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Asserting our right "...to petition the Government for redress of grievances."

Amendment 1, U.S. Constitution, Dec. 15, 1791

RECONSIDER THE USE OF "ASSESSMENT PERIODS" IN MERCHANT MARINER CREDENTIALING

[**Publication History:** Originally published as NMA Report #R-448, Nov. 12, 2007 "Assessment Periods" Harm Retention Of Trained & Experienced Mariners: A Report to Congress On Lower-Level Merchant Marine Personnel"]

[**NMA Policy Statement:** Our Association believes that the continued use of "Assessment Periods" as required in 46 CFR Tables 10.211(g) – Guidelines for Evaluating Applicants for Merchant Mariner Credentials Who Have Criminal Convictions and Table 10.201(h) is harmful to the retention of trained and experienced mariners.]

The Coast Guard Introduces Assessment Periods

Title 46 U.S. Code §7101(h) allows the Secretary of Homeland Security (i.e., the Coast Guard) to "review the criminal record of an individual who applies for a license or Certificate of Registry." On January 18, 1996, the Coast Guard promulgated 46 CFR §10.201(h), that delegated the task of evaluating applicants with criminal records down to the level of the local Regional Exam Center (REC).

Since that time, many changes in Coast Guard "licensing" took place. The term "license" is now replaced by the term "credential" which is a combination of features taken from the old paper both license for merchant marine officers and the plastic wallet-size merchant mariner document (i.e., MMD or "z-card"). Mariner's credentials identify them with "officer" or "rating" "endorsements" printed in their credential. The "credential" itself is now a pocket-sized passport-style booklet that replaced both the old paper license and the plastic z-card.

The Coast Guard's Authority to Review a Mariner's Criminal Record

46 CFR §10.211 Criminal Record Review [*Emphasis is ours!*]

- (a) The Coast Guard may conduct a criminal record review to determine the safety and suitability of an applicant for an MMC and any endorsements. An applicant conducting simultaneous MMC transactions will undergo a single criminal record review. At the time of application, each applicant must provide written disclosure of all convictions not previously disclosed to the Coast Guard on an application.
- (b) A criminal record review is not required for applicants seeking a duplicate MMC under §10.229.
- (c) *Fingerprints.* Beginning April 15, 2009, the Transportation Security Administration (TSA) will provide to the Coast Guard the applicant's fingerprints submitted by the applicant with his or her TWIC application and, if applicable, the applicant's FBI number and criminal record generated in the TWIC review process. This information, or the fingerprints taken by the Coast Guard at an REC, will be used by the Coast Guard to determine whether the applicant has a record of any criminal convictions.
- (d) When a criminal record review leads the Coast Guard to determine that an applicant is not a safe and suitable person or cannot be entrusted with the duties and responsibilities of the MMC or endorsement applied for, the application may be disapproved.
- (e) If an application is disapproved, the applicant will be notified in writing of that fact, the reason or reasons for disapproval, and advised that the appeal procedures in subpart 1.03 of part 1 of this chapter apply. No examination will be given pending decision on appeal.
- (f) No person who has been convicted of a violation of the dangerous drug laws of the United States, the District of Columbia, any State, territory, or possession of the United States, or a foreign country, by any military or civilian

court, is eligible for an MMC, except as provided elsewhere in this section. No person who has ever been the user of, or addicted to the use of a dangerous drug, or has ever been convicted of an offense described in section 205 of the National Driver Register Act of 1982, as amended (49 U.S.Code §30304) because of addiction to or abuse of alcohol is eligible for an MMC, unless he or she furnishes satisfactory evidence of suitability for service in the merchant marine as provided in paragraph (l) of this section. A conviction for a drug offense more than 10 years before the date of application will not alone be grounds for denial.

(g) The Coast Guard will use table 10.211(g) to evaluate applicants who have criminal convictions. The table lists major categories of criminal activity and ***is not to be construed as an all-inclusive list***. If an applicant is ***convicted*** of an offense that does not appear on the list, the Coast Guard will establish an appropriate assessment period using the list as a guide. The assessment period commences when an applicant is no longer incarcerated. ***The applicant must establish proof of the time incarcerated and periods of probation and parole to the satisfaction of the Coast Guard***. The assessment period may include supervised or unsupervised probation or parole.

(h) When an applicant has convictions for more than one offense, the minimum assessment period will be the longest minimum in table 10.211(g) and table 10.213(c) in §10.213 based upon the applicant's convictions; the maximum assessment period will be the longest shown in table 10.211(g) and table 10.213(c) of §10.213 based upon the applicant's convictions.

