UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

ERIC NORMAN SHINE,
Respondent

Docket Number: CG S& R 03-0166
CG Case No. 1671475

ORDER GRANTING SUMMARY DECISION

Issued: July 21, 2004

Issued by: Hon. Parlen L. McKenna

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I. PRELIMINARY STATEMENT

In discharge of its duty to promote the safety of life and property at sea, the United States Coast Guard ("Coast Guard" or "Agency") initiated this administrative action seeking revocation of the Merchant Mariner's License ("License") and Merchant Mariner's Document ("Document") issued to Respondent Eric Norman Shine. This action was brought pursuant to the legal authority contained in 46 United States Code ("U.S.C.") 7703, and was conducted in accordance with the procedural requirements of 5 U.S.C. 551-559, 46 CFR Part 5, and 33 CFR Part 20.[1]

On March 6, 2003, Respondent Shine was charged with mental incompetence. The factual allegations in the Coast Guard's complaint are: "Respondent is medically incompetent due to a major depressive disorder or other psychiatric condition." The Coast Guard further alleged that Respondent Shine acted under the authority of his License and Document, while mentally incompetent on three separate occasions: [2]

1) Between March 6, 2001 and June 11, 2001, by serving as a Third Engineer and/or Second Engineer aboard the vessel MAUI as required by law or regulation;

2) Between December 2, 2001 and January 5, 2002, by serving as a Third Engineer aboard the vessel PRESIDENT JACKSON as required by law or regulation; and

3) From January 5, 2002 until present, while engaged in matters concerning his License and Document.

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[1] While this case was pending, the United States Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of HR 5005 § 1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the Agency.

[2] In this decision, the phrases "medically incompetent" and "mentally incompetent" are considered synonymous. Although the complaint is inartfully worded, "[f]indings leading to an order of . . . revocation may be made so long as the [respondent] has actual notice and the questions are litigated." Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2422 (GIBBONS) (1986) (citing Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir 1950). Here, the record clearly shows that Respondent Shine knew and understood which act constituted the basis of the incompetence charge; namely, his major depressive disorder while serving aboard various vessels in 2001 and 2002, and his continued mental health condition. This is the issue that has been highly contested throughout the proceeding, despite the inartfully worded complaint.

On June 26, 2003, the Respondent filed an Amended Answer denying the jurisdictional and factual allegations, and he asserted thirty-seven Affirmative Defenses.[3] If the charge of incompetence is proven by preponderant evidence, the only available sanction under law is **REVOCATION**. See Appeal Decision No. 2181 (BURKE) (1980); 46 CFR 5.61(a)(9) & 5.569.

Throughout this entire proceeding, the Respondent failed to comply with Discovery Orders issued on July 1, 2003 and August 4, 2003 directing him to produce medical and psychological records. The Respondent also vigorously challenged the undersigned's Orders issued on July 30, 2003, August 4, 2003, and September 8, 2003 directing him to submit to a psychological examination. The Respondent was repeatedly warned that the sanction for failure to comply with the judge's Orders was quite severe and could result in an adverse inference being drawn.[4] Yet, the Respondent continued to object to discovery. The Respondent maintains that his present mental state is irrelevant; he asserts privilege; and he argues that the Orders requiring him to produce medical/psychological records and the Orders directing him to submit to a psychological examination constitute a violation of his rights to privacy and due process.[5]

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[3] Respondent's Affirmative Defenses 1, 6, 7, 30-32, and 34 allege the Coast Guard, the Administrative Law Judge (ALJ), and the Department of Homeland Security lack jurisdiction and authority to adjudicate this matter. These Affirmative Defenses were rejected in Orders dated July 9, 2003 and September 9, 2003. Likewise, Affirmative Defenses 3 and 5, concerning the defectiveness of the complaint due to lack of specificity, were rejected in the July 9, 2003 Order described above and in an August 12, 2003 Order.[3] Respondent's Affirmative Defenses 11, 12, and 29, concerning alleged improper filing of the complaint in favor of a party in a maritime labor controversy, were rejected in a separate Order dated September 9, 2003. In that same order, Respondent's Affirmative Defense 35 and 36, alleging that this administrative action is barred by the statute of limitations and doctrine of laches, were rejected. Among other things, Respondent's Affirmative Defense 2, 8, 9 were rejected in an Order dated September 10, 2003. To ensure a full and complete record, the Respondent's remaining Affirmative Defenses will be addressed in the body of this Order.

[4] See Order Denying Reconsideration of Medical and Psychological Records (Aug. 4, 2003); Order [Concerning Psychological Examination] (Aug. 4, 2003); Final Order Directing Psychological Examination (Sept. 8, 2003).

[5] See Opposition to USCG's Request for Issuance of Subpoenas and/or the Acquisition of Respondent's Medical/Psychological Records (June 25, 2003); Objection to Motion for Mental Health Examination (July 16, 2003); [Respondent's] Motion for Reconsideration of Order Regarding Production of Medical and Psychological Records (July 31, 2003); Respondent's Response to Court Order Regarding Psychological Examination (Aug. 1, 2003); [Respondent's] Motion for Order Precluding Psychological Records and Testimony at Hearing (Aug. 5, 2003); [Respondent's] Motion for Reconsideration of the Court's Order of August 4, 2003 Concerning
Footnote continued on next page

Further, the Respondent has employed every imaginable ploy to prevent release of his medical and psychological records, and has vigorously fought to avoid submitting to a psychological examination as directed by the undersigned. As a matter of fact, the Respondent went so far as seeking a Temporary Restraining Order and Preliminary Injunction from the U.S. District Court for the Southern District of California, which, if granted, would have nullified the undersigned's Final Order dated September 8, 2003 regarding the Psychological Examination by Dr. Ansar Haroun.[6]

Thereafter, on September 18, 2003, the Respondent appeared for the psychological examination accompanied by his attorney of record and a videographer. The Respondent would only consent to the examination if the interview was videotaped and his attorney was present. Dr. Haroun advised the Respondent that the facility was a county mental clinic that only sees patients pursuant to a court order and no judge has forced such an accommodation on the clinic over the past sixteen years.[7] Dr. Haroun explained, "that introducing such distracters (outside parties like attorneys or video technicians, or video equipment) may interfere with the interview, and result in opinions that are not valid." Dr. Haroun stressed that he is "ethically obligated to conduct the interview in a manner that minimizes any threats to validity and, therefore, cannot permit the presence of attorneys, video-technicians or video equipment." After two failed

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Psychological Exam (Aug. 6, 2003); Reply Memorandum of Respondent Eric Shine in Support of Motion for Reconsideration of the Court's Order August 4, 2003 Concerning the Psychological Exam (Aug. 12, 2003); [Respondent's] Motion for Order Precluding Use of Medical Records for any Purpose (Aug. 15, 2003); Reply Memorandum of Respondent Eric Shine in Support of Motion for Reconsideration of the Court's Order August 4, 2003 Concerning the Psychological Exam (Aug. 18, 2003); [Respondent's] Brief Regarding Burden of Proof and Psychological Examination (Aug. 25, 2003).

[6] Respondent Shine filed his Motion for Temporary Restraining Order and Preliminary Injunction on September 12, 2003. The Southern District Court of California dismissed the case for lack of subject matter jurisdiction on September 24, 2003.

[7] Dr. Haroun's explanation as to why the examination did not occur was fully discussed in a letter to the undersigned Judge dated September 18, 2003.

attempts to contact the undersigned at his Alameda office, Respondent departed without having the psychological examination as ordered. At no time between the issuance of the September 8, 2003 Order and the September 18, 2003 appointment date, did Respondent's counsel file a motion for leave to be present or to videotape the psychological examination. Nor did Respondent's counsel attempt to contact the undersigned on his cell phone number even though the parties had been previously provided said number on multiple occasions.

In light of the Respondent's continuous refusal to submit to a psychological evaluation and his refusal to produce all required medical records, an Order and Notice of Failure to Comply was issued on September 23, 2003. Therein, the undersigned found that the Respondent's actions constituted a failure or refusal to undergo a psychological examination as directed. As a result, an inference was drawn in accordance with 33 CFR 20.1313 that the results of the examination would be adverse to the Respondent. This Judge also found that Respondent's failure to produce medical and psychological reports, as directed in past Discovery Orders, resulted from the Respondent's attempt to conceal damaging evidence in this proceeding.[8] Consequently, pursuant to 33 CFR 20.607, it was found that all such medical and psychological records would be adverse to the Respondent.

Where a mariner's mental capacity is at issue, the law is clear with respect to the Coast Guard and this judge's authority to require production of medical/psychological records under 33 CFR 20.604 and the judge's authority to order a psychological examination under 33 CFR 20.1313. Thus, when so ordered, the Respondent has two choices once his mental competence is deemed relevant in a Coast Guard administrative proceeding. He can (1) produce all court ordered medical/psychological records and submit to a psychological examination or (2) face an

adverse inference being drawn against him. See 33 CFR 20.607(a) and 20.1313. Here, the Respondent felt so strongly that he would not allow the government to review his medical records nor would he submit to a psychological examination, which is his right. See *Prehearing Conference Transcript*, at p. 48 (San Diego, Ca. Jun 3, 2003)(Respondent would not sign a waiver for the release of his medical records). However, he cannot stand behind his limited right to privacy and still retain his privilege of holding a Coast Guard issued License and Document.

The Coast Guard does not take it upon itself to seek out persons on whom to bestow a merchant mariner's document or license. Rather it is the applicants who must convince the Agency that they possess all necessary qualifications and meet the Agency's requirements. See 46 CFR 10.101, 10.201, 12.01-1, and 12.02-4. However, once the Agency grants or renews a license, a legally protected property interest is vested in the license holder. See John H. Reese, ADMINISTRATIVE LAW DESK REFERENCE FOR LAWYERS 167-168 (2003). In turn, the license may not be suspended or revoked without due process proceedings, whereby the Agency must afford the holder of a license a fair opportunity to confront the Agency and contest its claim. See 5 USC 558(c); see also id. at 168.

