimidate mariners.

Other Flaws Exist in the System

There are other problems with the drug program as

reported by mariners not connected to this case. These problems include:

- Coast Guard reliance solely on employers to report cases of drug and alcohol abuses on their vessels. Many Captains who report drug abuse to their employers or directly to the Coast Guard are repeatedly ignored. Yet, most captains do not want to have their licenses at risk with drug users on the vessel.

- Some employers cut back on drug testing and allow known drug users to continue to work when they are short of crew. The same employers conduct a vigorous drug testing program when work is slow so they can terminate workers for cause and avoid paying unemployment.

- Cases where crewmembers lace the food of a captain or other employee they don't like with drugs so that person will test positive and/or be fired for drug use. A person so abused has no way to prove his or her innocence.

- Employers who test a mariner after his tour of duty when they know he will be "clean" or when they will have plenty of time to hire a replacement before his next tour of duty.

- Employers who knowingly allow a mariner convicted of a drug test to continue to work on a vessel.

- Personnel managers contribute specimens in place of a "dirty" employee or otherwise control the submission of specimens and then hold that act of suppression over that employee's head.

- Mariners who are falsely accused discover too late that the system denies them all avenues to prove their innocence. The result of bending the system is that an unknown number of good mariners are forced out of the merchant marine service and a better-known number"' of drug abusers are detected at an unacceptably high level. *[1.7% as per 66 FR 4887, Jan. 18, 2001 and 46 CFR 16.230(e).]*

- The Coast Guard, that serves as one of our nation's armed forces in times of war, governs her civilian merchant mariners under an administrative law system similar to a court martial. The judges in this administrative law system are civilians, but the persons who prosecute mariners usually are commissioned Coast Guard officers.

Knowledge is Key

Captain Alan Spears, a San Diego attorney who represented many mariners in administrative law proceedings stated" in part: "After reading the new rules and regulations,"' I can offer this advice to licensees who find themselves before the ALJ: Hire a trial lawyer who is extremely conversant in U.S. Coast Guard license suspension and revocation proceedings.

õIt will be much less expensive paying a lawyer going into these proceedings than paying one in what may prove to be a futile attempt to undo the damage (suspension or revocation) resulting from incompetent self-representation."

We urge mariners not to remain blissfully unaware of drug laws and drug testing procedures. We recommend that Captain Spears' book, Drug Testing: What Every Mariner Should Know About Chemical Tests for Dangerous Drugs, (MET Stock #BK-0643) should be a part of every mariner's library.

CASE #5
THE DRUG TEST
By Captain Joseph J. Kinneary, Ph.D.

*[About the author. **Joseph J. Kinneary** is a High School science teacher and an adjunct assistant professor at Farmingdale SUNY. A long standing member of the Council of American Master Mariners, his article is drawn from an address given at their spring '06 meeting and from his recent book The Good Lord Hates A Coward. His book is available from JK Marine, P.O. Box 502, Northport, NY 11731 (631) 858-1886, or Marine Education Textbooks, 124 North Van Ave., Houma, LA 70363 (985) 879-3866*

I walked up the gangway of my first ship as a midshipman at the USMMA in 1973 -- it was a break-bulker on the Australian run. And down the gangway of what now appears to be my last ship as Captain of a NYC owned sludge tanker, 30 or so years later. The interval in between turned out to be a grand adventure in which I developed a genuine respect for the sea-going life and those who excelled at it. It impressed me as being one of the few occupations in which one is judged solely by actions and not words -- you can't talk your way out of a gale on the North Atlantic or into a 410 ft berth with a 400 ft oil barge.

I have a sea story with a bit of a twist for you today. It's a convoluted story that wound up involving doctors, lawyers, a Congressman, the *New York Times,* a university sociologist, a former student/USCG investigator, three sets of Misconduct charges, one charge of incompetency, a suspension, and attempt at revocation of my Master Mariner license ó and it ain't over yet.

Perhaps the story is best introduced by reading a letter I sent to the USCG dated 5 January 2002:

Lt. Commander Post
USCG Merchant Marine Drug Testing
212 Coast Guard Drive
Staten Island, NY 10305

I am writing to relate a series of events, which from my perspective are unfortunate, concerning Federally mandated drug testing for merchant mariners. Some background information may be useful. Upon graduation from the U.S. Merchant Marine Academy (1975), I embarked upon what has turned out to be a unique and interesting seagoing career., one which has taken me to all corners of the globe. Along the way, I've made good use of the extended periods ashore which are inherent to the shipping industry ó obtaining a Ph.D. in

biology from Rutgers University. For the past 13 years I have been employed with the New York City, Department of Environmental Protection (NYC-DEP) as a captain of their sludge tankers. This position has afforded me the luxury of being close to home to watch my children grow and also to work as a part-time biology professor at Kingsborough Community College.

Crossing the North Atlantic in the winter, guiding a light gasoline barge on a short hawser through a narrow swing bridge, piloting a loaded oil tanker through a congested harbor in zero visibility, months away from home and family, union strikes, company bankruptcies; throughout my maritime career I have met every challenge that has come my way -- save one. I have had difficulty producing the urine sample necessary for drug testing. I don't know why. I suspect it's psychological stress which stimulates the sympathetic component of my autonomic nervous system, shutting down the excretory system ó but it's just a guess. My private physician has diagnosed it as "shy bladder," a chronic syndrome.