(i) If a person with a criminal conviction applies before the minimum assessment period shown in table 10.211(g) or established by the Coast Guard under paragraph (g) of this section has elapsed, then the applicant must provide, as part of the application package, evidence of suitability for service in the merchant marine. Factors that are evidence of suitability for service in the merchant marine are listed in paragraph (l) of this section. The Coast Guard will consider the applicant's evidence submitted with the application and may issue the MMC and/or endorsement in less than the listed minimum assessment period if the Coast Guard is satisfied that the applicant is suitable to hold the MMC and/or endorsement for which he or she has applied. ***If an application filed before the minimum assessment period has elapsed does not include evidence of suitability for service in the merchant marine, then the application will be considered incomplete and will not be processed by the Coast Guard***.

(j) If a person with a criminal conviction submits their MMC application during the time between the minimum and maximum assessment periods shown in table 10.211(g) or established by the Coast Guard under paragraph (g) of this section, then the Coast Guard will consider the conviction and, unless there are offsetting factors, will grant the applicant the MMC and/or endorsement for which he or she has applied. Offsetting factors include such factors as multiple convictions, failure to comply with court orders (e.g., child support orders), previous failures at rehabilitation or reform, inability to maintain steady employment, or any connection between the crime and the safe operation of a vessel. If the Coast Guard considers the applicant unsuitable for service in the merchant marine at the time of application, the Coast Guard may disapprove the application.

(k) If a person with a criminal conviction submits their MMC application after the maximum assessment period shown in table 10.211(g) or established by the Coast Guard under paragraph (g) of this section has elapsed, then the Coast Guard will grant the applicant the MMC or endorsement for which he or she has applied unless the Coast Guard considers the applicant still unsuitable for service in the merchant marine. If the Coast Guard disapproves an applicant with a conviction older than the maximum assessment period listed in table 10.211(g), the Coast Guard will notify the applicant in writing of the reason(s) for the disapproval. The Coast Guard will also inform the applicant, in writing, that the reconsideration and ***appeal procedures contained in subpart 1.03 of this chapter*** apply.

(l) If an applicant has one or more alcohol or dangerous drug related criminal or NDR-listed convictions, if the applicant has ever been the user of, or addicted to the use of, a dangerous drug, or if the applicant applies before the minimum assessment period has elapsed for his or her conviction, the Coast Guard may consider the following factors, as applicable, in assessing the applicant's suitability to hold an MMC. This list is intended as a guide for the Coast Guard. ***The Coast Guard may consider other factors appropriate to a particular applicant***, such as:

- (1) Proof of completion of an accredited alcohol or drug abuse rehabilitation program;
- (2) Active membership in rehabilitation or counseling group, such as Alcoholics Anonymous or Narcotics Anonymous;
- (3) Character references from persons who can attest to the applicant's sobriety, reliability, and suitability for employment in the merchant marine including parole or probation officers;
- (4) Steady employment; and
- (5) Successful completion of all conditions of parole or probation.

Table 10.211(g)—Guidelines for Evaluating Applicants for MMCs Who Have Criminal Convictions

Crime ¹	Assessment periods	
	Minimum	Maximum
Assessment Periods for Officer and Rating Endorsements		
Crimes Against Persons:		
Homicide (intentional)	7 years	20 years.
Homicide (unintentional)	5 years	10 years.
Assault (aggravated)	5 years	10 years.
Assault (simple)	1 year	5 years.
Sexual Assault (rape, child molestation)	5 years	10 years.
Robbery	5 years	10 years.
Other crimes against persons ²		
Vehicular Crimes		
Conviction involving fatality	1 year	5 years.
Reckless Driving	1 year	2 years.
Racing on the Highways	1 year	2 years.
Other vehicular crimes ²		
Crimes Against Public Safety		
Destruction of Property	5 years	10 years.
Other crimes against public safety ²		
Dangerous Drug Offenses^{3,4,5}		
Trafficking (sale, distribution, transfer)	5 years	10 years.
Dangerous drugs (Use or possession)	1 year	10 years.
Other dangerous drug convictions ⁶		
Assessment Periods for Officer Endorsements Only		
Criminal Violations of Environmental Laws		
Criminal violations of environmental laws involving improper handling of pollutants or hazardous materials	1 year	10 years.
Crimes Against Property		
Burglary	3 years	10 years.
Larceny (embezzlement)	3 years	5 years.
Other crimes against property ²		

Footnotes

¹Conviction of attempts, solicitations, aiding and abetting, accessory after the fact, and conspiracies to commit the criminal conduct listed in this table carry the same minimum and maximum assessment periods provided in the table.