While it is clear that the Respondent has a property interest in his license and document, the question remains what process is due? See Morrisey v. Brewer, 408 U.S. 471, 481 (1972); see also Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). The fact that there is a right to a hearing does not necessarily mean that a full trial-type hearing is mandated. See Jacob A. Stein, et. al., ADMINISTRATIVE LAW, § 32.02(1), at 32-37 (2003). Some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing.

[8] On July 1, 2003, an Order was issued directing the Respondent to produce all medical and psychological records. On August 4, 2003, an Order Denying Reconsideration of the July 1, 2003 Order was issued.

See Goldberg, 397 U.S. at 263; see also Matthews v. Eldridge, 424 U.S. 319, 340 (1976). Contrary to Respondent Shine's argument in this case, due process simply does not require an administrative agency to hold an evidentiary hearing where there are no disputed material issues of fact or when the dispute can be adequately resolved from the paper record. See Reese, ADMINISTRATIVE LAW DESK REFERENCE FOR LAWYERS 168; see also Pennsylvania v. Riley, 84 F.3d 125, 130 (3rd Cir. 1996); Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996); Puerto Rico Aqueduct and Sewer Authority v. U.S. EPA, 35 F.3d 600, 605-06 (1st Cir. 1994), *cert. denied* 513 U.S. 1148 (1995); Veg-Mix v. USDA, 832 F.2d 601, 607-08 (D.C. Cir. 1987); Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986).

In this case, the Coast Guard filed a Motion for Summary Decision ("Summary Decision Motion"), asserting that there is no genuine issue of material fact that the Respondent suffers from a major depressive disorder or other psychiatric condition that renders him incompetent.[9] The Summary Decision Motion included thirty-three (33) attachments, which contained supporting non-medical and medical documentary evidence. In his reply brief submitted on October 1, 2003, the Respondent does not deny that he suffers from a major depressive disorder. Instead, Respondent Shine disputed that the depressive disorder renders him incompetent and attached a medical report from Dr. Richard Rappaport for support. On October 3, 2003, the Coast Guard filed a Reply to the Respondent's Opposition, and the Respondent filed another response on October 7, 2003.

After complete review of the parties' submissions, on November 20, 2003, the undersigned judge notified the parties of his intent to grant the Coast Guard's Motion for Summary Decision. To ensure that the record is full and complete, the undersigned further

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[9] The motion was filed on September 10, 2003 and was titled "Contingent Motion for Summary Judgment."

ordered the Respondent and his counsel to submit a detailed brief of any and all alleged substantive errors that the Respondent will assert on appeal. The Respondent filed his Response on December 2, 2003 in which he listed thirty-seven (37) issues to be raised on appeal. The undersigned addresses each of the Respondent's proposed arguments for appeal in Appendix A.

By this Order, the factual and legal issues surrounding the Coast Guard's Summary Decision Motion and the Respondent's Opposition will be addressed. This Order will also address certain unresolved issues pending in this proceeding. I note that none of the unresolved issues create a genuine issue of material fact concerning Respondent Shine's mental competence. Nevertheless, the unresolved issues will be discussed below in order to ensure that the administrative record is complete.

II. DISCUSSION

A. Coast Guard's Motion For Summary Decision

1. Legal Standard of Review of the Motion for Summary Decision

Summary decision is a well accepted and commonly used procedural device in administrative agencies, whereby the government disposes of a controversy on the pleadings without an evidentiary hearing. See Reese, ADMINISTRATIVE LAW DESK REFERENCE FOR LAWYERS 168; see also Pennsylvania, 84 F.3d at 130; Paige, 91 F.3d at 44; Puerto Rico Aqueduct and Sewer Authority, 35 F.3d at 605-06; Veg-Mix, 832 F.2d at 607-08; Consolidated Oil & Gas, Inc., 806 F.2d at 279. The standard of review of a summary decision motion is set forth in 33 CFR § 20.901. Title 33 CFR 20.901 provides in pertinent part:

> (a) Any party may move for a summary decision in all or any part of the proceeding on the grounds that there is no genuine issue of material fact and that the party is entitled to a decision as a matter of law… .
>
> (b) The ALJ may grant the motion if the filed affidavits, the filed documents, the material obtained by discovery or otherwise, or matters officially noted show that there is

no genuine issue of material fact and that a party is entitled to a summary decision as a matter of law.

The motion may be made as to some or all the claim in order to find that "as a matter of law" the moving party should prevail. See Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE § 8.22[5], at 483 (2d ed. 1997).

In an administrative context, the standard of review of a summary decision motion is inextricably linked to Rule 56(c) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") (governing review of a summary judgment motion).[10] See Puerto Rico Aqueduct, 35 F.3d at 607. A judge "will generally grant summary [decision] if the pleadings and papers filed by the parties establish, without substantial dispute, facts that entitle the movant to judgment as a matter of law." See Ernest Gelhorn & William F. Robinson, Jr., Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612, 613 (Jan. 1971). All competing inferences or reasonable doubts as to whether a genuine issue of material fact exists are viewed in a light most favorable to the non-moving party (i.e., the Respondent). See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The moving party (i.e., the Coast Guard) bears the initial burden of identifying those portions of the pleadings, the material obtained by discovery or otherwise, or other material contained in the record that show an absence of a genuine issue of material fact. See generally 33 CFR 20.901(b); see also Fed. R. Civ. P. 56(c); Anderson, 477 U.S. at 251-55; Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1985).

[10] See Fed. R. Civ. P. 56(c), which states in pertinent part:

> . . . [Summary] [J]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law**. . . .

(Emphasis added).

Here, the Coast Guard is entitled to the benefit of an adverse inference due to Respondent's failure to comply with the discovery orders and the Respondent's failure to submit to psychological examination. However, an adverse inference alone is insufficient to support a summary decision motion. See Financial Federal Saving and Loan Assoc. v. Savings Investment Service Corp., No. Civ-86-176-W, 1986 WL 641, at *5 (W.D. Okla Dec. 11, 1986); National Acceptance Company of America v. Bathalter, 705 F.2d 924, 932 (7th Cir. 1983). The Coast Guard, as the moving party, is still required to provide adequate evidentiary support for its summary decision motion in order to prevail. See id.

Once the moving party proves that there exists no genuine issue of material fact, the burden shifts to the non-moving party to identify specific facts evidencing triable issues of fact. See 33 CFR 20.901(c); see also Fed. R. Civ. P. 56(c); Anderson, 477 U.S. at 251-55; Celotex Corp, 477 U.S. at 322-24. The Supreme Court has defined the type of factual issue that would preclude summary judgment. In Anderson, the Court held:

> "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."

477 U.S. at 248. Ultimately, the judge must determine whether the pleadings, affidavits, and other documentary evidence in the record are such that a hearing would serve no useful purpose because judgment as a matter of law in favor of the moving party is clear.

Viewing the documentary evidence in a light most favorable to Respondent Shine, I find that the Coast Guard is entitled to judgment as a matter of law on the basis of the record. As stated earlier, Respondent Shine does not deny that he suffers from a major depressive disorder, but rather disputes whether the depressive disorder constitutes incompetence, which would

justify revocation of his Merchant Mariner's License and Document. To preclude the entry of judgment in favor of the Coast Guard, the Respondent argues that: 1) the Coast Guard's motion for summary decision is procedurally defective because no date has been set for the hearing on the motion and the Coast Guard failed to attach affidavits to the motion for summary decision as required by 33 CFR 20.901; 2) the contents of his medical/psychological records are privileged and are afforded privacy under the Constitution and he objects to the psychological examination ordered by the judge in this proceeding; 3) the documentary attachments supporting the Coast Guard's motion for summary decision are irrelevant, unreliable, and do not establish that Mr. Shine is currently mentally incompetent; 4) Dr. Rappaport's psychological evaluation dated September 30, 2003 is the most recent evidence of Respondent's mental state and shows that Mr. Shine is mentally competent. For reasons stated below, Respondent Shine's arguments are rejected.

2. *The Coast Guard's Motion for Summary Decision is not Procedurally Defective*

The Respondent's argument that the Coast Guard's Summary Decision Motion is procedurally defective is without merit. The Coast Guard's Motion for Summary Decision was properly filed. Contrary to Respondent's assertion, 33 CFR 20.901 does not require that a fixed date for a hearing on the merits be set nor is a hearing date on the Motion for Summary Decision required. Section 20.901(a) provides, in pertinent part, a "party must file the motion [for summary decision] **no later than 15 days before the date fixed for the hearing**." 33 CFR 20.901(a) (emphasis added). This section establishes a time limit for filing a summary decision motion. Section 20.901(a) also provides the ALJ with discretion as to whether to hold a hearing on the motion for summary decision. The language states, "The ALJ **may** set the matter for argument and call for submission of briefs." 33 CFR 20.901(a) (emphasis added). In no way does Section 20.901 impose or mandate that a fixed date for hearing on the merits be set or that a

hearing date on the Motion for Summary Decision be established. The arguments of Respondent's counsel are simply untenable.

Likewise, I am not persuaded by Respondent's argument that the Coast Guard's Motion for Summary Decision is defective because the Coast Guard failed to file affidavits as to such matters as would be admissible in evidence and has not shown that the affiant is competent to testify. Section 20.901 does not require that supporting affidavits be submitted with the motion for summary decision. The relevant portion of the regulation provides that a party "**MAY** include supporting affidavits with the motion." 33 CFR 20.901(a). This means that the decision whether to include affidavits with the summary decision motion is left to the discretion of the moving party. The inclusion of affidavits with the summary decision motion is not mandatory as Respondent's counsel suggests. Thus, a summary decision motion cannot be defeated merely because a moving party failed to file affidavits to the motion.

Moreover, Section 20.901(c), which Respondent counsel relies upon, does not support his position. Indeed, when Section 20.901(c) is read in conjunction with Section 20.901(a), it is clear that the drafters of the regulation merely intended to establish criteria for affidavits if a party chose to include supporting affidavits with its Motion for Summary Decision. Furthermore, the language contained in paragraph (b) supports this interpretation of Section 20.901. In paragraph (b), the drafters provided a non-exhaustive, non-exclusive list of documents the ALJ may rely on in ruling on a summary decision motion. Those documents include filed affidavits, the filed documents, the material obtained by discovery or otherwise, or matters officially noticed. See 33 CFR 20.901(b).