At any rate, I was about to embark on my vessel the *M/V Newtown Creek,* on the morning of December 27th, when I was informed by shore personnel that my number had come up for the random drug test, a dreaded event (I would have rather tackled a 50 knot gale) which I had managed to weather, not without much difficulty, on three or four previous occasions.

After three hours, three quarts of water, folded arms and much foot tapping by the collection agent, still no sample. Phone calls were made, another captain located ó it isn't always pretty, but transporting sludge is a vital service, the ship had to move. I was whisked off in a DEP vehicle with senior management escorting me to what at the time was an unidentified location.

Upon arrival approximately one hour later, at 44 Beaver Street, apparently the downtown headquarters for NYC drug testing, I informed the attending nurse that my bladder felt as if it could burst, and I would likely be able to provide the necessary sample. She stated that I would have to wait to see the staff physician, who when I finally got to see him proved to be very helpful. He told me there was a good chance that I would lose my "fucking jobö. About this time I was informed that a urine sample would no longer be accepted. I don't (know) who made that decision. I offered to give a blood sample, but this too was in vain. During this time, a representative from NEDPC, the drug testing company was on hand. Throughout my experiences with this company, I have found their people to be arrogant and condescending ó I believe due to SPWLPS (Small People with Large Power Syndrome).

On January 3, I submitted my physician's statement (attached) to the Medical Review Officer, who refused to meet with me. The following day I was officially charged with Misconduct for Refusal to Take a Drug Test by my immediate employer, the NYCDEP. I have been placed on "Leave Without Pay" (and benefits) until further notice.

As everyone in the Marine Department is now aware of my state, the jokes and innuendoes are flying ó no big deal. I would, however, very much appreciate your advice as to how best to proceed, as I am getting a bit old to change careers. While I applaud the battle against drug use, if given the opportunity I urge you to support the development of more benign testing procedures, perhaps sparing a future mariner my dilemma.

Sincerely,
Captain Joseph J. Kinneary, Ph.D.

I received a response to my letter approximately one and a half months later. It was another set of Misconduct charges, instigated by a USCG ó a Chief Warrant Officer seeking suspension of my license for Refusing to Submit to a Random Drug Test. Over the next two years -- NYC suspended me -- reinstated me -- fired me ó rehired and reinstated me to my Captain's position -- and fired me again approximately two years ago in March of 2004 about two weeks after an article mentioning my situation went out over the Associated Press wire.

On the Coast Guard front, I went outside the box and, instead of hiring an admiralty attorney, hired an expert civil rights attorney. The case had by now been bumped up to a Coast Guard Lieutenant. (who by chance was a former student of mine in an oceanography course I taught as an adjunct professor at the USMMA ó but that's another story). He offered a six month suspension settlement, which I turned down.

The Hearing was eventually held in a Criminal Court (by design or coincidence?) room 346 on Broadway in Manhattan. It was intimidating. I will never forget my daughter stating to my wife, Nancy, as we walked up the court house steps,**"mommy, this building says criminal court."**

My heart sank as we walked in and saw the USCG had arrived with six uniformed personnel. I remarked to my wife, "I hope they left someone back to hold down the fort."

My attorney stated, "I hope they realize this is not the murder case." He rose to the occasion and turned the court room upside down. [As an aside--the USCG later went after him and he wound up self-destructing before my case was finished ó I told you it was a convoluted story]

During the hearing the USCG:

1. Eventually admitted that I had passed alternative drug tests and was not a substance abuser.
2. Their key witnesses, a MRO and a VP of the drug testing company (NEDPC) contradicted themselves and flat-out lied under oath.

It didn't make any difference to the USCG Administrative Law Judge. He ruled against me and in his decision insinuated I failed to provide a urine sample out of a desire to hide illegal activity.

I turned in my Captain's License for a one year suspension on March 18, 2003 and didn't get it back until this past summer -- two years, four months, and four days later. No one has been able to satisfactorily explain to me where the missing time went. Six months can be accounted for by a temporary license I obtained during this period. I was also served with an additional set of Misconduct charges seeking complete revocation of my Master Mariner License (for operating a publicly owned, non-inspected vessel without a license) by this same Coast Guard Lieutenant ó whom I would venture to say if he found himself alone on the bridge of a merchant vessel, would be hard pressed to figure which end went through the water first -- and I'm not kidding. These charges were dropped in the 11th hour before the scheduled Hearing when I refused their unilateral settlement offer.

So, what do we make of all this? I've chronicled the details in a book entitled *The Good Lord Hates A Coward* --

you can draw your own conclusions.