²Other crimes will be reviewed by the Coast Guard to determine the minimum and maximum assessment periods depending on the nature of the crime.

³Applicable to original applications only. Any applicant who has ever been the user of, or addicted to the use of, a dangerous drug shall meet the requirements of paragraph (f) of this section. Note: Applicants for reissue of an MMC with a new expiration date including a renewal or additional endorsement(s), who have been convicted of a dangerous drug offense while holding a license, MMC, MMD, STCW endorsement or COR, may have their application withheld until appropriate action has been completed by the Coast Guard under the regulations which appear in 46 CFR part 5 governing the administrative actions against merchant mariner credentials.

⁴The Coast Guard may consider dangerous drug convictions more than 10 years old only if there has been another dangerous drug conviction within the past 10 years.

⁵Applicants must demonstrate rehabilitation under paragraph (l) of this section, including applicants with dangerous drug use convictions more than 10 years old.

⁶Other dangerous drug convictions will be reviewed by the Coast Guard on a case by case basis to determine the appropriate assessment period depending on the nature of the offense.

[USCG–2006–24371, 74 FR 11216, Mar. 16, 2009, as amended by USCG–2006–24371, 74 FR 39218, Aug. 6, 2009]

“Running the Gauntlet

Once the Coast Guard identifies a person with a criminal record, that person must run the gauntlet of inquisitorial procedures before the Coast Guard will consider issuing or renewing his credential. The new regulatory path incorporates a built-in minimum delay of one year, euphemistically called an “**Assessment Period**,” in which the Coast Guard withholds its services and delays processing the mariner’s application for a new license, license renewal, raise of grade or merchant mariner document. **It is this delay that our Association addresses in this paper.**

The introduction of “**Assessment Periods**” occurred in a Final Rule that appeared in the Federal Register at 60 FR 65478 on Dec. 19, 1995. The rulemaking resulted from the EXXON VALDEZ accident where the National Transportation Safety Board concluded “The Master’s judgment was impaired by alcohol during the critical period the vessel was transiting Valdez Arm.”⁽¹⁾ [⁽¹⁾NTSB, *Grounding of U.S. Tankship Exxon Valdez on Bligh Reef, Prince William Sound Near Valdez, Alaska March 24, 1989. NTSB/MAR-99/04, p.166, item 4.*]

The Coast Guard traditionally reviews a mariner’s criminal convictions when applying for a license. They also established drug and alcohol testing regulations to prevent substance in the merchant marine. We do not question those regulations. However, the Coast Guard incorporated the establishment of “**Assessment Periods**” that we consider ill advised and counter-productive. This rule randomly touches a significant number of merchant mariners. The typical mariner – even one who is making genuine progress in turning his/her life around and away from past abuses – is powerless to defend himself, even with the assistance of a lawyer, in light of this established rule.

[NMA Comment: In 2007, we asked Congress to re-examine the effect of “Assessment Periods” as provided in 46 CFR §10.201(h) that implement 46 U.S. Code §7101(h) to determine if these regulations are a fair and reasonable exercise of the authority Congress originally granted under the statute. We received no response.]

In considering the regulations and their application, we assert that the authority granted to the Coast Guard should be revised to better acknowledge and accept as sufficient punishments imposed by local and state courts of record coupled with rehabilitation programs and bona fide recommendations of parole officers and social workers who have a prolonged opportunity to “assess” a mariner to determine whether he is rehabilitated. We assert that evidence of punishment and rehabilitation presented by civilian agencies should be accepted at face value to allow a mariner to perform his/her duties without imposing the mandatory delay of an “**Assessment Period**.”

In making this recommendation, we believe that Coast Guard civilian and military personnel at the National Maritime Center in West Virginia, who now perform “evaluations” on all applications), rarely have a background in law enforcement and social work and seldom if ever have an opportunity for a face-to-face meeting to make a meaningful evaluation of the thousands of mariners they routinely process. The delay occasioned by an “**Assessment Period**” may also be coupled with other delays in routine processing of a typical application that contributed to markedly substandard service to the public addressed by the House Coast Guard and Maritime Transportation Subcommittee in July 2009.