I find that the supporting documents attached to the Coast Guard's Motion for Summary Decision were submitted in accordance with 33 CFR 20.901. I also find that the motion is not

defective because the Coast Guard entitled it a "Contingent Motion." The motion was contingent based on the Respondent's failure to undergo psychological examination and to produce psychological/medical records as ordered by the undersigned. There is no prejudice to Respondent and the undersigned does not see how Respondent was prejudiced because the Coast Guard made the motion contingent on the failure to undergo psychological examination and failure to produce psychological/medical records. If anything, the motion placed the Respondent on notice that the Coast Guard intended to seek summary decision based on the repeated refusals. Accordingly, the Respondent's arguments, that the Motion for Summary Decision is defective or that the motion was improperly filed, are rejected.

3. *Federal Regulations and Case law unequivocally required the Respondent to turn over his medical records and submit to a psychological examination*

As I previously stated in the September 8, 2003 Final Order Directing Respondent to undergo a Psychological Examination, physician-patient privilege does not apply in Coast Guard suspension and revocation proceedings. See 46 CFR 5.67.[11] In the aforementioned order, I further found that the Coast Guard's policy against the applicability of physician-patient privilege to suspension and revocation proceedings applies with equal force to mental health professionals, such as psychologists, psychiatrists, and social workers. See also Actions Against Seamen's Licenses, Certificates, or Documents, 50 FR 32719 (Aug. 9, 1985) (to be codified at 46 CFR pt. 5). Thus, Respondent's assertion of privilege with respect to his medical/psychological records is unavailing. Therefore, the undersigned was authorized to order Respondent Shine to produce his medical/psychological records pursuant to 33 CFR 20.604 and I

[11] Title 46 CFR 5.67 reads as follows:

> For the purpose of these proceedings the physician-patient privilege does not exist between a physician and a respondent.

had the authority under 33 CFR 20.607(a) to draw an adverse inference based on Mr. Shine's failure to provide or permit discovery of his medical/psychological records.

I also noted in the September 8, 2003 Final Order Directing Respondent to undergo a Psychological Examination that an ALJ is authorized to order the medical examination of a respondent in any proceeding in which the physical or mental condition of the respondent is relevant and the failure for a respondent to undergo such examination may give rise to an adverse inference. See 33 CFR 20.1313. More specifically, 33 CFR 20.1313 provides in pertinent part:

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

(Emphasis added). Thus, upon the Coast Guard's showing of "good cause" based on the non-medical as well as the medical documentary evidence, I had the authority to order Respondent Shine to undergo psychiatric/psychological examination.

While it is true that access to Mr. Shine's medical/psychological records and the psychological examination ordered in this case are subject to his constitutional right of privacy, such protection is not absolute. See United States v. Westinghouse Electric Corp., 638 F.2d 570, 577-78 (3d Cir. 1989); United States v. Mazzola, 217 F.R.D. 84, 88 (D. Mass. 2003); United States v. Colletta, 602 F. Supp. 1322, 1327 (E.D. Pa. 1985).[12] "[C]ourts and legislatures have determined that public health or other public concerns may support access to facts that an individual might otherwise choose to withhold" even when the disclosure may reflect unfavorably on the character of that individual. Westinghouse, 638 F.2d at 577-78. The "right

[12] Although Mazzola and Colletta are both criminal cases, the principle that the constitutional right of privacy is not absolute applies with equal force in these proceedings.

to privacy is a conditional [or qualified] right that can be overcome if the government can demonstrate a substantial interest that outweighs the [Respondent's] right to privacy." See Grosso v. Town of Clarkston, No. 94 CIV. 722 (JGK), 1998 WL 566814, at *6 (S.D.N.Y. Sept. 3, 1998)(citing Whalen v. Roe, 429 U.S. 589, 602 n. 29 (1977)).

The Third Circuit in Westinghouse set forth "[t]he factors which should be considered in deciding whether an intrusion into an individual's privacy is justified. 638 F.2d at 578. The factors include:

> [T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Westinghouse, 638 F.2d at 578.

Under the facts of this case, the Westinghouse factors are easily satisfied. The purpose of Coast Guard suspension and revocation proceedings is to ensure the safety of life and property at sea. See 46 U.S.C. 7701(a). There is a strong public policy embodied in the Coast Guard law and regulations for removing incompetent mariners from serving aboard vessels. See e.g. 46 U.S.C. 7703(1)(B) (authorizing proceeding against a license or document if the holder commits an act of incompetence); 46 CFR 5.61(a)(9) (authorizing an investigating officer to seek revocation when incompetence is found proved); 46 CFR 5.569(d) (providing that the only proper order for incompetence is revocation); 46 CFR 5.201 (permitting a holder to voluntarily deposit a license or document with the Coast Guard where there is evidence of mental or physical incompetence); See also Appeal Decision 2417 (YOUNG) (1985) (citing Appeal Decision 2181 (BURKE), modified sub nom. Commandant v. Burke, NTSB No. EM-83 (1980)) (holding that "No one who is suffering from a psychiatric disability should be permitted 'to serve

aboard any vessel . . . in a capacity in which he could cause serious harm to himself, to others, or to the vessel itself.").

Title 5 CFR 5.31 defines Incompetence as the "inability . . . to perform required duties, whether due to professional deficiencies, physical disability, **mental incapacity**, or any combination thereof." (Emphasis added). Based on the allegations in the Coast Guard's complaint, the medical/psychological reports and the psychological examination are unquestionably relevant and material to the issue herein. See generally 33 CFR 20.802. The substantial governmental interest here is to prevent mentally incompetent individuals who perform safety sensitive job duties from boarding vessels and endangering the ship and/or it's crew. By refusing to provide or permit discovery of medical/psychological records and by refusing to undergo a psychological examination, the Respondent could obstruct legitimate attempts by the Coast Guard to remove incompetent mariners from the sea and thereby expose other mariner's to potential harm. Thus, the Respondent's conditional right to privacy is outweighed by the substantial governmental interest that is narrowly tailored to insure the safety of life and property at sea.

Moreover, the medical information that the Coast Guard seeks would be afforded adequate protection after it is entered into evidence in this proceeding. As I pointed out to the Respondent and his counsel, 33 CFR 20.606 provides that the judge can issue a protective order. The Respondent's personal privacy interests are also protected by Exemption 6 of the Freedom of Information Act ("FOIA"), as amended and codified in 5 U.S.C. 552(b)(6), and the Privacy Act, as amended and codified in 5 U.S.C. 552a. FOIA Exemption 6 authorizes an agency to withhold all information about an individual contained in medical files when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." See 5

U.S.C. 552(b)(6).[13] The Privacy Act strictly prohibit an agency from disclosing records[14] to any person or another agency without written notice or consent of the individual to whom the record pertains unless the disclosure of the record falls within one of the twelve exceptions. See 5 U.S.C. 552a(b).[15] Thus, I find that the applicable law and regulations afford Respondent Shine

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[13] FOIA generally requires federal agencies to disclose agency records to the public unless the agency can establish that the material qualifies as an exemption. See 5 U.S.C. 552; see also Chilivis v. Securities and Exchange Comm., 673 F.2d 1205, 1210-1211 (11th Cir. 1982). "[T]he term 'agency records' . . . covers not only documents created by the agency but also documents submitted to the agency for use in carrying out its duties." See General Elec. Co. v. Nuclear Regulatory Commision, 750 F.2d 1394, 1400 (7th Cir. 1984). The exemption for medical files is found in 5 U.S.C. 552(b)(6), which provides in relevant part:

> (b) **This section does not apply to matters that are** –
>
> * * *
>
> > (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy;

(Emphasis added).

[14] "[T]he term 'record' means any item collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, **medical history**, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(4) (emphasis added).

[15] Title 5 U.S.C. 552a(b) provides in pertinent part:

> **(b) Conditions of disclosure.** – **No agency shall disclose any record** which is contained in a system of records **by any means of communication to any person**, or to another agency, **except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains**, unless disclosure of the record would be –
>
> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> (2) required under section 552 of this title;
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
>
> (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
>
> (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
>
> (6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;
>
> (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written

Footnote continued on next page

maximum protection from unauthorized disclosure of his medical/psychological records and the results of the psychological/psychiatric examination ordered in this proceeding. In American Fed'n of Gov't Employees vs. Department of Housing and Urban Dev. 118 F.3d 786, 793 (D.C. Cir 1997), the court held that an individual's interest in protecting privacy of information is significantly less important where the information released is obtained by the government but not disseminated publicly. As such, I find that the Respondent's conditional right to privacy is outweighed by the substantial governmental interest that is narrowly tailored to ensure the safety of life and property at sea.

This is especially true given the fact that Coast Guard regulations and publications have long since held that individuals must be physically qualified to hold merchant mariner's licenses and documents. See 46 C.F.R. Parts 10 and 12; see also Navigation and Vessel Inspection Circular No. 2-98 (1998). For example, 46 C.F.R. Parts 10 and 12 provide general requirements for the issuance and renewal of all licenses and certificates of registry. Specifically, mariners applying for an original license, raise in license grade, or renewal of license, must submit to a physical examination and establish that they possess all necessary qualifications, such as physical health and competence. See 46 C.F.R. 10.201(a), 12.02-27(d), 12.05-5; 12.15-5. More

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request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(f) of title 31.

importantly, all applicants must demonstrate that they have no physical impairments or medical conditions that would render them incompetent to perform their ordinary duties. See 46 C.F.R. §§ 10.205(d), 10.207(e), 10.209(d), 12.02-27(a), 12.02-27(d), 12.05-3(a)(2) and 12.05-5(a).

Although Coast Guard regulations do not list specific physical conditions that would disqualify an applicant from holding a merchant marine document or license, the Agency provides guidelines for evaluating a mariner's eligibility in its published Navigation and Vessel Inspection Circular ("NVIC"). See NVIC No. 2-98 (1998). The guidelines published in the NVIC are consistent with Regulation I/9 of the International Convention of Standards of Training, Certification, and Watchkeeping for Seafarers (STCW), which requires each participant to establish standards of medical fitness for seafarers. See id. The United States is a signatory to the STCW. Once more, the medical standards listed in the NVIC are tantamount to the United States' standards for meeting the STCW regulations. See id.