Maybe it's my own fault -- after 48 years of nothing but accolades and awards from the establishment ó maybe I didn't respond properly to adverse circumstances, or maybe I have some idiosyncratic aversion to these urine only drug tests. But then how do you explain:

1. Seventeen and a half million Americans are estimated to have shy bladder syndrome officially known as Paruresis, orí
2. Michael Capparo, a marine engineer for the Staten Island Ferry reporting in a February 22, 2004 newspaper *(Staten Island Advance).* that he has resorted to self-catheterization to get him through the urine only random drug test. I've spoken to Mike. It's a true storyí .or,
3. Kevin McHugh, Captain of a large container ship for Maersk-Sealand reporting that his assistant engineer, who for whatever reason could not provide a urine sample for an early AM random drug test. With the three hour limit fast approaching he became more and more nervous, fearing all the implications of a "refusal to test.ö Finally, in desperation, and at the urging of fellow crewmembers he went and sat in the ship's food storage cold room while continuing to consume water. He was able to provide the sample with just minutes to spare, í or
4. The phone call I received on March 13, 2006 from Captain Dan Morrison, a San Francisco tugboat captain with about 25 years experience. His call sounded like a 911 emergency recording. Apparently involved in a case similar to mine ó he didn't come up with a urine sample in the allotted three hour period and was fired almost immediately by his employer Crowley Maritime. Charges have been filed by the USCG seeking suspension and he may have to sell his home. This, in spite of the fact that he has proven himself to be drug free with a more accurate hair test.

There are other similar stories ó it goes beyond our industry.

But let's leave drug testing and expand our view point. There was a recent cover story, So, Would You Go To Sea? in *Fairplay,* the International Maritime journal published in the UK. It documents the denial of shore leave and the disconcerting trend by maritime nations towards the criminalization of marine accidents. The article lists the top five reasons to keep your feet dry as:

1. Tedium and monotony
2. Hostile authorities.
2. Crushing bureaucracy.
4. Separation from family.
5. Low pay.

The bottom line is this. If you treat seafarers like criminals and drug addicts, it will become a self-fulfilling prophecy ó that is the way they will behave, and that is to whom we will have to entrust modern ships, which because of their size and nature of cargoes have the capability of inflicting tremendous damage and destruction.

I received a recent letter from an old shipmate, Captain Harry Boyce, dated 9 January 2006. Captain Boyce is about my age. He was a deckhand on the *MT/Poling Bros* # 7, a small coastal oil tanker, when I broke in almost 30 years ago. He went on to become a New York Harbor tugboat captain and is one of the finest gentleman you would ever hope to meet. He writes in part:

"I left the industry in September of 2003. I'm now a credit manager for a construction company in nearby Massachusetts. Although there are some things I miss about the boats it was time for me to get out. Just a few months short of thirty years I was increasingly weary of the never ending responsibilities of a tugboat captain. Some of the changes in the Marine Transportation industry have the best intentions, but they are treating the symptom and not the disease. The caliber of new hires, the expectations of market sensitive owners (i.e., greedy) and the consequences of an oil spill overshadow all the things that I enjoyed about my job afloat for many years."

A man like this, with the kind of experience he has had, should be worth his weight in gold to a boat owner, yet he has been driven right out of the business.

So what is going on here? I think there are a couple of messages:

First is a very practical one. If you are a Captain of a commercial vessel or for that matter a Chief Engineer, your major concern today is not a steering gear failure, fire in the engine room, dense fog, or heavy weather -- its getting tangled up in the quagmire of inhumane regulations, regulators, and investigators, many of whom are incompetent and unreasonable boarding on abusive. *A New York Times article* of March 26, 2006 quotes a Homeland Security expert from the University of Maryland as calling the Coast Guard "vastly understaffed and under resourced. "I suggest that's an overly kind and generous description of their performance in regulating and licensing the Merchant Marine. If you do find yourself in an adverse situation with them WATCH OUT. They are also very powerful and you are likely to find yourself alone, deserted by Company officials and administrators. But what else is new for a Captain of a merchant vessel?

Second is a subtle, but perhaps more important message. In case you have not noticed we have entered into a brave new world. Words like terrorism, surveillance, and fear permeate our thoughts and conversations. Where fear is present power is usually not too far behind and where there is power there is abuse of power. There always has been and always will be.

We all know what is instigating and driving this crushing and at times overtly hostile regulation of the transportation industry. It's fear of another environmental catastrophe and the events of 9/11. I strongly suspect as we move forward in this new and at times frightening world we are going to need a corps of men and women who do not let fear dictate their actions or bend so deeply and unquestioningly to power. When you stop and think about it, that's exactly the type of people who made this Country. We are going to need men and women who can think clearly, act decisively and maintain their composure in extreme situations.

I can think of no better environment that fosters this independent thought and self-reliant action then the bridge or engine room of a merchant vessel. Organizations like the Council of American Master Mariners that defend the integrity of what's left of this noble profession are performing a service on a scale even greater than they realize.

Coast Guard's Performance Is a Paradox

*[**Source:** By Jack R. Simpson, Contributing Editor (Editorials), Waterways Journal, August 21, 2006. **Vocabulary: Paradox** = a self-contradictory and false proposition.]*

We have on numerous occasions written kind words

about the performance of the U.S. Coast Guard, major player in the homeland security game, and protector of mariners at sea. But the agency's involvement in the licensing of seamen, both blue water and brown, turns it into a paradox.