“Assessment Period” is a Misnomer

As used in this regulation today, “**Assessment Period**” is a misnomer. While originally designed to keep the “bad guys” from obtaining credentials, this rule also prevents those mariners who make progress in turning their lives around from advancing in the merchant marine. While requiring follow-up reports may be worthy of consideration, **assessment periods” do not really “assess” anything. They only delay, deter and discourage mariners from returning to duty in the maritime industry.**

The Coast Guard does not have the trained and available personnel to do anything other than to delay. If a mariner persists in seeking a credential after he completes his “Assessment Period,” the Coast Guard will first check to determine whether the mariner has re-offended during that period. However, many licensed mariners, who find themselves out of work and are faced with reverting to an unlicensed status and reduced pay of a deckhand during an “Assessment Period” simply move out of the marine industry into another line of work. As a result, the employers in the marine industry lose their mariners’ training and skills. The cost and time consumed by training comes at a steadily increasing cost and aggravation to business owners and their customers. For example, training an unlicensed but experienced deckhand to advance to a mate/pilot position on a towing vessel was cited in Proceedings⁽¹⁾ as costing \$78,100 and taking as much as two years. [⁽¹⁾ Proceedings, Fall 2008, p.43.]

Assessment Periods as “Double Jeopardy”

The practical effect of imposing an “Assessment Period” in which the Coast Guard holds a mariner’s credential hostage is to punish a mariner a second time for the same offense. Incredibly, this punishment often occurs years after the original offense took place at the time when a mariner seeks to renew or upgrade his credential. This practice actively discourages, and in many cases, prevents a mariner with experience, skills, and an interest in the industry from returning to duty. This “Assessment Period” not only deprives the industry of human resources but, also places the Coast Guard’s administrative regulations on a pedestal above, beyond, and in addition to sentences handed out by civilian courts of record. Consequently, it is more than an arrogant boast that the Coast Guard, operating as a military service in the civilian sector can augment the sentence of a civilian court whenever it chooses to do so. While civilian authorities work to punish, deter, and rehabilitate offenders, the Coast Guard simply ignores these efforts and deals offending mariners a crippling financial blow that can deprive a mariner of a minimum of one year’s wages.

Enforcing an “Assessment Period” requires coordination between Investigating Officers in local Coast Guard Sector offices and the National Maritime Center in West Virginia. From our experience, the bureaucracy loses track of the individual mariner in drafting and evaluating complicated written evaluations and tries to reduce its judgment of social issues to a simple checklist. This simply does not work with our “limited tonnage” mariners who often do not communicate well in writing.

The Case of Mariner #21

Our Association encounters a disturbing number of “Assessment Period” cases. One outstanding case involved “Mariner #21,” age 43 whose full story appears in NMA Report #R-428-D and submitted to the House Coast Guard and Maritime Transportation Subcommittee in July 2009.

Although this mariner had a long criminal record, with the help of his fiancée and his church the mariner turned his life around. Nevertheless, he remains on parole and is closely supervised by a state Parole Officer. The Parole Officer supports Mariner #21s efforts to obtain the 100-ton license the Coast Guard previously approved him for and that still hopes to obtain. However, the Parole Officer has been just as frustrated by the Coast Guard’s inflexibility as the mariner who had to turn down several bona fide job offers. He must work as a deckhand until the end of his parole years from now.

In spite of the fact that the Coast Guard Regional Exam Center initially approved his application, the Coast Guard balked at licensing him because he was still on parole and imposed a lengthy “Assessment Period” on him. They rejected his formal appeal at the Regional Exam Center, at Coast Guard District Headquarters, and finally at the National Maritime Center through a seemingly endless appeal process. The appeal process, however, underwent a number of significant changes during this period although these changes did not help our mariner.

Mariner #21 is an outstanding example of a seaman, who grew up “on the bayou,” had years of practical small boat experience both before and after incarceration and is an example of a person who demonstrated to his state Parole Officer that he successfully turned his life around. He brought his case to the offices of Senator Mary Landrieu and Congressman Charlie Melancon but was unable to sway the Coast Guard’s determination to enforce the “Assessment Period” regulation upon him.

Unfortunately, appeals to individual Congressmen seldom are fruitful because the Coast Guard insists on inflexibly imposing this regulation. Yet, Representatives and Senators may be the only Federal officials that many of our mariners feel any connection with. Congressional staffers find it frustrating and time consuming to deal effectively with individual mariners who run afoul of detailed merchant marine personnel regulations interwoven with lengthy personal details of their constituents after the administrative appeals process fails. That appeals process in itself is cumbersome, ineffective, and penalizes mariners who are unable to compose a meaningful written appeal.⁽¹⁾ [⁽¹⁾Refer to NMA Report #R-436, Rev.3, The Coast Guard Appeals Process.]

“Assessment Periods” Affect Boat Owners and Operators

The Coast Guard “Assessment Period” policy in effect from 1996 effectively prevents boat owners (i.e., employers) from using mariners with marketable maritime skills from being employed as “officers” (even on small boats) because it delays and denies them access to the credentials they must have to operate legally. Remarkably, some of the small commercial vessels these “licenses” authorize service on have only one officer and perhaps one deckhand.