The physical standards that an applicant must meet before a merchant mariner document or license is either issued or renewed are summarized in the NVIC. In particular, the NVIC provides that a condition requiring the use of psychotropic medication, suicidal behavior, or a diagnosis of a primary psychosis is considered a potentially disqualifying condition. See id. The NVIC further provides that any other medication or therapy, which might compromise shipboard safety or result in the gradual deterioration of a mariner's ability to perform his duties, constitutes a possible disqualifying condition. See id.

It is clear from the evidence in this case that the Respondent currently suffers from a psychiatric condition that would affect his ability to serve at sea. Since the Respondent's last employment aboard a vessel, he has been admitted to a mental health hospital, undergone continuous psychotherapy, and was diagnosed with a mental condition requiring the use of

psychotropic medication. Most importantly, the record is devoid of any evidence to indicate that the Respondent's mental condition has changed since that time. As such, according to the Coast Guard's long established policy, the effects of a major depressive disorder constitute a potentially disqualifying condition. Accordingly, the Respondent's position that the medical/psychological information sought in this proceeding is irrelevant and violates the law lacks rational underpinning.

4. The Coast Guard has Satisfied its Burden of Proof

With respect to the merits of this case, Respondent Shine contends that the Coast Guard cannot sustain its burden of proof without first showing the Respondent committed a specific act of incompetence while acting under the authority of his license and/or document. The Respondent argues that a charge of incompetence must be based on a clear-cut act demonstrating "physical" or "mental" incompetence. The Respondent also argues that the act must have occurred at a time when the mariner served under the authority of his license onboard a seagoing vessel. Respondent Shine further contends that the Coast Guard cannot prove any credible evidence that he committed an "act," which demonstrates mental incapacity during the time he sailed aboard the M/V MAUI or the M/V PRESIDENT JACKSON. Rather, the Respondent argues that the Coast Guard has improperly narrowed its inquiry into his post employment mental condition without reference to any acts related to shipboard activity. These same arguments were raised in Affirmative Defenses 4, 15-28, and Respondent's August 25, 2003 Brief Regarding Coast Guard Burden of Proof.

At the outset, Affirmative Defenses 19-28 are rejected. In those Affirmative Defenses, the Respondent argues that he did not commit any act of incompetence (either medical or mental) at any time while serving under the authority of his license aboard various vessels, including the SS MORMACSUN, TONSINA, and SEA-LAND DISCOVERY - - just to name a

few. The complaint is only concerned with Respondent's actions: a) aboard the MAUI between March 6, 2001 and June 11, 2001; b) aboard the PRESIDENT JACKSON between December 2, 2001 and January 5, 2003; and from January 5, 2002 until present, while engaged in matters concerning his license and DOCUMENT. Accordingly, the Respondent's arguments relating to other vessels upon which Mr. Shine served is deemed irrelevant and immaterial.

The applicable regulations provide that a license, certificate of registry or merchant mariner's document may be suspended or revoked if the holder, when acting under the authority of that license, commits an act of incompetence. See 46 U.S.C. 7701(a) and 7703(1)(B). Thus, to prevail, the Coast Guard must prove that Respondent:

1) Is the holder of a license, certificate or registry, or document; who:
2) When acting under the authority of that license, certificate of registry, or document;
3) Committed an act of incompetence.

See 46 U.S.C. 7703(1)(B). First, there is no dispute that Respondent holds a Coast Guard issued license and document. The issue is whether the Coast Guard has established the second and third elements of its burden of proof. I find that the Coast Guard has done so.

a. The Coast Guard Proved Respondent was Acting Under the Authority of His License/Document

A person is considered acting under the authority of their license or document if he/she is employed in the service of a vessel and his/her license or document is required either by law or regulation or by an employer. See 46 CFR 5.57(a); see also Appeal Decision 2615 (DALE); Appeal Decision 2393 (STEWART); Appeal Decision 2550 (RODRIQUES); Appeal Decision 2566 (WILLIAMS). Similarly, a person is considered to be acting under the authority while engaged in "official matters" regarding the license. This includes, but is not limited to, such activities as applying for renewal of a license or appearing at a hearing. See 46 CFR 5.57 (b).

In this case, the Respondent's employment aboard the vessels MAUI and PRESIDENT JACKSON satisfies the "condition of employment test." The MAUI is a 24,544 gross ton ocean-going container ship whereas the PRESIDENT JACKSON is a 50,205 gross ton ocean-going container ship. Title 46 U.S.C. 8701(d) requires individuals serving on ocean-going vessels over 100 gross tons to hold a Coast Guard issued document. Because this statute requires Coast Guard issued merchant mariner papers for service aboard the two ships, such service constitutes "acting under the authority." See Appeal Decision 2371 (MCFATE) (interpreting the predecessor statute to 46 U.S.C. 8701 and 46 CFR 12.02-7). Further, the regulations (46 CFR 5.57) clearly establish that the Respondent continues to act under the authority of his Coast Guard credentials throughout this administrative proceeding even though the Respondent's employment onboard the vessels ceased after January 5, 2002. Thus, the Coast Guard has established that Respondent was acting under the authority of his license and/or document.

b. The Coast Guard Proved Respondent is Mentally Incompetent and Unfit for Duty at Sea

The regulations authorize the Coast Guard to investigate and issue a complaint if reasonable grounds exist to believe that the holder of a license may have committed an act of incompetence while acting under the authority of his license or document. See 46 CFR 5.101(a)(1) and 5.105(a). Incompetence is defined as the "inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination of it." See 46 CFR 5.31. In turn, a finding of mental incompetence must rest upon substantial evidence of a reliable and probative nature that the person charged suffers from a mental impairment of sufficient disabling character, which renders the person unable to safely perform his duties aboard a merchant vessel. See Appeal Decision 2417 (YOUNG). In fact, the act establishing mental incompetence need not be one directly

involved in the performance of duty. Rather, it is enough that the conduct or behavior of a mariner be of the sort that would, if carried over to shipboard, endanger life or property. See Appeal Decision 1466 (SMITH).

The Respondent, however, contends that the mere state of being mentally incompetent does not constitute an "act" sufficient to revoke a mariner's license. To support his position, the Respondent cites Appeal Decisions YOUNG and SMITH, in which the mariners committed specific acts such as killing another crewmember, creating a disturbance, and refusal to obey lawful orders. Contrary to this Respondent's assertions, the Appellants in those cases were charged with both misconduct and incompetence. The specific acts in issue only supported the allegations of misconduct. The charge of incompetence, on the other hand, was based solely on the fact that those mariners were unfit to perform their duties at sea, either due to a previously diagnosed mental condition or a general display of questionable behavior. See Appeal Decision 2417 (YOUNG); see also, Appeal Decision 1466 (SMITH).

A thorough review of Commandant Decisions on Appeal reveal that a finding of incompetence is not dependent on a specific act, but rather the sole act of serving onboard a vessel while suffering from either a physical or psychological impairment will support the charge of incompetence. For example, in Appeal Decision 1502 (WILLIAMS), a finding of mental incompetence was supported by an appearance of erratic behavior exhibited by the Appellant, a history of hospitalization for a mental condition, and a subsequent psychological examination. The Appellant failed to properly perform his duties as a Radio Operator while serving onboard a seagoing vessel. Moreover, the Appellant exhibited an unfounded fear of bodily injury, distrust of others, suspicion of an intimidation campaign against him, and other similar feelings of distress. The evidence revealed there was no apparent reason for his neglect of duty or his fear

of physical violence, and there had been no particular trouble on the voyage except with respect to the Appellant. As such, it was held that the Appellant's failure to conduct his job properly was due to his mental illness, which could not be blamed on other conditions on the ship.

Commandant Decisions on Appeal have also upheld a finding of mental incompetence even when there was no diagnosis or history of psychological illness prior to serving onboard a vessel. In Appeal Decision 825 (PERKINS), a finding of mental incompetence was based on evidence of the Appellant's irrational and unhygienic personal habits while living in close contact with the other crewmembers. While onboard the vessel, the Appellant was continuously dirty, both in person and clothing, and the Appellant habitually blew mucus from his nose directly to the deck in the mess hall. Due to these and other repulsive habits, the unlicensed personnel on the ship voted to exclude the Appellant from the mess hall during mealtimes. Also on the voyage, the Appellant was obsessed with the belief that his shipmates were plotting against him without provocation; he made completely fictitious statements to various persons in authority; he steered the ship more than 30 degrees off her course on numerous occasions; and Appellant caused an additional burden to be placed on his shipmates as he could not be trusted to perform the most simple tasks.

Moreover, the Master of the vessel and twenty-two crewmembers in the PERKINS case signed a petition containing some of the above facts. That petition protested against permitting the Appellant to continue his efforts to become a qualified merchant seaman and predicted that he would cause continuous trouble for everyone with whom he came in contact as a merchant seaman. It was the stated opinion of those who signed the petition that the Appellant was "completely unfit, mentally and physically, to go to sea and live in the close contact with other men which such a life required." A subsequent psychological examination concluded that the

Appellant was not fit for sea duty due to a "schizophrenic reaction, paranoid type." As such, the Appellant was found to be unfit for duty on merchant vessels by reason of his mental condition.

It is of particular interest that mariners who possessed a medical or physical condition were similarly charged with incompetence without a showing that they committed a specific act of negligence or even that they failed to perform their duties properly. Rather, it was sufficient that the mariner's medical condition posed a danger to safety. See Appeal Decision 1414 (BROWNE) (where Appellant suffered from periods of unconsciousness that occurred without warning at infrequent intervals); see also Appeal Decision 1720 (HOWELL) (where Appellant failed to posses the color sense required for a qualified member of the engine department); Appeal Decision 606 ADELMAN) (Appellant was found to be physically incompetent to perform his duties by reason of drug addition). These Decisions reveal that a finding of incompetence has been consistently upheld when a mariner's medical condition presents a potential danger to the safety of life and properly at sea. See Appeal Decision 606 (ADELMAN); see also Appeal Decision 1414 (BROWNE).

