

JUSTICE PREVAILS – United States Coast Guard Ordered, for the First Time, to Pay Attorney Fees to Successful Respondent in Suspension & Revocation Proceeding

For the last four decades, Coast Guard has been successful in avoiding an award of attorney fees to merchant mariners wrongly prosecuted -- but never say never. For the first time since the 1980 enactment of the Equal Access to Justice Act, Coast Guard has been ordered by a District Court judge to pay attorney fees and costs to a Respondent, Clint Walker Davis, Jr., in a Suspension and Revocation Proceeding.

The Court remanded the fee amount to Coast Guard for a determination of reasonable fees. Soon after Coast Guard and Davis agreed that he would receive \$80,000.00 in fees and costs. At the end of the day, Davis will have no out of pocket legal fees for the defense of his merchant mariner credential.

This article is a follow-up to an article entitled, "[A Revocation on Crack](#)" published by MOPS in its Eddies and Current Magazine. In that article, the arrogance of the Coast Guard prosecutors and the errors of the specimen collection staff at Coast Guard was discussed at length. After a long legal battle with Coast Guard to obtain Davis' specimen bottle, inspection of the bottle revealed that it was not Davis'.

Davis was an active member of the Coast Guard at the time he was alleged to have provided a specimen that tested positive for cocaine. Coast Guard separated Davis for involvement with drugs, and thereafter filed a Complaint seeking revocation of Davis' merchant mariner credential based on that positive test. Our firm was engaged to defend the S&R Complaint.

The Revocation proceeding was tried on May 2-3, 2013. Coast Guard sought a thirty-day continuance at the close of the defense case to investigate the collection of Davis' specimen. Coast Guard moved to withdraw its Complaint on May 24, 2013 after performing an investigation into the collection procedures used to collect Davis' specimen.

Our firm filed a successful application to the Board of Correction of Military Records (BCMR) and Davis was reinstated to the Coast Guard with back pay and other emoluments, including cleansing of his military record as to the positive drug test. Coast Guard admitted in its response to Davis' application to the BCMR that an error has occurred during the collection of Davis' specimen and that the urine in the specimen bottle was likely not Davis' and that the administrative discharge of Davis was the result of that error.

Davis filed his fee application with the Coast Guard on June 21, 2013. Coast Guard sought and was granted a thirty-day extension to file its response, arguing that it still had to investigate in order to effectively respond to Davis' fee application. Coast Guard finally filed its Opposition on August 21, 2013.

Over a year after Davis filed his fee application ALJ Walter J. Brudzinski finally issued his opinion denying Davis' application. His reasoning was that the collector had testified that she followed the manual's procedures. Obviously she had not, and ALJ Brudzinski had declined to read the record testimony from the trial or the Coast Guard's response to Davis' BCMR application wherein Coast Guard admitted that an error had occurred in the collection (in fact many had occurred).

Similarly, the Commandant sat on Davis' appeal for over twenty months, issuing his opinion on February 26, 2016, only after Davis filed a Complaint for issuance of a Writ of Mandamus compelling the Commandant to issue his decision on appeal. Remarkably, the Commandant's decision, denying Davis' application on the same grounds as ALJ Brudzinski issued the day before the answer to the Mandamus Complaint was due.

Over four years later justice prevails. On July 27, 2017, the District Court for the District of New Jersey issued an Opinion and Order in the case of *Davis v. Zunkunft*, 2017 WL 3168984 (D.N.J. 2017) overturning the ALJ's decision and the Commandant's Decision on Appeal.

The Court found that the Coast Guard was never substantially justified in bringing a S&R Complaint against Davis, and in fact such action was unreasonable. The Court further found that Coast Guard failed to follow its own procedures for drug testing of its members and failed to investigate the procedures during collection of a positive sample as required by its own manual. The Court also found the Coast Guard reasonably should have known that the collection procedures were compromised prior to initiating the two proceedings (Administrative Separation and Revocation of Credential) against Davis.

Davis vehemently denied drug use throughout all of the underlying proceedings, and fought incessantly to defend his name and to recover the large amount of attorney fees he accumulated in the process. Ultimately the Court agreed with Davis' contention that the record showed that Coast Guard failed to follow its own manual both in the collection of Davis' sample and in failing to investigate the procedures used after the report of a positive drug test and that such action was unreasonable.

There have been two prevalent thoughts among attorneys who defend mariners in Coast Guard Suspension and Revocation Proceedings. The first is that your chances of prevailing in a drug case are slim to none. The second is that Coast Guard has never been ordered to pay a fee award pursuant to the Equal Access to Justice Act. I think it is fair to say that the tide has turned on both accounts and mariners need competent counsel now more than ever to safeguard their reputations and credentials from overzealous Coast Guard prosecutors and an ALJ system that tows the Coast Guard line.

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