We assert that individual employers rather than the Coast Guard should have the freedom to exercise their own judgment as to whether they can entrust a licensed job applicant with operational control of their business investment. Yet the existing regulation gives this judgment call to the Coast Guard and takes it away from the boat

owner. In light of the Coast Guard's lack of knowledge of and involvement with small commercial vessel operations, we believe that an employer has a better understanding of the commercial mariners available for hire than does the Coast Guard at local, district, or national level. Many government employees who staff the National Maritime Center in West Virginia have no maritime background in small commercial vessel operation whatsoever. Furthermore, the boat owner rather than any Coast Guard official must deal with crew shortages that plague the marine industry and its shrinking pool of qualified mariners who will even consider taking a job afloat.

The “Assessment Period” Flies in the Face of a National Problem

The Coast Guard policy also ignores one national problem. In his State of the Union Address on Jan. 24, 2004, President George W. Bush stated:

“...Tonight I ask you to consider another group of Americans in need of help. This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. So tonight, I propose a four-year \$300 million prisoner re-entry initiative to expand job training and placement services...America is the land of second chance, and when the gates of prison open, the path ahead should lead to a better life.”

Within two days of his release from prison, our Mariner #21 was at work as a deckhand. However, the Coast Guard “Assessment Period” at first 10 years but later reduced to 5 years, will ensure that he remains a deckhand at low pay for that period although he has always been capable of running the boat. Waiting until age 48 to apply again for a license is not an attractive option for him or for his employer. Since this mariner is restrained from advancing to a position that more accurately reflects his skills and training.

The “Length” of an Assessment Period

46 CFR Table 10.201(h) cites the length of an “Assessment Period” as a minimum of one year extending to a maximum of twenty (20) years depending upon the type of offense. In the case of Mariner #21, a Coast Guard officer in Memphis that had never met him assigned his original 10-year “Assessment Period”. On appeal – an appeal our Association had to manage for him because of literacy considerations – it was reduced to five years.

In comparison, an individual who has a reportable accident on the water, if brought before an Administrative Law Judge, may have his license suspended for several months depending on the offense. Frequently, a significant portion of the time is put on probation in return for good behavior.

According to 46 CFR Table 5.569, Selection of an Appropriate Order, only drug convictions draw penalties of over a year. However, an evaluator at the National Maritime Center noting even a garden-type criminal violation can assign an “Assessment Period” that delays issuing a mariner's credential for a minimum of one year

The Cost of an “Assessment Period” to a Limited Tonnage Credentialed Mariner

Let's consider a “typical” licensed limited-tonnage mariner who operates an inland towing vessel operating on the Gulf Intracoastal Waterway. Although gross wages vary, let's consider this officer makes \$500 per day (high scale), \$400 per day (medium scale) or \$300 per day (low scale). Considering existing personnel shortages, this officer works two weeks (or months) on and one week (or month) off and accumulates 240 working days per year. Compare this to a “deckhand” on who may earn \$150 per day (high scale).

Assume that this “typical” licensed officer receives a minimum 1 year “Assessment Period” and must serve in an unlicensed capacity as a deckhand for a year. He will accumulate these losses for each of the three pay grades:

- \$500 – \$150 (as deckhand) x 240 days = Annual \$84,000 loss
- \$400 – \$150 (as deckhand) x 240 days = Annual \$60,000 loss
- \$300 – \$150 (as deckhand) x 240 days = Annual \$22,500 loss

Aside from the financial loss, there also may be the humiliation of serving as a deckhand on a vessel you once served as the master of. The financial losses affect not only the individual involved but also other members of his family.

Mariner #71

Mariner #71, age 50, recently applied for the fourth issue of a Master of Towing Vessels license. He was involved in a “scrape” with local police where he pointed an unloaded pistol at a man who assaulted him and verbally threatened to stab him. He was arrested, made bail, and his case went to city court where he paid a \$200 fine. The wording on his court documents made this statement: “The Court hereby dismisses the prosecution thereof, as provided by law, the dismissal hereof shall have the same effect as an acquittal.” Nevertheless, the Coast Guard assigned him a 5-year “Assessment Period.” This experienced towing vessel officer, who is seriously

considering retirement, faces a total financial loss over five years of (\$84,000 x 5 =) \$420,000 if he walks away from the industry although he temporarily accepted work as a deckhand while appealing the decision.