In the case at hand, Respondent Shine exhibited behavior onboard both the M/V MAUI and the M/V PRESIDENT JACKSON that demonstrates a lack of psychological well being to serve as an engineer. During the course of his employment aboard the PRESIDENT JACKSON, an investigation was conducted into the Respondent's behavior following the receipt of several written complaints from officers and crewmembers. *(Agency Attachments to Contingent Motion for Summary Decision "Attachment" 6, 10, 11, and 12)*. The results of the investigation were entered in the vessel's official logbook. *(Attachment 12)*. Any entry in an official logbook concerning an offense is admissible in evidence and constitutes prima facie evidence of the facts recited. See 33 CFR 20.1305(a). In this case, the logbook entry provides evidence of the

Respondent's confrontational and aggressive behavior. The logbook entry describes how the Respondent continuously intimidated and harassed the crew with threats of litigation. According to the logbook, the investigation found that Respondent Shine was repeatedly insubordinate and failed to follow lawful orders, which compromised the vessel's safety. Of particular concern, the logbook entry concluded that the Respondent's continued presence aboard the vessel created an un-seaworthy condition. *(Attachment 12).*

Additional details regarding the Respondent's disruptive behavior are provided in numerous letters submitted by the officers and crew aboard the PRESIDENT JACKSON. The First Assistant Engineer experienced an inability to direct and supervise the Respondent without fear of conflict. In an effort to avoid confrontation, Mr. Shine was assigned simple, long-term projects. *(Attachment 11)*. In addition, crewmembers feared interaction with the Respondent because of his constant harassment and threat of litigation. As a direct result of his intimidation tactics, the Respondent created a tumultuous work place that adversely affected the work performance of the crew. *(Attachments 6, 10, and 11)*. Similarly, the Respondent's performance onboard the MAUI mirrors that of the PRESIDENT JACKSON. In particular, the Matson Navigation Company Officer Evaluation Report completed by the Chief Engineer, Cecil D. Ray, describes how Respondent Shine lacked the necessary skills to perform his duties and possessed an overall inability to work with the other crewmembers. *(Attachment 5).*

Because the safety of lives and the vessel depend on decisions made and actions taken in an instant, it is essential that the crew relies on and trusts one another. Moreover, in order for the ship to operate safely, all mariners must be capable of living and working together under confined conditions. In this case, the Respondent's inability to work with crewmembers, and

flagrant disregard for authority, hindered his ability to carry out the responsibilities and duties required of an engineer aboard seagoing vessels.

The record shows that Respondent was obsessed with the belief that his crewmembers and former employers were retaliating against him for "doing the right thing;" he continuously harassed the crew with threats of litigation; his insubordination often created an unseaworthy condition; and he caused an additional burden to be placed on his shipmates as he could not be trusted to perform or complete his expected duties. In turn, the evidence revealed there was no apparent reason for his insubordination or his fear of being victimized, and there had been no particular trouble on the vessels except with respect to the Respondent. Indeed, there is substantial evidence on which to base the conclusion that the Respondent was completely unfit to live and work at sea under close contact with other crewmembers.

While the Respondent's mental unfitness for sea duty was clearly shown by his conduct aboard the MAUI and the PRESIDENT JACKSON, the issue of his present-day psychological well-being must be addressed. In order to support a finding of mental incompetence in this case, the Coast Guard's evidence must not be limited in time to when the Respondent was actually employed on board a vessel. See Appeal Decision 2417 (YOUNG). Rather, the evidence presented must sufficiently show that the Respondent's current condition at the time of these proceedings renders him unfit for service at sea. See Appeal Decision 1466 (SMITH); see also Appeal Decision 2280 (ARNOLD); Appeal Decision 1838 (FORSYTH); Appeal Decision 2417 (YOUNG).

Although the Respondent argues there is no evidence of mental incompetence subsequent to the Agency's "fit for duty" declaration, a review of the entire record affirms the indisputable

fact that Respondent Shine currently suffers from a major depressive disorder.[16] Numerous psychotherapists have interviewed and counseled the Respondent for various lengths of time, dating as far back as June 2002 until the present. All of them have evaluated the Respondent and diagnosed him with various psychological disorders. However, it is the consensus of all these psychotherapists that Respondent Shine suffers from a major depressive disorder**.**

Dr. Douglas Riddle first diagnosed the Respondent with major depression in June 2002. *(Attachment 19)*. In August 2002, a disability insurance company requested information from Dr. Riddle as to why the Respondent remained disabled from work longer than normal. *(Attachment 32).* In response, Dr. Riddle explained that repeated multiple stressors have prolonged Shine's severe depression with significant impairment of his mood and behavior. Dr. Riddle further wrote that Mr. Shine was not able to engage in productive social interactions and remained unable to manage his mood sufficiently to work effectively. *(Attachment 32)*.

Likewise, in October 2002, Dr. Emad Tadros began treating the Respondent for a major depressive disorder. *(Attachment 23)*. At that time, Dr. Tadros stated that it was his professional opinion that Mr. Shine was disabled from gainful employment. Dr. Tadros further listed the various types of medication the Respondent took on a daily basis as Effexor XR 300 mg and Depakote ER 250 mg. *(Attachment 23)*. A few months later, Dr. Tadros drafted an evaluation of Mr. Shine's psychiatric condition on January 21, 2003. In that evaluation, Dr. Tadros states that Mr. Shine's depression has failed to improve. A list of psychotropic medication taken by the Respondent and the corresponding amounts is detailed in the evaluation as follows: Effexor XR recently regained at 150 mg qd; Lexapro 10 mg recently increased to iii qd; DepakoteER 500 mg

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[16] Having been duly examined and found competent, Respondent Shine received his Merchant Marine License on June 1, 2000. Evidence regarding his psychological well-being aboard the MAUI and PRESIDENT JACKSON surfaced after March 2001. Similarly, evidence diagnosing the Respondent with a major depressive disorder begins in June 2002.

ii qd no level known. Dr. Tadros also explains that Mr. Shine's depression is accompanied by suicidal thoughts. *(Attachment 30)*. On that same day, the Respondent was admitted to Sharp Mesa Vista Hospital. At the time of admission, Dr. Tadros diagnosed the Respondent with bipolar manic-depressive disorder. *(Attachment 31)*.

In February 2003, Dr. Francine Kulick concluded that Mr. Shine suffers from moderate to severe emotional instability with a mild to moderate suicide risk. *(Attachment 24)*. In her evaluation, Dr. Kulick notes that Mr. Shine has been on numerous medications including Depakote, Effexor and Lexapro. *(Attachment 24)*. At that time, the Respondent was diagnosed with a major depressive disorder. *(Attachment 24)*.

It is noteworthy that even the Respondent has repeatedly admitted he suffers from a major depressive disorder requiring the use of psychotropic medication. In a Disability Status Inquiry form, completed by the Respondent in September 2002, Mr. Shine states that he is taking anti-depressants and remains unable to work due to severe depression. *(Attachment 4)*. Similarly, in a letter to the MEBA Plans Manager on October 1, 2002, Respondent explains that he is severely depressed and totally disabled. *(Attachment 20)*. Mr. Shine further stresses that he is taking psychotropic medication that cannot be terminated instantaneously. *(Attachment 20)*. Had the Respondent submitted to the court-ordered examination scheduled for September 23, 2003, Dr. Ansar Haroun would have provided the most current diagnosis. As it stands, however, the Respondent ultimately failed/refused to undergo the psychological examination as directed. As a result, an adverse inference applies that, at the very least, Dr. Haroun would have similarly diagnosed Mr. Shine with a major depressive disorder requiring the use of psychotropic medication.

Instead, a psychological evaluation rendered by Dr. Rappaport on September 30, 2003 provides the most recent diagnoses that Mr. Shine continues to suffer from a major depressive disorder. Respondent's counsel argues that Dr. Rappaport's findings and conclusions give rise to significant issues of material fact, which must be resolved following a hearing on the merits. I do not agree.

5. The Respondent Failed to Identify Specific Facts Evidencing Triable Issues of Fact

It is ironic that Respondent Shine willfully violated multiple orders to turn over his medical records and submit to a psychological evaluation and then attempts to introduce an unauthorized medical report prepared by Dr. Rappaport to boot strap a controverted issue of fact to require a hearing. For reasons stated below, Dr. Rappaport's psychological evaluation is rejected. Furthermore, even if the filing of Dr. Rappaport's report was proper, viewing the evidence in a light most favorable to the Respondent, there is no genuine issue of material fact disputing that Mr. Shine's severe depression persists today.

a. Dr. Rappaort's Conclusions from the Psychological Evaluation is Rejected

Respondent Shine contends that the psychological evaluation provided by Dr. Richard Rappaport on September 30, 2003 is the most recent evidence of Respondent's mental state and should, therefore, trump all outdated records and documents presented by the Coast Guard. Respondent's counsel draws particular attention to Dr. Rappaport's conclusion that Mr. Shine currently does not suffer any mentally incapacitating disorder. However, a closer review of the report, as well as the circumstances surrounding the examination, reveal that Mr. Shine's reliance on Dr. Rappaport's conclusion is misplaced.

The fact that Respondent repeatedly refused to submit to a psychological examination by the psychologist selected by the undersigned judge cannot be overlooked. Most recently, the

Respondent was specifically ordered to undergo an examination by Dr. Ansar Haroun no later than October 1, 2003. While the Respondent ultimately failed to submit to this examination, he now attempts to offer an evaluation from a psychiatrist of his choice as a substitute at the eleventh hour. This alternate source is not appropriate, allowable, or legally adequate. Neither the undersigned judge nor the Coast Guard had prior knowledge that Dr. Rappaport saw the Respondent. More importantly, Dr. Rappaport rendered his evaluation without sufficient information from the parties or specific instructions from the judge. Instead, by surreptitiously seeking Dr. Rappaport's services, the Respondent was able to manipulate the interview by selectively disclosing favorable information regarding his psychological well-being. For example, the section in Dr. Rappaport's evaluation pertaining to Mr. Shine's psychiatric history is devoid of any reference to either Mr. Shine's nervous breakdown in January 2003, or his hospitalizations in December 2002 and January 2003.[17] Similarly, the report fails to mention the Respondent's numerous counseling sessions with various psychologists over the past few years, including, but not limited to Dr. Francine Kulick, Dr. Emad Tadros, and Dr. Douglas Riddle. Suffice-it-to-say, either Dr. Rappaport was not privy to Mr. Shine's complete psychological history or Dr. Rappaport deliberately chose to discount crucial information without providing a reasonable explanation. Consequently, the conclusions in Dr. Rappaport's evaluation are viewed as conjecture at best and are appropriately rejected.

