

**Board of Pilot Commissioners for the Bays
of San Francisco, San Pablo and Suisun**

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**BOARD OF PILOT COMMISSIONERS
MINUTES**

**June 24, 2010
9:30 A.M.**

OPEN MEETING**Call to Order and Roll Call-9:30 a.m.**

President Miller, Vice President Johnston, and Commissioners Roberts, Wainwright, and Sullivan were all present, constituting a quorum. Commissioners Osen and Tate were absent. Ex officio member Dale Bonner, Secretary of the Business, Transportation and Housing Agency was represented by Deputy General Counsel Gabor Morocz. Also present were Port Agent Captain Peter McIsaac, Dennis Eagan (Board Counsel), Raymond Paetzold (Maritime Counsel), Executive Director Allen Garfinkle and Assistant Director Nancy Hall Bennett.

1) Approval of Minutes

President Miller informed the Board that the draft minutes emailed to them earlier this week have been the subject of clerical corrections but not substantive changes and that the revised draft minutes are included in each Board member's board book. He asked that when the Board votes on approving the minutes, the motion would authorize staff to make clerical changes to the minutes distributed by email earlier this week.

President Miller asked if members of the Board had corrections or additions to the draft minutes. Commissioner Wainwright stated that the draft minutes did not include reference to his comments in connection with the decision by the Attorney General's Office not to waive the prohibition on contracting with outside maritime counsel.

President Miller asked whether members of the public had comments on the draft minutes. There were none.

Commissioner Johnson moved that the minutes be approved with a reference to Commissioner Wainwright's comments, and that staff be authorized to make clerical changes consistent with those included in the members' board books. Commissioner Wainwright seconded the motion. The motion passed on a unanimous voice vote.

2) Announcements – President Miller

President Miller announced that, consistent with the Board's past practice of surveying licensees semi-annually, he had directed staff to conduct a confidential retirement survey of all licensees in July. The most recent survey was conducted in January, 2010. Commissioner Roberts, who chairs the Pilot Power Committee, inquired whether President Miller anticipated a need for Section 237(d) data to be reviewed in connection with the results of the survey. President Miller responded that he did not see a present need for such a review.

President Miller announced that he had requested Chairman (Commissioner) Roberts to convene the Continuing Education Committee to review the Board's regulation 215(b) which requires that all licensed pilots attend a 6-day manned model training program every five years. The Committee is requested to consider whether the 6-day duration requirement continues to be appropriate or whether a different duration would be more appropriate to the continuing education requirements of the Board. The Committee is requested to report to the Board its findings and make recommendations for modification of the regulation if appropriate.

President Miller announced that he had asked Chairman (Commissioner) Sullivan to convene the Pilot Safety Committee to review the Board's experience in implementing Harbors and Navigation Code section 1156.6 concerning pilot transfer equipment and safety matters and to make recommendations to the Board concerning its implementation or modification if the Committee determines that modification would be appropriate.

3) Board Member Activities – Board Members

President Miller stated that he had no activities to report but that he and Vice President Johnston would be serving as proctors at the written examination segment of the Board's trainee selection examination scheduled for Monday, June 28 at the California Maritime Academy. President Miller also stated his intention to attend the session at which evaluators of the candidates taking the simulator segment of the examination will be trained. It is scheduled for Wednesday, June 30 at CMA.

Vice President Johnston reported that he had attended a dinner on Thursday, June 24 at the Japanese Consul's home, with Rear Admiral Shinichi Tokumaru, the Commander of the Japanese Training Squadron, which presently is visiting San Francisco Bay. Vice President Johnston reported that Admiral Tokumaru was very complimentary of the professionalism and courtesies of the SF Bar Pilots who brought his ships into San Francisco. The admiral asked that he pass on to the Port Agent his good wishes and appreciation of these courtesies extended by the Bar Pilots.

4) Executive Director's Report – Executive Director Garfinkle

A) Correspondence and activities since the May 27, 2010 meeting.

Letters Received:

- June 10, 2010: From San Francisco Bar Pilots regarding employee commendations
- From MITAGS regarding training evaluation
- From Shea, Labagh and Dobberstein regarding San Francisco Bar Pilots Independent Audit

B) Report on pilot licensing matters in the past month and current month.