Mariner #72

Mariner #72, Age 40, is a fourth-generation Gulf of Mexico tugboat Captain with a 1,600 ton license that he recently renewed. He reported that he was stopped by a Sheriff’s deputy after having too much to drink at a Christmas party. Although he spoke with the District Attorney, he found that the DWI arrest went on his driving record in the National Driver’s Register.

There is no requirement in the regulations that requires a mariner to report a DWI conviction to the Coast Guard. Consequently, this meant that this DWI offense would return to haunt him when he applied to renew his Coast Guard license approximately four years later. Consequently, the effect of this conviction would hang over his head like the sword of Damocles until his next license renewal. At that time, the Coast Guard would “evaluate” his application and might or might not assign a minimum “Assessment Period” of one year.

Having the possibility of a minimum one year “Assessment Period” interrupting your career can be a very stressful experience, and postponing the struggle for four years only aggravates that stress. Consequently, Mariner #72 enrolled in a one-month on-site rehabilitation program offered by his union in hopes that he could offer it to the Coast Guard four years later along with a clean record as proof of cure. However, there is no guarantee that any such program would be acceptable to whoever “evaluates” his license renewal application at the time.

Background of the Assessment Period

On March 13, 1995 (60 FR 13570+) the Coast Guard proposed regulations to implement the Oil Pollution Act of 1990 that would permit the Agency to review information from the **National Drivers Register (NDR)** on an applicant for a merchant mariner credential prior to issuing the credential. In addition, the rulemaking proposed regulations that permitted criminal record checks (see 46 CFR §10.211, above) of any individual applying for a new license, raise the grade, or renewal of a license, or an endorsement with a new expiration date.

Table 10.201(i)—Guidelines for Evaluating Applicants for Licenses and Certificates of Registry Who Have NDR Motor Vehicle Convictions Involving Dangerous Drugs or Alcohol¹

No. of convictions	Date of conviction	Assessment period
1	Less than 1 year	1 year from date of conviction.
1	More than 1, less than 3 years	Application will be processed, unless suspension or revocation ² is still in effect. Applicant will be advised that additional conviction(s) may jeopardize merchant mariner credentials.
1	More than 3 years old	Not necessary unless suspension or revocation is still in effect.
2 or more	Any less than 3 years old	1 year since last conviction and at least 3 years from 2nd most recent conviction, unless suspension or revocation is still in effect.
2 or more	All more than 3 years old	Application will be processed unless suspension or revocation is still in effect.

¹Any applicant who has ever been the user of, or addicted to the use of, a dangerous drug shall meet the requirements of paragraph (b) of this section.

²Suspension or revocation, when referred to in table 10.201(i), means a State suspension or revocation of a motor vehicle operator's license.

The rulemaking proposed to provide the Coast Guard with an opportunity to identify an applicant who was convicted of certain motor vehicle offenses and/or convicted of certain other serious crimes – indeed, a very broad and net. This was a period in which the Coast Guard, as part of the Department of Transportation, enforced sweeping new regulations against substance abuse in 46 CFR Part 16 and 49 CFR Part 40 and alcohol abuse in 33 CFR Part 95.

The preamble to the Notice of Proposed Rulemaking stated in part: “Although an individual’s motor vehicle record is not directly related to his or her maritime career, a record of alcohol or drug-related, or other motor vehicle offenses...(violations) indicate that the individual may have a disregard for his or her own safety or the safety of others and therefore may not be suitable for marine employment.”

The idea of an “Assessment Period” first appeared in the proposed rule. In it, this period would commence

when an applicant with a conviction was no longer incarcerated and is no longer under supervised parole or probation (which could extend for months or years after conviction). If a mariner has a completed credential application, he would be required to complete an “Assessment Period” whose duration was spelled out in the proposed regulations before the Coast Guard would act on that application.

The Coast Guard cited one purpose of the proposed “Assessment Period” was for a mariner to “demonstrate that he/she does not present a safety risk to fellow crewmembers and passengers while at sea.” But, demonstrate this to whom? The mariner is seldom if ever in contact with anyone in a Coast Guard office to demonstrate anything.

From a passive point of view, just staying out of trouble for a minimum period of no less than one year would be the only “proof” acceptable to the Coast Guard and then only when its investigations office and/or the National Maritime Center is ready to consider it as part of a formal application – paid for in advance. The “Assessment Period,” according to the preamble, was an “estimate(s) of the time required to permit the Officer in Charge Marine Inspection to determine that, despite the criminal conviction, the applicant may now be entrusted with the duties and responsibilities of a merchant mariner.” This leisurely time frame seems to ignore the mariner’s need to earn a living to support himself and his family for periods ranging upwards from a minimum of one year.