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[17] Mr. Shine discusses the details surrounding his nervous breakdown and hospitalization in an interview with Dr. Francine Kulick, conducted on January 29, 2003. The Transcription of Tape Cassette Recordings of the interview were provided by the Respondent in his Motion for Reconsideration of Court's Order and Notice of Failure to Comply, filed on September 20, 2003. Additional evidence of Respondent Shine's nervous breakdown and hospitalization is provided in Dr. Kulick's report on the Respondent's psychological condition, issued on February 20, 2003 and Dr. Emad Tadros' evaluation rendered upon admitting Mr. Shine to Sharp Mesa Vista Hospital on January 21, 2003. <u>See</u> Coast Guard Attachments 24 and 31.

Indeed, it cannot be overlooked that Dr. Rappaport's conclusion conflicts with his overall diagnosis of Mr. Shine. While Dr. Rappaport concludes there is no evidence that Mr. Shine is incompetent or unable to perform his duties, a diagnosis of major depression is cited throughout Dr. Rappaport's psychological evaluation. Dr. Rappaport states that Mr. Shine "experienced a major depressive disorder, which had an increasing impact on him as the process dragged on and on with no relief. It was maddening for him. And yet, he could not stop himself from questioning the system itself." See Dr. Rappaport's Psychological Evaluation, at 15 (Sept. 30, 2003). Dr. Rappaport also explains that the stressors in Mr. Shine's life, including conflicts with the maritime industry, his work environment, and feelings of being treated unjustly, eventually developed into psychological problems. See id., at 13. Dr. Rappaport diagnosed those psychological problems as a "major depressive disorder with fluctuation from mild to moderately severe. See id., at 10 and 12. Dr. Rappaport also noted evidence of a major mood disorder. See id., at 10. In conclusion, Dr. Rappaport explains that Mr. Shine's inherent trait of challenging the existing practices continues to preoccupy him, and thus, his depression continues. See id., at 15.

Regardless of Dr. Rappaport's professional opinion regarding Mr. Shine's psychological condition, the undersigned judge will make the ultimate determination as to whether the Respondent is able to perform his duties. An administrative law judge is not bound by the recommendations of the psychiatrist or even by the medical findings and opinion. See Appeal Decision 2021 (BURKE). Although a medical doctor's expert opinion is ordinarily given considerable weight in the ascertainment of a medical condition, the final determination as to whether a mariner is fit for sea duty should be made by the Administrative Law Judge based upon all the pertinent facts. See Appeal Decision 2021 (BURKE); see also Appeal Decision 825

(PERKINS). As such, whether the Respondent is incompetent for all, some, or only certain shipboard duties is a matter for the sole determination of the undersigned judge, not Dr. Rappaport.

b. No Genuine Issue of Material Fact Exists Even When Considering Dr. Rappaport's Report

Even assuming arguendo, that Dr. Rappaport's medical report was a permissible filing, there is no genuine issue of material fact that Mr. Shine suffers from a major depressive disorder, which persists today. As a matter of fact, Dr. Rappaport diagnosed the Respondent with "Major Depressive Disorder, single episode (296.2), with fluctuation from mild to moderately severe." Dr. Rappaport also diagnoses Respondent Shine with "Traits of an obsessive-compulsive nature with some narcissistic features, not to the level of a disorder." In rendering the diagnoses, Dr. Rappaport relied upon and cited to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR") (American Psychiatric Association 2000).

On November 18, 2003, the undersigned issued an Order proposing to take Official Notice of the DSM-IV-TR in its entirety. On November 24, 2003, the Respondent filed an objection to the November 18, 2003 Order. Based on the Respondent's objection, the undersigned issued an Order of Clarification on December 10, 2003. The Order explained that Official Notice of the definition and symptomology of Major Depressive Episodes and Disorders, Obsessive-Compulsive, and Narcissistic was needed to give context to Dr. Rappaport's medical report. Thereafter, Respondent withdrew his objection on December 11, 2003, in accordance with the December 10, 2003 Order. Accordingly, Official Notice of the DSM-IV-TR was taken of the definition and symptomatology of Major Depressive Episodes and Disorders, Obsessive-Compulsive, and Narcissistic.

The DSM-IV-TR states, "Major Depressive Disorder is a clinical course that is characterized by one or more Major Depressive Episodes (see p. 349). See DSM-IV-TR, at page 369. The DSM-IV-TR indicates that "those with Major Depressive Disorder have . . . decreased physical, social, and role functioning." Dr. Rappaport explains "a major depression is characterized by sadness, feelings of hopelessness and helplessness, vegetative signs such as difficulty with appetite or sleep and possible thoughts of suicide." This explanation is consistent with features of Major Depressive Episode described in the DSM-IV-TR at page 349. However, the DSM-IV-TR goes on to explain, "Many individuals report or exhibit increased irritability (e.g., persistent anger, a tendency to respond to events with angry outbursts or blaming others, or an exaggerated sense of frustration over minor matters)." Id. at 349. "If the impairment is severe, the person may lose the ability to function socially or occupationally." Id. at 351.[18]

It is clear from the evidence in this case, that there is no disputed issue of material fact that the Respondent currently suffers from a psychiatric condition that renders him mentally incompetent to serve under the authority of his Coast Guard issued license and document. Indeed, since the Respondent's last employment aboard a vessel, he has been admitted to a hospital for mental health disorders, undergone continuous psychotherapy, and was diagnosed with a mental condition requiring the use of psychotropic medication. Most importantly, the

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[18] The DSM-IV-TR defines "Obsessions" as "persistent ideas, thought, impulses or images that are experienced as intrusive and inappropriate and that cause marked anxiety or distress." See DSM-IV-TR, at page 457. "Compulsions" are defined as "repetitive behaviors (e.g., hand washing, ordering, checking) or mental acts (e.g., praying, counting, repeating words silently) the goal of which is to prevent or reduce anxiety or distress."

Furthermore, the essential features of Narcissistic Personality Disorder are a "pervasive pattern of grandiosity, need for admiration, and lack of empathy."

While Dr. Rappaport diagnosed Respondent with obsessive-compulsive trait and indicated that the narcissistic features exhibited by Mr. Shine do not rise to the level of a disorder, the definition of the two is necessary to fully understand Mr. Shine's symptoms.

record is devoid of any evidence to indicate that the Respondent's mental condition has chanced since that time.

Thus, viewing the evidence in a light most favorable to Respondent and based on the various admissions contained in the documentary evidence concerning Mr. Shine's psychological condition, I find that the Coast Guard is entitled to judgment as a matter of law. I further find that the written record in this case was completely adequate to resolve the legal issue concerning Respondent's competency. Given the breadth and depth of the written record, I cannot say that the opinions and credibility of lay witnesses explored on direct or cross-examination would add anything material to the limited issue concerning Mr. Shine's mental competency to serve aboard a vessel. As such, I turn to the other unresolved issues pending.

B. **Other Unresolved Issues Pending**

There are two unresolved issues: 1) Respondent's Motion for Reconsideration and 2) Respondent's Response to the February 5, 2004 Order and Request for Scheduling Conference. Each issue will be discussed in turn.

1. Respondent's Reconsideration Motion

The Respondent filed a Motion for Reconsideration on September 30, 2003, in which he asserts the Judge's Order and Notice of Failure to Comply dated September 23, 2003 contains several inaccuracies and misstatements of fact. Respondent Shine specifically argues: (a) all relevant medical psychological records have been furnished to both the Agency and this Judge; (b) Dr. Haroun refused to conduct the examination despite Respondent's willingness to comply; and (c) Dr. Haroun was not properly prepared for the examination and lacked crucial information. Moreover, despite the undersigned's ruling on the matter on September 23, 2003, Respondent continues to maintain that the California Code of Civil Procedure 2032(g) and Rule

35 of the Federal Rules of Civil Procedure support recordation of the psychological examination and the presence of his attorney during the psychological examination.

While the Coast Guard acquired various medical records through its subpoena power set forth in 46 CFR 5.301 and 33 CFR 20.608, several documents relating to Respondent's psychological well-being remain unavailable. Such documents include all medical records concerning Mr. Shine's mental competence from Sharp HealthCare in San Diego, California. Rather than fully complying with the Coast Guard's subpoena, Sharp HealthCare transmitted the records under seal to the undersigned Judge on July 28, 2003. Because Mr. Shine's records contain information subject to the confidentiality requirements of the California Welfare and Institutions Code, the hospital was hesitant to release the records without first obtaining Mr. Shine's consent. When Mr. Shine's consent could not be obtained, Sharp HealthCare sent the medical records directly to the Judge for the limited purpose of an in camera review. As such, Mr. Shine's refusal to make his records available for purposes of this proceeding has resulted in unnecessary obstacles and delay.

Additional evidence reveals that Respondent deliberately withheld psychological records in his direct possession. It was only through the employment of eleventh-hour tactics in an effort to defeat the summary decision motion that the Coast Guard and this judge became aware of Dr. Richard Rappaport's psychological evaluation of Mr. Shine. Dr. Rappaport's report reveals additional medical/psychological documents provided to him by the Respondent, which were not similarly provided to the Coast Guard.[19] Included amongst these documents are: a) records from Dr. Kathleen Flanigan, indicating that she saw Respondent Shine on February 4 and 5, 2003; b) a report from the Del Mar Psychiatric Center, diagnosing the Respondent with a major depressive

disorder and a generalized anxiety disorder; c) a report from Dr. Alec Caldwell, making generalized conclusions of an emotionally explosive personality; and d) a packet of records from Dr. Emad Tadros, parts of which the Coast Guard obtained from other sources but were not produced by the Respondent. The Respondent's deliberate attempt to conceal relevant information and withhold psychological records in his possession constitutes a refusal to comply with the Judge's discovery orders. As such, the inference that all such medical and psychological records would be adverse to the Respondent continues to apply.