In the month of May the Board renewed eight licenses: Captains Fuller, Gabe, Horton, Weiss, Wells, Sweeney, Slough and Chapman.

In the month of June the Board renewed four licenses: Captains McCloy, Wehr, Hurt and Cloes.

C) Report of surcharges received by the Board: Executive Director Garfinkle reported that the SFBP has collected \$251,245.07 in surcharges for the month of May and the Inland Pilot has collected \$3,286.00 on behalf of the Board.

D) Report of Budget subcommittee hearings and contractual matters:

Executive Director Garfinkle asked Ms. Bennett to report on the Interagency Agreement with the Department of Technology. Ms. Bennett reported that the contract will be signed the next week and that the Board will have a new website (www.bopc.ca.gov) effective July 1, 2010.

Executive Director Garfinkle asked the Port Agent if he would like to report on any legislative matters. Captain McIsaac reported that AB 1888 was moved out of the Senate Government Organization Committee on consent on June 22.

5. Port Agent's Report – San Francisco Bar Pilots (SFBP) Port Agent Captain Peter McIsaac

A) Monthly report on SFBP ship-piloting business activity:

Absent for Medical Reasons (AFMR) and Not Fit For Duty (NFFD) Report:

Capt. Simenstad has been AFMR since Feb 27.

Capt. Gates was AFMR from April 11 through June 16. He was found fit for duty by a Board physician prior to being dispatched.

Capt. McIsaac was AFMR beginning March 16. On May 4 he was found NFFD to pilot by a Board physician. He is expected remain unfit until early August but will continue his duties as Port Agent.

Recommended Minimum Rest Period Exceptions:

There were 51 during the month of May on eight separate days. The shortest was 5.3 hours. It was a relatively busy month compounded at various times by pilots being pulled for training, two NFFD, one on bereavement leave, trainee test preparation and one pilot who was carried away for multiple days.

PV SAN FRANCISCO:

PV SAN FRANCISCO was out of service from June 1 through the 26 while undergoing annual maintenance and ABS load line modifications. A condition and valuation survey has been completed as per regulation and insurance carrier requirements. The boat was found to be in excellent condition with no deficiencies.

Billed Vessel Moves in May '10 compared to a 3 year average:

Bar Crossings: (563) down 12%
Bay Moves: (109) down 32%
River Moves: (32) down 18%
Total Moves: (704) down 11%
GRT: (25.9M) down 12%

When compared to the first five months of 2009 bar crossings are down 7% while total moves are down 9%.

At the conclusion of the Port Agent's Report, President Miller stated that the Board would go into closed session to discuss the contents of the Port Agent's confidential report regarding pilots who are currently absent for medical reasons (AMFR) but that the closed session would be deferred to the end of the day's agenda and consolidated with other closed session matters.

6) Reported Safety Standard Violations and Investigations - Executive Director Garfinkle

No new reports have been received.

7) Reportable Piloting Events - Executive Director Garfinkle

On May 26, 2010 the tug Keegan Foss grounded while made fast to the Medi Osaka in Santa Fe Channel, Richmond Inner Harbor.

8) Rules and Regulations Committee - Commissioner Wainwright.

A) Report on June 14, 2010 Committee meeting.

The Committee reviewed the status of rulemaking for Portable Pilot Units and Commission Investigator Minimum Standards, both are within the 45-day public comment period. The Committee also reported that the Commission's new Conflict of Interest Code has been forwarded to the Fair Political Practices Commission.

The Committee continues to draft regulations regarding new requirements for annual physicals for all pilots and trainees as well as Port Agent reporting of incidents. The next meeting is scheduled for July 20.

9) Finance Committee –Commissioner Osen

Commissioner Wainwright reported on behalf of Commissioner Osen, who was absent. The Committee met on June 17, 2010. A quorum was present.