The preamble continued: “In addition, a merchant mariner who holds a Coast Guard issued credential is responsible for *knowing and following a large body of maritime law*,⁽¹⁾ much of it related to safety, health, or environmental protection. Before issuing a credential, the Coast Guard must be satisfied that an applicant will obey these laws and regulations without direct and immediate oversight by a law enforcement agency.” [⁽¹⁾*We openly question the number of classroom hours devoted to “maritime law” in courses required to obtain a “limited tonnage” officer’s credential.*]

A mariner on parole or probation has a state law enforcement agency with direct and immediate oversight of his conduct whether he wants it or not. This safeguard is already provided, and the Coast Guard does not have to be overly concerned about it. In addition, if a licensed mariner is responsible for knowing “a large body of maritime law” and regulation, he has already passed a written professional examination that reflects the degree that Coast Guard officials determine is sufficient. If a mariner breaks the law and is apprehended by any Agency, he knows he will be punished.

The preamble continues: “Recidivism among those with criminal convictions is a legitimate Coast Guard concern. The assessment periods provide a basis for excluding from the merchant marine those individuals who may have recidivist tendencies and a basis for concluding that these tendencies do not exist.”

Recidivism, or the return to criminal habits, is a concern not only of the Coast Guard but of other law enforcement agencies as well. Instead of leaving a mariner to sit idle and jobless on the beach and get into trouble during an assessment period that may include either probation or parole, we assert that returning to work may well provide the best alternative to recidivism and should be allowed in a spirit of cooperation between civilian law enforcement authorities and the Coast Guard without being interrupted by a mandatory “Assessment Period” as provided by the current regulations. There are already significant delays built into the credentialing process without adding an extra burden of an “Assessment Period” to butt in where its interests as a licensing agency are only secondary.

The Final Rule and Public Comments on “Assessment Periods”

The final rule entered into force on January 18, 1996 at the conclusion of the comment period. Since most of the rule dealt with utilizing information from the National Drivers Register, we concentrate only on the relatively few (i.e., five) public comments received on the section dealing with “Assessment Periods.”⁽¹⁾ [⁽¹⁾*Refer to 60 FR 65481, Dec. 19, 1995.*]

“Five comments addressed the minimum and maximum assessment periods for which the OCMI will consider a conviction in the evaluation of an applicant for merchant mariner’s credentials.”

“One comment expressed that the assessment periods appeared to be arbitrary. The U.S. Coast Guard has reviewed three reports from the U.S. Department of Justice, Bureau of Justice Statistics (BJS). These reports are entitled, “Recidivism of Prisoners released from 1983,” “Recidivism of Felons on Probation,” and “Recidivism of Young Parolees.” The reports revealed high rates of re-arrest for released prisoners, felons on probation, and young parolees. Based on a sample of State prisoners released in 1983, 62.5 percent were rearrested for a felony or serious misdemeanor within 3 years. Using a sample of felons sentenced to probation in 1986, a report found that 62 percent of the probationers either had a disciplinary hearing for violating a condition of their probation or were arrested for another felony within three years. Another BJS study, based on a sample of young parolees between the ages of 17 and 22, found that 69 percent of young parolees were re-arrested for a serious crime within 6 years of their release from prison. One of the reports found that of the prisoners in the study, those with a prior arrest for a violent offense had a greater likelihood of re-arrest than other released prisoners. Therefore, the categories of

violent crimes in Tables 10.201(h) ... have longer assessment periods.”

[NMA Rebuttal: While these three reports paint a dismal picture of recidivism on the national level, they are a quarter-century old and never applied specifically to the marine industry. Considering the current crew shortages and the unattractiveness of life at sea to most individuals, the marine industry does offer employment opportunities at decent wages that present a powerful alternative to idleness, getting into trouble, and becoming a burden to the State. We ask that potential employers, rather than the Coast Guard, be able to pick and choose likely candidates to fill these jobs without having to deal with delays caused by the imposition of an arbitrary “Assessment Period.”]

“The Coast Guard determined that the assessment periods, as published [in 46 CFR §10.211(h) above] are a sufficient guideline for the OCMI to consider the convictions of applicants. The assessment periods take into account both recidivism of the categories of crimes and the consequences of their occurrences.”

“Several comments suggested reducing the length of the assessment periods and including supervised parole or probation as part of the assessment periods. The Coast Guard established the assessment periods for the OCMI when evaluating an applicant with criminal convictions. The assessment periods do not prevent an individual from applying before the minimum assessment period has elapsed or between minimum and maximum assessment periods.”