Similarly, the Respondent's actions exhibited on the morning he appeared for an interview with Dr. Haroun constitute a refusal to undergo a psychological examination as directed. In his Motion for Reconsideration of the Court's Order and Notice of Failure to Comply, the Respondent argues he explained to Dr. Haroun that the court order did not prohibit video recordation of the examination. The Respondent claims that despite this assurance, Dr. Haroun continued to refuse to proceed with the examination. The Respondent also argues that such unintrusive recordation is customarily allowed under both Rule 35 of the Federal Rules of Civil Procedure and the California Code of Civil Procedure § 2032. The Respondent, therefore, asserts that he made a good faith attempt to comply with the Judge's orders when his counsel undertook efforts to contact the Judge's general office number for clarification. I do not agree. Employing the same eleventh-hour tactics, at no time between the issuance of the September 8, 2003 Order and the September 18, 2003 appointment date, did Respondent's counsel file a motion for leave to be present or to videotape the psychological examination. Both Respondent and his counsel were repeatedly advised that the consequences for failing to comply with the

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[19] Dr. Rappaport's psychological evaluation was attached to Respondent's Opposition to Contingent Motion for (continued from page 13) Summary Judgment filed on October 1, 2003.

undersigned's order would be severe (i.e., an adverse inference would be drawn). Under these circumstances, at minimum, Respondent's counsel should have sought clarification in advance of the examination as to whether he could be present during the psychological examination and whether videotaping was permissible. Considering Respondent's repeated objections to the discovery orders and orders compelling psychological examination, this latest action is simply just another attempt to evade discovery. Because the Respondent failed to raise any new legal or factual issues, his arguments concerning both the video recordation of the interview and his failure to submit to a psychological examination are hereby summarily rejected pursuant to 33 CFR § 20.309(f).

Finally, the Respondent's argument that Dr. Haroun was not provided with sufficient information before the scheduled exam is without merit. Dr. Haroun is a competent professional who is the primary psychiatric professor at the University of California San Diego. He is also an employee of the County of San Diego, providing psychiatric evaluations for Superior Court proceedings and has held this position for numerous years. Although the undersigned ordered the Respondent to undergo an examination by Dr. Haroun, the ultimate determination as to how many interviews and/or psychological tests that were needed to make a general diagnosis of the Respondent's current mental state was to be decided by Dr. Haroun. A judge's letter of instruction, along with parts of both parties' submissions, was tendered to Dr. Haroun on September 17, 2003. However, Dr. Haroun's ability to assess Respondent Shine's current mental capacity was not contingent on this documentation as such information was merely initial background material that was to be reviewed by Dr. Haroun for his first meeting. The remainder of both parties' submissions was received by Dr. Haroun a short time thereafter. Since Dr.

Haroun was authorized up to 20 hours of paid time on this case, the momentary delay in receiving all of the background material is of no consequence.

Upon review and careful consideration to each of the Respondent's contentions, the undersigned finds that the Respondent was not justified in leaving Dr. Haroun's office on September 18, 2003 without having the court ordered examination. Rather, the Respondent's actions constitute a failure or refusal to submit to a psychological examination as directed. As such, the Respondent's Motion for Reconsideration is **DENIED**, and an inference that the results of the examination would be adverse to the Respondent stands.

2. *Respondent's Response to the February 5, 2004 Order and Request for Scheduling Conference*

Following the Vice Commandant's dismissal of an interlocutory appeal of the undersigned's denial of Respondent's Motion for Recusal on the basis of bias, the undersigned issued an Order on February 5, 2004 directing Respondent's Counsel to clarify whether he is "**still**" Counsel of Record and whether he is adopting the claims, defenses, and other factual and legal contentions contained in Respondent's appeals.[20] On February 10, 2004, Respondent's Counsel affirmed that there had "been no change in the legal representation of respondent in this matter" and indicated a lack of knowledge concerning the "'claims, defenses, and other factual and legal contentions' contained in the appeals." Based on Counsel's response, I find that it is not relevant to the resolution of this case whether or not Mr. Forgie adopts the claims, defenses, and other factual and legal contentions' contained in the appeals. If Counsel desires the appellate material he requests, a copy can be obtained from his client. Moreover, Respondent's Counsel

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[20] Mr. Shine filed the appeal to the Commandant without the assistance of counsel, and it appears that Mr. Shine failed to forward a copy of the appellate filings to his attorney, Peter Forgie. After reviewing the appellate record, the Commandant held in Appeal Decision 2644 (SHINE) (2004) that Mr. Shine's appeal was premature as a Decision and Order had not been rendered in the proceedings.

requested a scheduling conference be set for the purpose of determining dates for a hearing on the Coast Guard's Motion for Summary Decision and a hearing to consider evidence on the Coast Guard's Complaint and the Respondent's defenses. For the reasons stated above in this decision, those requests are **DENIED**.

III. CONCLUSION

In conclusion, there is substantial evidence in the record to support a finding that the Respondent suffers from a mental impairment of sufficient disabling character, which renders him unable to safely perform his duties aboard a merchant vessel. In the absence of any showing that his condition has been cured, Respondent is mentally incompetent to perform duties on a vessel at sea.

Pursuant to the Table of Suggested Range of an Appropriate Order codified in 46 C.F.R. 5.569(d), the only proper order for a charge of Incompetence is revocation. Revocation is not excessive in this case given the potential danger to life and property if the Respondent returned to service at sea. In fact, it has been repeatedly held that a person suffering from a psychiatric disability should not be permitted to serve aboard any vessel in a capacity in which he could cause serious harm to himself, to others, or to the vessel itself. See Appeal Decision 2514 (NILSEN); see also Appeal Decision 2460 (REED); Appeal Decision 2417 (YOUNG).

Accordingly, an outright revocation of the Respondent's license and merchant mariner document is the only appropriate order. WHEREFORE,

V. ORDER

IT IS HEREBY ORDERED that the Coast Guard's Motion for Summary Decision be, and it hereby is, GRANTED;

IT IS HEREBY FURTHER ORDERED that the Coast Guard License and DOCUMENT issued to Respondent Eric Norman Shine is REVOKED. Respondent is ordered

to immediately surrender his License and DOCUMENT to his attorney so that arrangements can be made to immediately transmit said documents to the U.S. Coast Guard Marine Safety Office San Francisco Bay. It is hereby further,

ORDERED that the service of this SUMMARY DECISION on the Respondent's counsel will serve as notice to the Respondent of his right to appeal, the procedure for which is set forth in 33 C.F.R. §§ 20.1001-20.1003. (Attachment B).

SO ORDERED:

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HON. PARLEN L. MCKENNA
Administrative Law Judge
United States Coast Guard

Done and Dated: July 21, 2004
Alameda, California

ATTACHMENT A

RULINGS ON RESPONDENT'S ISSUES ON APPEAL

1) Respondent intends to appeal the denial of each of the requests and motions which he has filed in this matter. Those requests and motions are a matter of record, and each is incorporated herein by reference, along with any opposing papers and the rulings/orders related thereto.

    RULING: The basis for the denial of each Respondent's requests and motions are set forth in each of the corresponding orders.

2) Respondent intends to appeal the granting of all requests/motions which were filed by the Coast Guard and opposed by Respondent in this matter. Those requests/motions, and the Respondent's oppositions, are incorporated herein by reference as those set forth in full.

    RULING: The basis for the granting of each of the Coast Guard's requests and motions are set forth in each of the corresponding orders.

3) Respondent intends to appeal the denial by the court of discovery requests, including but not limited to those filed on June 13, 2003, July 28, 2003, and August 28, 2003. Respondent further intends to appeal the court's order of October 7, 2003, which order precluded the filing of further discovery requests, and the filing of any further oppositions by Respondent to both the U.S. Coast Guard and the ALJ's actions in this matter.

    RULING: The basis for the denial of discovery requests are set forth in the Order Denying in Part Respondent's Motion for Discovery, dated June 30, 2003; the Order Denying Respondent's Second Motion for Discovery, dated July 30, 2003; Order [Concerning Respondent's Third Motion for Discovery], dated September 10, 2003; and Order, dated October 7, 2003.

4) Respondent intends to appeal the court's rulings regarding the validity, constitutionality and application of 46 CFR 5.67.

    RULING: The basis for applying 46 CFR 5.67 is set forth in the Final Order Directing Psychological Examination dated September 8, 2003.

5) Respondent intends to appeal the ALJ's granting of the USCG's motion for production of Respondent's medical and psychological and disability records. The bases for this appeal are set forth in several of Respondent's filings with the court.

    RULING: The basis for granting the USCG's motion for production of Respondent's medical and psychological and disability records are set forth in the Orders issued on July 1, 2003 and August 4, 2003.

6) Respondent intends to appeal the Administrative Law Judge's Order to Show Cause dated July 8, 2003, and to submit witness summaries. The bases for this appeal are set forth in Respondent's filings.

> **RULING:** The basis for the Order to Show Cause dated July 8, 2003, is detailed therein.

7) Respondent intends to appeal the Order Rejecting Respondent's Affirmative Defenses that Show Lack of Jurisdiction and Authority, issued on July 9, 2003.

> **RULING:** The basis for the Order Rejecting Respondent's Affirmative Defenses that Show Lack of Jurisdiction and Authority were detailed in Orders dated July 9, 2003, and September 9, 2003.

8) Respondent intends to appeal the undersigned's refusal to sanction the USCG for its failure to comply with the directive to identify the specific source and the time of the USCG's acquisition of Respondent's medical, psychological, and disability records, and the USCG's abuse of process and utilization of the subpoena process in violation of the Health Insurance Portability and Accountability Act (HIPPA) and the Privacy Act of 1974, 5 U.S.C. § 552(a).

> **RULING:** The basis for the undersigned's ruling is detailed in the September 8, 2003, Final Order Directing Psychological Examination.

9) Respondent intends to appeal the Order of July 7, 2003, directing Respondent to make medical records available, and the court's denial of Respondent's Motion for Reconsideration of Order regarding Production of Medical and Psychological Records.

> **RULING:** The basis for the Order is detailed in the July 7, 2003, Order.