There is no denying that Coast Guard personnel performed masterfully during hurricane recovery efforts and that many Katrina victims owe their lives to the agency's rescue efforts. But there is also no denying that the agency is causing one very big headache for the towing industry and efforts to man its boats. It is not the first time we have broached the subject. Talk to the grass-roots crewmen, talk to the industry leaders, talk to almost anyone, and you'll find that the Coast Guard puts far too many stumbling blocks in the path of mariners seeking to renew their licenses and new potential mariners seeking their first jobs.

Why is that? Seriously now, why is that? We all know that water transportation is vital to the economic well-being of the nation. We wonder why, when it is so important, the Coast Guard feels compelled to make things so tough. It is so unfairly tough that many trained rivermen with decades of experience are just plain fed up and are leaving the industry.

Believe it or not, the Coast Guard is also guilty of getting rid of blue- and brown-water mariners who have committed no crime ó people who are guilty of no infraction whatsoever.

A case in point is that of **Capt. Joseph J. Kinneary, Ph.D.**, who had managed to obtain an unlimited master's license and 15 pilotage endorsements for New York Harbor. Capt. Kinneary has both brown-water and blue-water experience, including piloting loaded oil tankers through a congested harbor in zero visibility. The captain's story is fully documented in <u>The Good Lord Hates A Coward</u>, "An Account of Life as a Merchant Seaman," including a journal of a random drug test. It was written by the captain and published by JK Marine. The tale is almost unbelievable, except that it is so well-documented that we believe it.

On October 16, 2002, in Criminal Court Room 453 in New York City, Judge Peter A. Fitzpatrick requested and received Capt. Kinneary's master's license No. 035508. The matter involved an action brought by the Coast Guard against Capt. Kinneary, who was charged with misconduct. The Coast Guard sought revocation or suspension of his license. That sets the scene.

Now we fade to the cause of the action. Capt. Kinneary was unfortunate enough to have a psychological disorder known as shy bladder syndrome, which prevented urination during random drug tests. When his attempts to comply failed time after time, he was not allowed to substitute results from blood or saliva tests, which are permissible under the Coast Guard regulations. The only infraction we can discover is that during one of the many test attempts, when the subject could not produce the full amount of specimen required, he simply weakened and added warm tap water to the container.

We note here that Capt. Kinneary sought and made use of legal counsel. He had also the testimony of physicians and shipmates. For whatever reason, some of those in the chain of Coast Guard misfits who hounded him couldn't accept the fact that he had never taken drugs in his life. He simply had no desire to.

Despite the captain's efforts over and over again to comply with the random drug test, he was ultimately found guilty of not complying. If this charade weren't so serious it would be funny. The testimony brought to light that the company handling the urine test had let the watered specimen pass through unchallenged for quite some time. It was serious enough to relieve the company of its contract.

During his lengthy ordeal, Capt. Kinneary was unable to work much of the time. Ultimately, he lost his license and was unable to work at all. Also during his ordeal, he came to believe that the Coast Guard investigators were suffering with some sort of disorder he called Small People With Large Power Syndrome (SPWLPS).

Well, we have run across SPWLPS before, almost in every walk of life ó particularly at various levels of local, state and federal government. And, unfortunately, we have run into it in the Coast Guard. But isn't it sad? Isn't it sad that a captain with years of experience, a captain who used his spare time to gain a doctorate, a captain who has exactly the kind of experience the marine industry needs, is ousted because some Coast Guard "bureaucrats" with SPWLPS needed to show him who was boss?

This case is fully documented. It has been written up in newspapers. We invite the Coast Guard to explain why this captain was treated as he was. If the charges in his book are inaccurate, we'd like to know about it. We'd like to know because there are hundreds of rivermen who are trying to decide whether working on the river is worth the effort and whether they, too, can be given the bum's rush. There are hundreds of rivermen who feel just as Capt. Kinneary feels.

In Congress there is currently an effort to produce a Water Resources Development Act that will satisfy the desires of the U.S. Senate and House of Representatives. It is safe to say that over a period of several years, the cost to bring the issue to this point has been in the millions of dollars. But of what use will waterways be if we can't man the boats that are supposed to ply them?

The Coast Guard needs to wake up. This is not a homeland security issue. It's a matter of SPWLPS.

[GCMA Comment: We believe SPWLPS is an issue that should concern all mariners. We invite our readers' comments.]

CASE #6
MISGUIDED POLICY THREATENS TO DESTROY MARINER'S CAREER, FAMILY, AND LIVELIHOOD

***[Source:** Court papers cited in this article were prepared by Douglas H. Greenburg, Esq., former District Attorney, Terrebonne Parish, LA appealing to the Louisiana Circuit Court of Appeal on behalf of defendant Captain Tracey Trahan. Captain Trahan is an experienced Master of Towing Vessels and a member of the Gulf Coast Mariners Association. Emphasis is ours.]*

Statement of Jurisdiction

This is a criminal felony case on direct appeal from the 32nd Judicial District Court, Terrebonne Parish, State of Louisiana. Jurisdiction of this Court is vested in Article 5, Section 10 of the Constitution of the State of Louisiana and Article 912 of the Louisiana Code of Civil Procedure.