- The Committee was unable to review the fund condition as documents were not presented by the California Highway Patrol at the time of the meeting.
- Ms. Julie Yasuda of the SFBP presented the Committee with a summary cash report showing that the SFBP received \$3,748,600.60 in total receipts for the month of May, continuing a slight upward trend for revenue collections.
- In regard to the NavTech Surcharge the Committee heard a presentation by Ms. Yasuda. As dictated by statute the SFBP has only one year to collect a surcharge for a repayment for the purchase of Portable Pilot Units. As the year-end is approaching the SFBP has been able to see that the current surcharge of \$32/move is insufficient to reach the targeted amount of collection needed. Ms. Yasuda presented the Committee with a proposed increase of the surcharge to \$40/move and after discussion the Committee voted unanimously to recommend to the Board adoption of a new surcharge.

Commissioner Wainwright moved that the Board adjust the current NavTech surcharge to \$40/move and that staff be directed to notify both the SFBP and the Inland Pilot of the change effective July 1, 2010. Commissioner Roberts seconded the motion and it passed on a unanimous voice vote.

- The Committee also considered the current pilot boat surcharge. Currently the surcharge is 0.00844. The Committee heard a presentation by Ms. Yasuda in which she stated that the current monthly mortgage payment for the pilot vessels is \$212,800. In the past the Committee has agreed that the fund should keep a reserve of two months of mortgage payments in the account. Currently the surplus is set at \$300,000. In an effort to meet the targeted reserve of roughly \$435,000 the Committee is recommending that the Board raise the surcharge rate to 0.01097.

Commissioner Wainwright moved that the Board adjust the current Pilot Boat surcharge to 0.01097 and that staff be directed to notify both the SFBP and the Inland Pilot of the change effective July 1, 2010. Commissioner Roberts seconded the motion and it passed on a unanimous voice vote.

- The Committee received from SFBP a copy of the report of its independent auditors, Shea Labagh Dobberstein. The Committee will discuss the audit report at its next meeting.
- Further, the Committee will regularly review the mid and long term financial needs of the Board. President Miller has suggested that the Committee place such an item on the agenda for all future meetings. The Committee will do so and looks forward to discussion of long-range priorities.

10) Pilot Evaluation Committee - Captain E. Nyborg

President Miller announced that the Board would receive the Pilot Evaluation Committee (PEC) report as the next item of business in order that pilots scheduled to work on the day of the Board meeting and who also are the subject of the PEC agenda items be minimally delayed in returning to their duties.

Pilot Evaluation Committee Chairman (Capt.) Nyborg addressed the Board as follows:

The Pilot Evaluation Committee met on June 16, 2010.

In closed session, all five trainees were interviewed individually. The current trainees include: Ruff, Merritt, Fawcett, Kellerman and Laakso. Their time in the program ranges from 12 months to 15 months. All trainees are progressing at their own rate. There may be a recommendation for one certificate of completion at the July Board meeting.

Pilot Trainee Capt. Mike Peery was let go following his 12 month review with the Executive Director. Capt. Garfinkle has the support of all PEC members in this difficult decision. It should be noted that the Pilot Trainee Training Program is exceedingly challenging to any mariner and the demands of the program require intense focus and commitment. It is the job of PEC to ensure that each trainee knows exactly where he stands each month, and what he or she needs to do to be successful.

With respect to the Trainee Selection Examination scheduled for the week of June 28, the written portion of the exam is complete and published. With respect to the simulator portion of the exam, PEC and pilot volunteers spent three days at CMA finalizing the simulator exam this month. With the help of Capt. Garfinkle, Ray Paetzold, and Drs. Chinn and Hertz, the process is complete. All involved feel that the simulation will test the candidates abilities in all areas of piloting, with special emphasis on those areas

deemed most important. PEC would like to thank Captains Buckley and Noonan at CMA for the outstanding effort they have given this project. We are lucky to have such talent available to us. PEC would also like to thank Ray Paetzold for his help with the exam and for his years of service to PEC.

The trainee drug testing program is active and working well, but needs to transfer over to the custodianship of the Board. Capt. Gates has been handling the program, but will be retiring this month. The contact info for Capt. Garfinkle was provided to the collection company as the new administrator for the trainee drug testing program.

The final trainee from the last exam is now with us having begun his duties on June 1st. Capt. Kris Laakso is hard at work learning the Bay, preparing to start his Federal exams, and riding ships. He brings with him a career of experience tow boating on the West Coast. Kris' father is a retired Panama Canal Pilot. Kris lives in Washington with his wife and two children.