10) Respondent intends to appeal the Order denying his motion for an order precluding admission into evidence any psychological records or testimony from Respondent's treating psychotherapists. The basis of the Respondent's arguments on this point (and on those listed in paragraphs 1-9) are set forth in documents already on file, including but not limited to the motion dated August 5, 2003.

> **RULING:** The basis for the undersigned's ruling is detailed in the Orders issued on July 1, 2003, August 4, 2003 and September 8, 2003.

11) Respondent intends to appeal the Order of July 15, 2003 directing Respondent to produce records or submit affidavits. The bases for this appeal are set forth in several filings by Respondent.

> **RULING:** The basis for the Order is detailed therein.

12) Respondent intends to appeal the July 30, 2003, and August 4, 2003, Orders regarding psychological examination. The basis of Respondent's appeal as to the psychological examination is set forth in documents on file, and they are incorporated herein by reference. Those filings include the brief, motions, and response filed on July 21, 25 (2), 31, August 1, 6 (2), 12, 15 (2) and 25.

    RULING: The bases for the July 30, 2003, and August 4, 2003, Orders are detailed therein.

13) Respondent intends to appeal the August 12, 2003, Order denying motion for clarification of USCG allegations. The basis therefore is set forth in Respondent's motion dated August 5, 2003, and his filings of June 13, 2003, June 25, 2003, and July 7 and 25, 2003.

    RULING: The basis for the August 12, 2003, Order is detailed therein.

14) Respondent intends to appeal the Order of August 28, 2003, denying Respondent's request to apply the United States Department of Labor, Longshore and Harborworkers ALJ's bench book to the proceedings.

    RULING: The basis for the August 28, 2003,Order is detailed therein.

15) Respondent intends to appeal the September 2, 2003, Order regarding the introduction of documents authored by Respondent complaining about the Union.

    RULING: The basis for the Order is detailed therein and in the Order dated September 9, 2003.

16) Respondent intends to appeal the Order of September 2, 2003, regarding the ALJ's ability to issue a license at a lower grade as opposed to revocation.

    RULING: The basis for the Order is detailed therein.

17) Respondent intends to appeal the Order of September 4, 2003, regarding certain attorney client communications.

    RULING: The basis for the Order is detailed therein.

18) Respondent intends to appeal the "Final Order Directing Psychological Examination" and its rulings on medical records issued on September 8, 2003. The bases for the appeal are set forth in Respondent's filings of September 19, 2003, and October 1, 2003.

    RULING: The basis for the Order is detailed therein.

19) Respondent intends to appeal the Order of September 8, 2003, denying Respondent's Motion for Alternative Dispute Resolution.

RULING: The basis for the Order is detailed therein.

20) Respondent intends to appeal the Order of September 9, 2003, rejecting certain affirmative defenses, and intends also to appeal any other orders striking any of the Respondent's affirmative defenses. The bases for this appeal are set forth in each of the Respondent's filings.

RULING: The basis for the Order is detailed therein.

21) Respondent intends to appeal the September 12, 2003, Order denying response motion for order regarding jurisdiction over Respondent.

RULING: The basis for the Order is detailed therein.

22) Respondent intends to appeal the September 23, 2003, Order relating to the Notice of Failure to Comply, and the order associated therewith. The basis for this appeal is set forth in, among other filings, Respondent's filings of October 1 and October 7, 2003.

RULING: The basis for the Order is detailed therein, and is further explained in the attached Order Granting Summary Decision.

23) Respondent has filed an appeal to Commandant [GMAO-1] in regards to this judge's denying Respondent's Motion for Recusal of the Administrative Law Judge which requires full due process hearings in this regard.

RULING: The basis for the denial of the Respondent's Motion for Recusal of the Administrative Law Judge is detailed in the Order dated November 20, 2003.

24) Respondent intends to appeal any order relating to his October 1, 2003, motion for Reconsideration of the Order and Notice of Failure to Comply. Neither Respondent, nor his counsel, are aware of any Order relating to that Motion for Reconsideration, and Respondent reserves all rights relating thereto.

RULING: The basis for the denial of the Reconsideration Motion is detailed in the attached Order Granting Summary Decision.

25) Respondent intends to appeal the undersigned's ruling relating to his failure to require the USCG to state with greater specificity the particular manner and/or statute alleged to have been violated by Respondent in relation to these proceedings pursuant to the requirements of 46 CFR 5.33.

RULING: The basis for the undersigned's ruling is detailed in the Orders issued on July 9, 2003, and August 12, 2003.

26) Respondent intends to appeal the August 12, 2003, Order denying Motion for Clarification of the United States Coast Guard allegations. The basis therefore is set forth in response to Respondent's motion dated August 5, 2003.

> **RULING:** The basis for the Order is detailed therein.

27) Respondent intends to appeal the issues associated with the conduct of the August 26 and August 27, 2003, proceedings, the absence of due process, and the lack of foundation for any proffered evidence.

> **RULING:** The proceeding was conducted in accordance with the Administrative Procedure Act, Coast Guard Procedural Regulations codified at 33 CFR Part 20, 46 CFR part 5, and 46 U.S.C. Chp. 77.

28) The Respondent intends to appeal the ruling(s) that no act of incompetence need be shown as a requirement to revoke his license. The bases for this appeal have been set forth in the documents which Respondent has filed since early May 2003.

> **RULING:** The basis for the ruling is detailed in the attached Order Granting Summary Decision.

29) Respondent intends to appeal the ALJ's rulings insofar as they fail to consider the implications of the Labor Management Reporting, and Disclosure Act (29 USC 401) to the activities of the Respondent herein, as regards the grievance and reporting procedures in which he has engaged, and which are now being utilized against him in the proceedings.

> **RULING:** The Labor Management Reporting and Disclosure Act is inapplicable. Rather, suspension and revocation proceedings for Incompetence are governed by the Administrative Procedure Act, Coast Guard Regulations codified at 33 C.F.R. Part 20, 46 C.F.R. Part 5 and 46 U.S.C. Chp. 77.

30) Respondent intends to appeal the retaliatory nature of these proceedings, the issues of malicious and retaliatory prosecution in the face of whistleblowing evidence which must include the letter to the Secretary of Transportation and USCG of March 2003 for which these proceedings were instituted, letters to the FBI, formal union grievances, formal U.S. District Court Civil complaints and other whistleblowing complaints and reports which have been made by Respondent and been used against him as evidence.

> **RULING:** The proceedings were conducted in accordance with the Administrative Procedure Act, Coast Guard Regulations codified at 33 C.F.R. Part 20 and 46 C.F.R. Part 5, and 46 U.S.C. Chp. 77. Further, this issue has been addressed and ruled upon in the September 9, 2003, Order.

31) Respondent intends to appeal the present proceedings as inapposite to the intent of Labor Management Reporting and Disclosure Act, the Sarbanes-Oxley Act, the Whistle Blower Protection Act, the Administrative Procedure Act [as amended by the WPA and other laws], in contrast to the language and intent of 46 USCA 2114, Railway Labor Act, the

Merchant Marine Act of 1936, general maritime law and admiralty, which requires timely due process hearings, and any hearings within an administrative authority or proceeding, not to extend beyond a four month time period.

> **RULING:** Coast Guard suspension and revocation proceedings for Incompetence are governed by the Administrative Procedure Act, Coast Guard Regulations codified at 33 C.F.R. Part 20 and 46 C.F.R. Part 5, and 46 U.S.C. Chp. 77. All other Acts, including but not limited to the Whistle Blower Protection Act, the Railway Labor Act and the Labor Management Reporting and Disclosure Act, are inapplicable. Furthermore, neither the APA nor the applicable Coast Guard Procedural Regulations establish time restrictions for completing the decisional process, including hearings.

32) Respondent intends to appeal the entire process and procedures and manner by which these proceedings have been carried out, as the process is to be remedial in nature and not punitive, and rather than pursuant to a proper and full investigation and proper due process hearings. The OALJ and USCG wish to create their own pre-ordained result through the denial of proper process and fact-finding procedures.

> **RULING:** The proceeding was conducted in accordance with the Administrative Procedure Act, Coast Guard Procedural Regulations codified at 33 CFR Part 20, 46 C.F.R. Part 5 and 46 U.S.C. Chp. 77.

33) Respondent intends to appeal the fact that the USCG and OALJ have in fact imposed themselves into a labor dispute to favor one side or one party in the disputes, rather then force all parties to use the proper process as created under the Railway Labor Act and further protected by the Merchant Marine Act of 1936.

> **RULING:** The Railway Labor Act is inapplicable. Further, this issue has been ruled upon in the September 9, 2003, Order.

34) Respondent intends to appeal that the USCG and OALJ/ALJ have far exceeded their authority and now attempt to escape derelictions of duty on the part of certain officials or individuals by whitewashing the Respondent's valid complaints and grievances through use of a "labor dispute medical examination," rather than by investigating and discovering the problems with the License Personnel Board and requiring that the various parties abide by the proper process and use its own influence and authority to ensure that the process is fair and impartial.

> **RULING:** This issue has been ruled upon in the September 9, 2003, Order.

35) Respondent intends to appeal the length of time that the proceedings have carried on without proper "Hearing" and that the NTSB, due to the conflicted and whistle blower nature of these proceedings, should have bee incorporated into the processes from the very beginning. That the matters within an ALJ's authority should not extend beyond four (4) months as per the LMRDS, and likewise for the Appeal to the Commandant, the NTSB and eventually to de novo judicial review, this entire process should not exceed a period of one year, or less.

RULING: Neither the Administrative Procedure Act, the Coast Guard Procedural Regulations codified at 33 CFR Part 20, the NTSB statute codified at 49 U.S.C. 1133, nor the NTSB Procedural Regulations for Merchant Marine codified at 49 CFR Part 825, establish time restrictions for completing the decisional processes, including hearing. Moreover, the Coast Guard regulations authorize the summary disposition of cases where there exists no genuine issue of material fact.

36) Respondent intends to appeal the proper use of the National Maritime Center/Chief Medical Officer, and the use of the Commandant for any matters such as this which involve more "complex" matters which are beyond the scope of the local I/O's or even ALJ's authority or expertise.

RULING: No appealable issue can be discerned in the above statement proffered by the Respondent.