Statement of the Case [1]

The defendants/appellants, Shawn David Verdin (hereinafter, "Shawn" or "Verdin") and Tracy Lee Trahan (hereinafter, "Tracy" or "Trahan"), were charged in this case by bill of information with the offense of possession of over 400 grams of cocaine. The defendants were not charged with possession with intent to distribute, nor was any evidence adduced at trial that would have tended to establish such intent. The defendants waived trial by jury, and the case was tried before Honorable David Arceneaux, District Judge, Division "D" Following the bench trial, the trial judge convicted the defendants of attempted possession of over 400 grams of cocaine. Thereafter, the trial court sentenced each of the defendants to serve a term of eight (8) years imprisonment at hard labor, but suspended the sentence, subject to the defendants' serving five (5) years of supervised probation, which was conditioned upon them completing one (1) year of imprisonment with credit for time served.

Tracy Trahan and Shawn Verdin are both commercial fishermen, who fish for shrimp in the coastal waters off Terrebonne Parish. Tracy Trahan also has a masters' license with the United States Coast Guard (earned at the age of nineteen (19), and [1]As used in this brief, "R" denotes page numbers of the record; "L" denotes line numbers. captained a tugboat during the shrimping off-season. [R.644, L. 1-5.] engaged in the shrimping business throughout their adult lives, and were extremely familiar with the Parish waters and waterways. Both are now in their early 30's. Neither has a high school education, Tracy having gone to 10th grade and Shawn having gone to the 7th are family men who support their families through their fishing business. They grew up in the same community and are lifelong friends.

Each of the men owned boats. They did not always work together, but did so frequently. Generally, they were wholesale fishermen; selling their catch at the local docks. At times, they would fish to fill small, private retail orders Neither had any felony record prior to being charged with this offense. There was no evidence adduced at trial suggesting that either had ever in any way been involved in the business of smuggling or distributing drugs, nor was there any evidence even suggesting that either of the two had ever even used illegal drugs.

On the date in question, June 9, 2004, the two defendants went out early in the afternoon to fill a small retail order for Mr. A. J. Naquin, who had called Tracy to make the order earlier. [R. 653, L. 5-7.] On that day, they were using Shawn's Carolina skiff, a white boat bearing the Louisiana registration number of LA3667FA.

The manner in which the boat was rigged and operated became an issue at trial, the law enforcement officers having drawn several negative inferences relative thereto, all of which were shown to be factually incorrect.

The skiff was equipped with butterfly frames commonly used in the area. The nets, or webbing, and frames were not raised when they left the dock, it being difficult and dangerous to travel with the net frames and nets raised when not actually skimming for shrimp. Prior to beginning their actual fishing, the two fishermen would raise the frames and webbing using a system of pulleys located on the boat. On the day in question, the webbing was still in the "picking box", the box used to sort the shrimp and any fish caught with them. The "scrapers" used in the sorting process were underneath the nets. Though Tracy had an ice machine, they did not bring any ice with them, as they planned to return the same afternoon, after filling the order. This was a routine practice.

The two men left from Dulac, went south through the Houma Navigational Canal and headed for Pelican Lake, where they'd had success in the past, with the intent of going further south if the Lake was too rough, where the barrier islands would provide protection from the wind. On their way out, they passed a water patrol vessel being operated by Lt. Danny Theriot, whom both of them knew on sight. Tracy waved to the lieutenant. [R. 658, L. 5-8.]

Once they got to Pelican Lake, they found it to be too rough for fishing and proceeded further south as planned. At that point, fate and circumstances embarked the defendants on a course of events which led to their arrest and conviction, in a truly classic case of ignorance and "being at the wrong place at the wrong time."

As they proceeded south, Tracy noticed a floating bag in their wake. It looked suspicious, and they turned the boat around to take a closer look. [R. 658, 659; L. 28-32, 1-6.] They discovered a large black garbage bag. The men had seen garbage bags, thrown off by offshore vessels, before, but this one looked different. It sat low in the water and did not have much buoyancy. [R. 659, L. 21-28.]

Shawn was driving the boat. Tracy picked up the bag. It seemed intact. There were no holes in it and it was not leaking water. It was tied in a knot at the top. [R. 660, L. 3-16.]. They feared that something bad was in the bag, perhaps drugs or even body parts. They agreed to take it back to the dock and show it to Mr. Jimmy Trosclair, the dock operator and an older man whom they trusted as a father figure, to assist them in getting the bag to law enforcement officials. The testimony would clearly show, and the trial court would conclude, that Shawn Verdin never touched the bag and Tracy was the only one who handled it. More importantly, neither ever opened the bag to see what it contained.

The men were guided in their thinking that the proper thing to do was take the bag into law enforcement by a childhood experience. Both were well-acquainted with an incident in which neighbors and friends, Ms. Lolita Neil, Mr. Shelby Bordelon and Mrs. Janice Bordelon, had found a large amount of cocaine at Last Island while fishing, worth approximately three million dollars. After opening the container and seeing that it was drugs, and after keeping it in their possession over the weekend, these people turned the drugs over to law enforcement and were heralded as heroes in the local press. The young men had it impressed on them that turning in the drugs was the right and proper thing to do.