Capt. Laakso, who was in the audience, addressed the Board and expressed his appreciation to the Board for accepting him into the training program, President Miller welcomed him aboard.

Capt. Nyborg continued his report to the Board:

With the pending retirement of PEC member Capt. Gates next month, PEC and the Port Agent would like to recommend to the Board, as his replacement, Capt. Tom Burger.

Capt. Nyborg stated that Capt. Burger became a San Francisco Bar Pilot in 1991 after his successful completion of the training program. As a 19 year veteran pilot, he has the level of experience needed to mentor trainee pilots. He has not previously served on PEC, but has volunteered for this duty on two occasions. Capt. Burger has always taken an interest in training pilots. He has the talent and demeanor to let a trainee do his own work even when conditions conspire to make our work most difficult. He has attended several PEC meetings to get up to speed on the work we do. He has been involved in the development of the simulator exam. He has studied Sections 209, 213, and 214 of the regulations to become familiar with the regulation and function of PEC.

Capt. Nyborg stated that he has known and worked with Capt Burger for 16 years, trusts his judgment in piloting, respects his skill as a mariner, and looks forward to working with him on PEC. He asked the Board to consider the recommendation favorably.

President Miller stated that he was pleased that Capt. Burger was familiar with the statutory requirements for membership in the PEC as specified in Harbors and Navigation Code section 1171.5 and with the Board's regulations related to the PEC and its activities.

President Miller noted that Capt. Burger had at least ten years' experience as a pilot on the Bays of San Francisco, San Pablo, and Suisun and confirmed that he had not previously served on the PEC. Commissioner Miller noted that HNC section 1171.5 limits the number of terms that an appointee can serve on the PEC to two four-year terms.

Commissioner Miller inquired of Executive Director Garfinkle whether he had confirmed the qualifications of Capt. Burger to serve on the PEC. The Executive Director stated that he had, and that Capt. Burger was qualified.

President Miller asked Capt. Burger whether he was familiar with Board regulations 209, 213, and 214. Capt. Burger responded that he was.

President Miller invited other Commissioners to inquire of Capt. Burger and Capt. Nyborg.

At the conclusion of the questioning by the Board, President Miller noted that the PEC, while it has advisory duties with respect to the Board, also has statutorily mandated duties and a mission that is critical to the success of the Board. He noted that the PEC was an element of state government and that PEC members themselves were thus part of state government.

The Board next took up the May 28, 2010 dismissal of pilot trainee Michael Peery during his first year of training by the Executive Director. Commissioner Wainwright moved that the Board ratify the Executive Director's action, and the motion was seconded by Commissioner Roberts. The motion passed unanimously.

There was a report on the action by the Selection Appeal Committee on two appeals at its June 16, 2010 meeting. The appeals followed rejection by the Executive Director of the applications of Captain Kevin Freese and Captain Mark LaCroix for admission to the Pilot Trainee Training Program. The Committee affirmed the rejections in both instances. The following are the minutes of the Committee concerning its action on the two appeals:

MINUTES

Meeting of the Selection Appeal Committee of the
Board of Pilot Commissioners for the
Bays of San Francisco, San Pablo, and Suisun
June 16, 2010

The Selection Appeal Committee of the Board of Pilot Commissioners met on June 16, 2010, at the Board's offices to consider the appeals of Captain Kevin Freese and Captain Mark LaCroix from the Executive Director's rejection of their applications for the Pilot Trainee Training Program. The full Committee was present, consisting of Commissioner Roberts as chair and Commissioners Johnston and Sullivan.

Both appeals presented the same issue. Section 213(e) of the Board's regulations requires as a minimum qualification "two years" of command time as master. Section 213(g) defines "year" as 360 days. There is nothing in the regulations defining "day" as other than a 24-hour period. Both applicants argued in their written appeals that the Committee should interpret its regulation in light of the federal regulation governing service time required for raises in grade for

ship's officers, ultimately leading to a master's endorsement on a merchant mariner credential. The federal regulation (46 C.F.R. § 10.107(b)) defines a "day" as eight hours, and credits 12 hours of work as one and one-half days. The appellants argued that the 12 hours they worked during a day should be counted as one and one-half days of command time as master. Absent such an interpretation of "day," neither had the 720 days of command time as master required by section 213(e).