[NMA Rebuttal: What this comment does not make clear is that the Coast Guard will simply “sit on” a mariner’s application until the expiration of the “Assessment Period.” Furthermore, “evaluation” for a credential is no longer in the hands of a local Officer in Charge, Marine Inspection (OCMI). It has been moved to the National Maritime Center in West Virginia far from any local port and closed to mariners who would make their complaint in person. Many of our mariners with limited writing skills can only present their arguments in writing or by telephone.]

“A person who applies before the minimum time period has elapsed must provide the OCMI with evidence of suitability for maritime employment. This final rule provides a list of factors in §10.201(j)for the OCMI to use as a guide in considering an applicant before the minimum assessment period has elapsed.”

“The applicant may also apply for merchant mariner’s credentials between the minimum and maximum assessment periods. During this period, the Coast Guard will issue a ...(credential)... to the applicant unless there are offsetting factors. The type of offsetting factors are listed in §10.201(h)(5)...” [above]

“After a further review, the Coast Guard determined that the OCMI would benefit from examining periods of supervised probation and parole as part of the assessment period. Periods of supervised probation and parole, like periods of unsupervised probation and parole, allow individuals to adjust to civilian life. Therefore, the OCMI may include periods of probation and parole in the assessment period with a letter of recommendation from a parole or probation officer.⁽¹⁾ The Coast Guard also revised §10.201(h)(2)... to clarify when the assessment period commences.”

[NMA Rebuttal: Apparently this statement hidden in the Preamble of the Final Rule never saw the light of day. Our Mariner #41 applied to renew his towing license on Nov. 16, 2006 and was assigned an Assessment Period ending Sept. 20, 2010. Assuming he withdraws from the marine industry, over a period of 3.33 years he would lose \$396,000 in gross wages and industry is deprived of one offshore rig-moving skipper. The full injustice of his treatment under the Coast Guard’s Administrative Law system appears in NMA Report #R-315-C, Rev. 1 as Case #6 and NMA Report #R-204, Rev. 3, Chapter 14.]

“One comment objected to the evaluating factor in §§10.201(j). ...concerning membership in a rehabilitation group. The comment period noted that many of these groups are anonymous and information on membership and attendance is usually confidential or non-existent. The Coast Guard will accept as proof of active membership a broad range of items, such as a letter from a counselor, or the signature or stamp of a secretary from the group the individual is attending.”

The comments [above] represent the total input the Coast Guard received from the public on this rulemaking package in 1995.

More Regulations

46 CFR §5.569 Selection of an appropriate order.

(a) This section addresses orders in a general manner. The selection of an appropriate order is the responsibility of the **Administrative Law Judge**, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or

mitigating evidence.

- (b) Except for acts or offenses for which revocation is mandatory, factors which may affect the order include:
- (1) Remedial actions which have been undertaken independently by the respondent;
 - (2) Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and
 - (3) Evidence of mitigation or aggravation.
- (c) After an order of revocation is entered, the respondent will be given an opportunity to present relevant material on the record for subsequent consideration by the special board convened in the event an application is filed in accordance with subpart L of this part.
- (d) ***Table 5.569 is for the information and guidance of Administrative Law Judges*** and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits. The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for *failure to obey a master's written instructions*. An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.

46 CFR Table 5.569—Suggested Range of an Appropriate Order

Type of offense	Range of order (in months)
Misconduct:	
Failure to obey master's/ship officer's order	1–3.
Failure to comply with U.S. law or regulations	1–3.
Possession of intoxicating liquor	1–4.
Failure to obey master's written instruction	2–4.
Improper performance of duties related to vessel safety	2–5.
Failure to join vessel (required crew member)	2–6.
Violent acts against other persons (without injury)	2–6.
Failure to perform duties related to vessel safety	3–6.
Theft	3–6.
Violent acts against other persons (injury)	4-Revocation.
Use, possession, or sale of dangerous drugs	Revocation (Note: see §5.59).
Negligence:	
Negligently performing duties related to vessel navigation	2–6.
Negligently performing non-navigational duties related to vessel safety	1–3.
Neglect of vessel navigation duties	3–6.
Neglect of non-navigational safety related duties	2–4.
Incompetence	The only proper order for a charge of incompetence found proved is revocation.
Violation of Regulation:	
Refusal to take chemical drug test	12–24
Refusal to take required alcohol test	12–24
Dangerous drugs (46 U.S.C. 7704)	The only proper order for a charge under 46 U.S.C. 7704 found proved is revocation.

[CGD 82-002, 50 FR 32184, Aug. 9, 1985, as amended by CGD 86-067, 53 FR 47079, Nov. 21, 1989; USCG-2000-7759, 66 FR 42967, Aug. 16, 2001]