Having picked up the bag, the two men dropped their fishing plans and headed back for the dock. On their way back, their paths would again cross with that of Lt. Theriot and also with Off. Richard "Dickie" Liner of the Sheriffs water patrol, and with dire consequences.

At 1:30 p.m. that day, Off. Liner received a telephone call at home from his supervisor, Major Odom, to go pick up his boat and take it out to search for a boat possibly carrying some drugs. He went home, got his boat and launched at a local dock, "T-Irv's". He proceeded to the area of Bayou Grand Caillou and the Navigational Canal, also known as the "Ship Channel", where he remained awaiting further orders. [R. 171, L. 1-4.] After approximately two hours, he received a call from his partner, Lt. Theriot, telling him to meet Theriot

at the intersection of Bayou Plott with Grand Caillou Bayou. The two officers rendezvoused and remained at the rendezvous point until approximately 4:00 p.m. when they saw the defendants' white Carolina skiff go by.

The officers had earlier received a call to be on the look-out for a white Carolina skiff with three subjects onboard. [FR. 176, L. 26-27.] Though only two occupants were visible on the defendants skiff (because that's all there was), Liner took off after the vessel, with Theriot right behind him. At this time, the defendants were traveling at what Liner described as "very high speed", but not at full speed. [R. 178, L. 5-9.] The defendants testified that they were traveling about forty miles per hour, about three-quarters of throttle speed for the boat. Liner stated that he pursued them at a speed of forty to forty-five miles per hour. At some point, the officer turned on his blue lights, but he never activated the siren. He also saw one of the two individuals turn and look at him at some point; Shawn admitted that he did turn around and see the pursuing boats once, but their blue lights were not on at the time. Tracy denied ever turning around at all. In any event, there is no dispute that, soon after the pursuit began, the defendants became fearful and were aware they were being pursued. The two were afraid that if caught with the bag in the boat and if it did contain drugs, the officers would draw a wrong conclusion and they would find themselves in trouble. Their fear was well-justified. Off. Liner testified at trial that, if he had found the bag in their boat, they would have been arrested on the spot, no questions asked and without concern for any possible explanations. [R. 216, 217; L. 26-32, 1-6.]

The defendants made a right turn into a small bay, and, as they did, Tracy dropped the bag overboard. Off. Liner saw the splash, but did not stop to look for its cause, continuing on to follow the defendants into the bay. While the officer described the bay as a "dead-end" with no way out but the way they came in, other evidence at trial showed this was not the case, and the defendants could have continued to evade the officers if they chose to. However, the bag gone, they came to a stop and waited for the officers. Liner was the first to catch up with them. Theriot came up. Soon after. Liner boarded the boat and noted the absence of ice and the webbing in the box. He did not lift the webbing up to check for contraband, so he did not see the scrapers located underneath. Off. Liner acknowledged on cross-examination that neither appeared to be under the influence of drugs, that he saw no large amounts of cash, and that there was no means of communication, such as a CB radio or cell phone on board. Nor did he observe any firearms on board.

The search conducted by the officers revealed nothing but the failure of the defendants to have the boat registration papers on board. They reprimanded the defendants, but did not issue a citation.

According to the defendants, the officers told them to go straight home and get the papers, so after the officers had gotten off their boat and they were allowed to leave, they headed back for home. However, Lt. Theriot, whose larger boat had gotten stuck in the shallow water, indicated that he instructed the defendants to leave the shallow bay and wait for the officers in deeper water, though he acknowledged that the defendants left calmly. The trial court rejected Lt. Theriot's contention, finding as a matter of fact that" I don't think the police, frankly, were that concerned about detaining them at that point." [Oral Reasons for Judgment, R. 760, L. 8-10.] "I think they were allowed to leave". IR. 763; L. 25-29]

However, the defendants, as they later admitted, did tell one lie during this encounter. Still fearful that the officers would misconstrue their having possession of the bag and its dubious contents, they told the officers that they had not thrown anything overboard. Fearful of the consequences, they denied any knowledge of the bag. Both of the defendants testified at trial and both acknowledged the truth: that they had taken possession of the bag with the intent to bring it to Mr. Trosclair and alert law enforcement, if necessary. They became scared and dumped the bag when the water patrol officers pursued them, then lied in an effort to cover up their knowledge of the bag.

When the officers left the scene, they passed by the point where the splash had taken place. Off. Liner found the garbage bag, still tied, and put it on his boat. [R. 245; L. 9-1 1.] Once opened, it could he seen that the package was "double-bagged", one black bag placed inside the other. Once the contents were removed from the garbage bags, the officers had to cut through several layers of packaging in order to determine what was inside. The first layer was a white plastic burlap-type material. Underneath that was a type of yellow rubber coating called "heat shrink" or "shrink. wrap". Only after the rubber coating was cut did the yellow bricks inside become visible. [R. 245; L. 16-21; 1Z. 247, L. 1-6.]