Freese Appeal

At the request of the Committee chair, Executive Director Garfinkle summarized the issue presented by the appeal, as outlined above. In addition to past precedent on this issue created by the 2002 appeal of Capt. Joseph Martin, the Executive Director, in response to a question, stated that he had consulted the Board's Maritime Counsel, Raymond Paetzold, who told him that his interpretation of section 213(e) was in accordance with past practice. He said his review of past application records also confirmed that this interpretation was in line with past practice. He stated that accepting the ordinary definition of "day" as 24 hours "leveled the playing field" for masters of oceangoing vessels (civilian and military), who are responsible on a 24-hour basis for the operation of their vessels. In response to a question from Commissioner Johnston, the Executive Director stated that the program application materials did not discuss the meaning of "day." He stated that the minimum qualifications for Houston pilots, offered by Capt. Freese as a contrast to the Board's minimum qualifications for pilots, were actually the same, because Houston, although allowing credit for one and one-half days for a 12 hours of work, and treating "days" as eight hours, required 1,080 such "days," which is one and one-half times the 720 calendar days that the Board's regulation requires.

Capt. Freese was present at the hearing. He argued that crediting those working longer hours during a day with more than one "day" for a 24-hour period leveled the playing field because his 12 hours of service represented more experience as master than a lesser number of hours worked in a 24-hour period by someone else. In response to a question from Commissioner Johnston, he said that he was 80 days short of qualifying for the program if calendar days were the standard. He said he personally, unlike some masters of tugboats, did not go home at night and was on the tug 24 hours. He said he spent his 12 hours of work navigating, as opposed to being "on call."

The Committee went into closed session to deliberate on the appeal. Chairman Roberts reconvened the open session of the meeting to announce that the Committee had voted to affirm the rejection of Captain Freese's application by the Executive Director.

LaCroix Appeal

At the request of the Committee chair, Executive Director Garfinkle summarized the issue presented by the appeal, as outlined above. Capt. LaCroix was not present. The Executive Director stated his view that the extra "day" credit argued for by Capt. LaCroix created an unfair distinction and that there was nothing in the law or regulations that allowed that. He mentioned the prior precedent of the 2002 appeal of Capt. Joseph Martin. He also stated that the State was free to, and had, enacted higher standards than those maintained by the federal government for the licensing of pilots.

The Committee went into closed session to deliberate on the appeal. Chairman Roberts reconvened the open session of the meeting to announce that the Committee had voted to affirm the rejection of Captain LaCroix's application by the Executive Director.

11) Pilot Fitness Committee - Commissioner Roberts

Commissioner Roberts reported that he is awaiting deliverables from Dr. Kosnik of UC San Francisco regarding the visits with Board physicians. He further reported that Dr. Peter Swan has left the Occupational Medicine Associates practice leaving the Board with only three Board physicians. The Pilot Fitness Committee plans to meet in July.

12) Pilot Pension Committee – Commissioner Tate

Commissioner Tate was absent, and there was no report.

13) Low Sulfur Fuel – Commissioner Osen

Commissioner Osen was absent, and there was no report.

14) Board Regulations – Vice President Tate.

Consideration of modification to Board Regulation Section 207(a) to provide that a Board member may be elected to a two year term of office as Vice President and be re-elected without limitation to a number of terms

The proposal was to make conforming changes in regulations for the election and term of Vice President as the changes previously made in Section 206 for the President. The amendment would strike the second sentence in Section 207(a) and insert two new sentences as follows:

~~"The Vice President shall serve for a term of one year. A member shall not serve as Vice President for more than two consecutive terms. The term of office is two years and it is renewable within the Board member's term of office. The Vice President serves in such capacity at the pleasure of the Board, and could be recalled at any time by the members of the Board at a properly noticed meeting."~~

Commissioner Miller moved that the staff be directed to move forward with the regulation process. Commissioner Wainwright seconded the motion and it was approved on a unanimous voice vote.

15) Financial Integrity and State Manager's Accountability (FISMA) Act of 1983.

The Board reviewed the draft report on the Board's systems of internal control for the biennial period ended December 31, 2009.