There were fifteen bricks in the bag. Although only five were tested, the trial court concluded that all of them were cocaine; the court reasonably concluded that the bag contained about seventy-five pounds of cocaine in all. [Reasons for Judgment, R. 764, 765, L. 21 et seq.] No effort was made at any time to see if the defendants' fingerprints were on the outer black garbage bag, or, more importantly, on any of the internal packaging.

The following night, on June 10th and during the early morning hours of .June 11, the defendants were taken in for questioning. Agent Calvin Rodrigue, a member of the Terrebonne Parish Sheriffs Office Narcotics division, went 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, GCMA reserves 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 õgood time,ö 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.

Traceyøs 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 Traceyøs license by asking him to õvoluntarily surrenderö 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 Trahanøs request, a GCMA representative accompanied him to a meeting with the Investigations Office in Morgan City. At that meeting, the Investigating Officers sought outright revocation of Captain Traceyøs 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 õscratchö the Coast Guard moved to place the matter before an Administrative Law Judge for settlement.

The Coast Guardøs 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 õon appealö to the Commandant since the summer of 2005 and had not been decided. *[(1) Coast Guard Case #2238983; S&R 05-0008]*

õIn 2004, 46 USC 7704(b) was amended by inserting õ**suspended or**ö after õshall be.ö The legal effect of this amendment was to remove the statutory requirement of mandatory revocation for proved drug convictions. The õpracticalö 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.ö

[GCMA 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 õUnder current law, the merchant marinerøs 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.ö *[(1) Footnote 4]*

õIn 1994, the Coast Guard began using õSettlement Agreementsö 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 marinerøs credentials in dangerous drug law conviction cases. Use of that discretion will allow the use of õSettlement Agreementsö 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.ö

õ46 USC 7701(d) states, õThe Secretary may prescribe regulations to carry out this chapter.ö 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).ö

õThe 2004 change to 46 USC 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, õAs 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).ö *[(1) Judge Jeffie J. Massey]*

õNowhere in the change to 46 USC 7704(b) did Congress require the Commandant to change his regulations. Ergo, 46 USC 7701(d) remains controlling, the Commandant õí may prescribe regulations to carry out this chapter.ö (Emphasis added.) 46 CFR 5.59(b) remains the law and revocation remains mandatory.ö

[GCMA Comment: The Coast Guard position is 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 April 19, 2007. Portions of that letter follow:

õí 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 õcrimeö 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.

õI 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 õjusticeö 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 Guardí .ö

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 ó 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 õguilty knowledgeö 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 appealí

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.

[GCMA Comment: Chief Administrative Law Judge Joseph Ingolia never answered the letter. 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.]

DISTURBING NEWS CLOUDS THE ENTIRE USCG ADMINISTRATIVE LAW SYSTEM

Can Or Should The Coast Guard Continue To Regulate Our Merchant Mariners?

*[**Source**: By Richard A. Block in GCMA Newsletter #48.]*

Recently, we received a copy of two lawsuits filed in the Federal District Court for the Eastern District of Louisiana on March 30 and April 4, 2007. In reading any lawsuit, you always must presume the Defendants are innocent until proven guilty ó and understand that justice, if it really exists, will come as a result of a trial that lies at some date far in the future. Of course, that is the same assumption that our mariners should be able to expect in their treatment by any agency of our government including the Coast Guard.

Surprisingly, I learned of the existence of this lawsuit from one of the defendants in mid-April in a meeting at the Marine Safety Unit in Morgan City while in pursuit of õjusticeö accompanied by one of our mariners[(1)] at that office. That visit piqued my interest, and I gained further insight about the underlying case in the following weeks. The defendants in the lawsuits include the Commandant and the Vice Commandant of the Coast Guard in their official capacities as well as the Chief Administrative Law Judge[(2)] individually and in his official capacity along with the Chief of the Administrative Law Judge Docketing Center in Baltimore and four other lesser Coast Guard officials. *[(1) Captain Tracey Trahan. (2) Chief ALJ Joseph Ingolia.]*

Just Another National Scandal?

As discussed in recent GCMA Newsletters, I believe the Coast Guard may have a new and extremely serious problem on its hands that demonstrates how far this agency has drifted off course. It comes as a terrible disappointment to those who believe the Coast Guard as a public agency, always tries to be even-handed and above board in its dealings with the public and with the merchant mariners Congress entrusts it to superintend. But this disappointment is tempered by the realism of the condescending treatment our mariners in this and predecessor organizations have received at the hands of Coast Guard officials for many years. However, this scandal could directly affect many of our merchant mariners and others who may have been driven out of the merchant marine.

The Coast Guardøs other and recently exposed shortcomings recently aired on a CBS õ60-Minutesö television broadcast on Sunday May 20, 2007 include:

- The new National Security Cutter is $250,000,000 wildly over budget and its entire õDeepwaterö Program in tatters and in complete disarray. This did not happen overnight!
- The failed 110-foot patrol boat lengthening to 123 feet scheme that turned into an engineering fiasco wasted another $64,000,000 and resulted in the scrapping of eight of the old but already-lengthened patrol boats.
- Another $38,000,000 was wasted in an attempt to develop a õfast response cutterö using unproven composite hull materials.
- The failed merchant marine personnel programs at the National Maritime Center and the 17 Regional Exam Centers that succeeded in driving thousands of mariners out of the industry that we previously pointed out in GCMA Report R-428-D, Report to the 110th Congress: Substandard Coast Guard Merchant Marine Personnel Services on our website.
- The problems in õInvestigationsö including the problems uncovered and probed in the attached lawsuit. (Refer to GCMA Reports from the entire #R-429 series also on our website.)