Commissioner Johnston moved that the Board adopt the report and associated Corrective Action Report and direct the Board President to communicate the report to the Secretary of Business, Transportation and Housing. Commissioner Wainwright seconded the motion and it passed on a unanimous voice vote.

16) Public Comment on Matters not on the Agenda

There were none.

17) Proposals for Additions to Next Month's Agenda

There were none.

18) Incident Review Committee Report – Executive Director Garfinkle

- A) XIN NING BO Incident of February 7, 2009, and Accusation initiated by the Board against Capt. Michael Simenstad.

The Board previously has voted to consider the Accusation in a hearing with an Administrative Law Judge presiding. The Board has discussed the merits of, instead, referring the matter to the ALJ sitting without the Board.

At its December 2009 meeting, the Board voted to sit with the administrative law judge to hear the case involving Captain Michael Simenstad and the XIN NING BO incident of February 7, 2009. The Board reconsidered its December vote at this meeting. The Board initially voted 4-0 to instead have the ALJ hear the matter alone, without the Board being present. In this initial vote, Commissioner Roberts was absent from the meeting, and Commissioner Johnston, who is a member of the Incident Review Committee, was one of the four votes in favor.

- B) IRC Incident report on the May 15th, 2010 allision of the R/V FROSTI with Pier 27.

Executive Director Garfinkle presented his report of the allision of the R/V FROSTI with Pier 27, piloted by Captain Hugo Kenyon.

On the morning of May 15, 2010, the R/V FROSTI was inbound from sea to Pier 27, Port of San Francisco with Captain Hugo Kenyon aboard. The inbound transit across the bar and through the Bay was made safely but after the master took the conn for the final approach to the dock, the bow made an unintentional contact with the wooden string piece on the dock.

During the course of the investigation, sufficient information was ultimately obtained to prepare a reasonably complete report for the purposes of determining whether there was a pilot error or the appearance of pilot error.

The Incident Review Committee (IRC) consisted of Commissioner Frank Johnston as Chairman and Executive Director Allen Garfinkle. The IRC prepared a report and found no pilot error and no appearance of pilot error and that this was therefore a non-incident under section 210(b) of the Board's regulations. The IRC is closing the investigation with no further action.

Commissioner Wainwright moved to accept the findings of the IRC report. Commissioner Roberts seconded the motion and the Board voted on a unanimous voice vote to accept the IRC report that this was a non-incident with no pilot error.

CLOSED MEETING

President Miller announced that the Board would go into closed session to consider two items of business:

- Pursuant to Agenda Item 5, to consider the Port Agent's confidential written report concerning pilots who have been absent for medical reasons (AFMR).
- Pursuant to Agenda Item 19, to confer with the Board's litigation counsel, Deputy Attorney General Judith Loach, regarding pending litigation as specified in the meeting notice. Consideration of this matter in closed session is authorized by Government Code Section 11126(e)(1).

President Miller then recessed the Board meeting at 11:29 a.m. The Board reconvened at 11:56 a.m. still in open session, then going into closed session to consider the previously stated matters.

OPEN MEETING

The Board returned to open session at 12:55 p.m.

President Miller announced that the Board in closed session had considered the Port Agent's confidential written report concerning pilots who have been absent for medical reasons (AFMR), and that it had met with litigation counsel, Judith Loach, Esq., regarding pending litigation.

President Miller announced that the Board had taken no action on these items.

The Board then returned to consideration of Agenda Item 18 concerning the administrative hearing in the matter of *Board of Pilot Commissioners v. Capt. Michael Simenstad*.

A question was raised whether Commissioner Johnston should have voted on this matter when it was considered earlier in the meeting, given his role as a member of the IRC, which recommended that the Accusation be filed against Captain Simenstad. Without deciding whether Commissioner Johnston's vote was improper, it was decided to again consider this matter later in the meeting, but this time without the participation of Commissioner Johnston. Commissioner Roberts made a motion, seconded by Commissioner Wainwright, to have the ALJ to hear the matter sitting alone. The motion carried on a 4-0 roll-call vote, Commissioners Miller, Roberts, Sullivan, and Wainwright voting aye, and Commissioner Johnston abstaining.

19) Adjournment

There being no further business, the meeting was adjourned at 12:59 p.m.

Respectfully submitted,



Allen Garfinkle
Executive Director