Focus on the Problem

To save printing 126 pages from the two lawsuits, which are expected to grow both in number and in size as additional filings take place, I focused on õitem 57ö in one of the lawsuits and this sentence that described a meeting held in Baltimore between Chief Administrative Law Judge Joseph Ingolia and his subordinate, Judge Jeffie J. Massey:

õAt that meeting, defendant Ingolia informed Judge Massey of his **unwritten policy** that USCG ALJs are to **always** rule for the USCG in S&R (Suspension and Revocation) cases; and, that if there is no possible way for to rule for the Coast Guard, then and only then can a USCG ALJ rule against the USCG in an in an S&R case; but in accordance with Defendant Ingoliaøs aforesaid unwritten policy a ruling unfavorable to the USCG

must be made in an **apologetic manner**.ö *[Emphasis is ours.]*

[GCMA Comment: An unwritten policy as alleged in two and possibly more pending lawsuits could adversely affect the outcome of any "suspension and revocation" case if any Administrative Law Judge feels obligated to follow this policy alleged to be prescribed by Chief ALJ Ingolia.]

Where there is smoke, there also may be fire. Although all of the facts are not in yet, this fire has generated more than smoke. It already has left a pervasive odor that reaches from Baltimore to Washington and even to far-off Morgan City, Louisiana, that is spreading.

Must the Coast Guard Win at Any Cost?

The õcostö in this case is borne by any mariner who is unfortunate enough to have a case that could involve suspension or revocation of his/her license or merchant mariner document (MMD) ó which will interrupt or end his or her career in the merchant marine ó including all õsettlement agreementsö that must be approved by an Administrative Law Judge. I believe this **unwritten policy** to õwin at any costö may have enhanced the Coast Guardøs õwinö record against not only against our lower-level mariners but against **all** mariners.

There is no telling how long this õ**unwritten policy**ö has been in effect and how long it has been carried out by the Chief ALJøs docile subordinate judges, but Chief ALJ Ingolia has been on the bench for the past decade! Unfortunately, for the Coast Guard and fortunately for our mariners, Judge Massey proved she was unwilling to play the game and courageously came forward and exposed the players.

Regrettably, corruption at this level apparently was in place in the Coast Guard even before Chief ALJ Ingolia came to office. Former Chief ALJ Chatterton was asked to resign for travel fund abuses revealed by former Administrative Law Judge Rosemary Denson. Judge Denson spoke with me at length and provided documentation of that incident when I was editor of the National Association of Maritime Educatorøs Newsletter. Her story appeared in NAME Newsletter #57, June 1996. It was ignored, and Judge Denson was driven from the bench ten years ago by the õold boyö network. Her story also appears on the internet in GCMA Report #R-395 ó again ignored by the Coast Guard although in plain public view.

"Power tends to corrupt ; absolute power corrupts absolutely." –(Lord Acton, 1887)

Unfortunately, granting the Coast Guard÷s Administrative Law System such absolute power over the lives of our mariners appears to have led to absolute corruption within the system. We can only ask these pertinent questions:

- **What action will the Commandant take, especially since he is a party to the lawsuit?**
- **How soon will he take action?**
- **How many cases that were previously decided will have to be re-opened?**
- **How many mariners' careers were destroyed when they were denied "due process."**
- **Can the Coast Guard remedy the situation alone, and if not, who then?**
- **Should Congress still allow the Coast Guard to superintend the U.S. Merchant Marine or should this task be given to another agency?**
- **How deeply is Coast Guard "management" involved in secret meetings and ex parte communications exposed by this lawsuit?**

Answering the Questions

If only some of the facts in the lawsuits are true, it means that Coast Guard management has become fouled with self-aggrandizing corruption ó and for some time! It means that every proceeding before an Administrative Law Judge for at least the last dozen years must be thrown out or have its transcript reviewed and be thoroughly reinvestigated by an independent third party. This can also extend to õsettlement agreementsö wrung from indigent mariners who could not afford a maritime attorney to protect their license, MMD, and ultimately their means of making a living. Does this level of corruption disqualify the Coast Guard from its role in õí superintendence over the merchant marine of the United States and of merchant marine personnelí ö as required by 46 U.S. Code 2103?

We can only hope that Congress will promptly attend to necessary changes because we seriously doubt that it would be appropriate for the Coast Guard to remedy this situation without immediately seeking Congressional guidance.

What is clear is that this situation must not be allowed to continue without an immediate official investigation! On May 31, **2005** Administrative Law Judge Jeffie J. Massey asked for an õindependent investigationö of the entire affair.(1) I believe that request, although ignored by her superiors in the Coast Guard for two whole years, is long overdue, and should be provided with Congressional oversight. *[(1)On Elsik v. Ingolia et al., page 78 (exhibit 8)].*

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