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Subject: RE: PMSA letter re Port Agent Duties meeting (rescheduled)

From: Mike Jacob [REDACTED]
Sent: Monday, July 10, 2023 11:47 AM
To: Tynan, Karen [REDACTED]; JENNIFER SCHMID [REDACTED]; Joanne Hayes-White [REDACTED]; Robert Carr - San Francisco Bar Pilots [REDACTED]; Einar Nyborg [REDACTED]; Dougherty, Stephanie L@CalSTA [REDACTED]; Garfinkle, Allen@BOPC [REDACTED]; Eagan, Dennis@DOJ [REDACTED]; Port Agent [REDACTED]; Anne McIntyre [REDACTED]
Cc: Kevin Baldwin [REDACTED]; John McLaurin [REDACTED]; Matt Robinson [REDACTED]
Subject: PMSA letter re Port Agent Duties meeting (rescheduled)

EXTERNAL EMAIL. Links/attachments may not be safe.

BOPC Boardmembers and Colleagues,
Please find attached letter with initial thoughts for organizing and planning questions ahead of the Port Agent assignment duties meeting, whenever rescheduled.
Given that we all have additional time now to prepare for a discussion, I would advance the attached for your consideration in the intervening weeks.
Best,
Mike

Mike Jacob
Vice President & General Counsel



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July 10, 2023

Commissioner Karen Tynan, President
Board of Pilot Commissioners
State of California
660 Davis St.
San Francisco, CA 94111
Delivered via Email

Re: Preliminary Questions for Board of Pilot Commissioners Ahead of Rescheduled Special Meeting Regarding the Board's Role in Port Agent's Duties

Dear President Tynan and Commissioners:

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), thank you for the opportunity to provide comments ahead of a future Special Meeting of the BOPC regarding the roles and authority of the Board and the Port Agent. Given the rescheduling of this meeting, it seemed a good time to not only forward our PMSA's concerns at this juncture for background but to provide some focus on the legal and factual bases upon which the Board might act, which are to-date unclear, and which may provide some consideration in advance of the rescheduled meeting.

PMSA may agree or disagree with the substantive actions proposed by Staff and/or the authority claimed by the Board to take these actions, yet at this point it is unclear. What is clear and indisputable is that it is in the public's, stakeholders', and the Board's interest to first be clear with respect to the basis or bases of assertion of authority in this matter prior to taking positions and actions. For the sake of good order, I offer this letter in the hopes that it helps the Board make imminently clear to the public what the full, complete, and actual situation is at hand factually and the legal foundational authority and related procedural bases upon which the Board could take action first, prior to then proposing any such actions and inviting the participation of stakeholders.

The Board Staff at the May BOPC monthly meeting advised stakeholders that its basis for advising Board actions in whatever the matter is ahead of us were already well established by the documents disclosed in the record. These materials were principally composed of: (1) a letter to the Port Agent from BOPC Executive Director Garfinkle of April 16, 2023, "Re: Piloting Assignments to Captain Ron Greger"; and, (2) the May 24, 2023 Staff memo of the Board Counsel, "Re: Staff recommendation concerning Port Agent's refusal to assign a pilot who is fit for duty." Both are attached for ease of reference.

These documents have done either of the critical things necessary to provide the public or the Board with the ability to ascertain anything about the situation at hand or the asserted authority of the Board to act. Again, independent of whether PMSA may agree or disagree with the policies, intent, or outcomes desired by the Board Staff in the underlying matter, neither of these documents establish or assert clear statutory or regulatory bases for the Board to issue an Order, regulatory direction, or a disciplinary action to the Port Agent in this matter. And neither of these documents presents a full recitation of the facts of the case, including any facts regarding the conduct of the licensee whose assignment is in question, or any findings which the Board describes facts whereby the Port Agent may be in violation of any statute or regulation. These should be made clear.

Foundational Authority for Board Action Needs to Be Ascertained

The assertion of authority to act by the Board, and the staff materials and arguments which support an assertion of authority to act, do not clearly state the basis for an authority to act.

The 4/16/23 Staff letter is a “request” by the Board Staff to the Port Agent. The 4/16/23 letter further notes that if the Port Agent does not act as requested that the Board will be asked to direct the Port Agent to make such assignments. The basis for this request is cited as the Port Agent’s duties statute at Harb. Nav. Code, § 1130 (a) (citing the “port agent shall “carry out the orders of the board”), but that only further begs the same question – what is the “order” in question of the board and how is it given?

No one would disagree that the Port Agent has a statutory requirement to carry out the orders of Board under HNC §1130. But the questions remain as to whether, how, and in what capacity such orders are issued and implemented by the Board and how they would be directed to the Port Agent. The 4/16/23 Staff Letter to the Port Agent does not discuss, list, or assert any such basis.

The 5/24/23 Staff memo cites Board regulations, § 218, the duty to make vessel assignments to pilots, and argues that the Port Agent’s exercise of discretion in withholding assignments of pilots to vessels is a substitute of his judgment for that of the Board in setting the number of pilots under Harb. & Nav. Code §§ 1170 – 1170.2. There is no issue that the pilots at issue here are licensees of the State, and no one would disagree that the Board has the exclusive ability to issue licenses under HNC §§ 1170-1170.2, but the Port Agent’s power to make assignments to vessels is distinct and apart from the issuance of a license by the Board. The questions here likewise are whether, how, and in what capacity the Board may direct the Port Agent to make certain assignments to pilots post-licensure. The 5/24/23 Staff Memo also does not discuss, list, or assert any such basis.

The basis for the Board to assert direct administrative authority over the discretionary actions of the Port Agent to make assignments should be affirmatively stated prior to the Board taking action. There are various ways in which the Board could direct Port Agent assignments, but these raise other questions. Under what statutory authority may the Board direct specific pilot assignments and not others? Does the Board get to determine when the Port Agent has violated Section 218, as alleged, and if so, what is the Board’s authority for implementing Section 218 by direct Order to the Port Agent? Is the violation of Section 218 “misconduct” by the Port Agent, and if so, is this a disciplinary matter? When, if ever, does the Board conclude that the Port Agent is acting as a public official and when the Port Agent is acting as President of the SFBP?

Moreover, PMSA is extremely concerned with the false logic and presumptions of the 5/24/23 Staff Memo asserting that there are safety implications to the entire pilotage system from the lack of an assignment of any one specific pilot. Is it logical that withholding assignments from one individual pilot yields a pilotage system that is no longer safe? Prior to April 3rd, the SFBP had a fixed number of licensees from which to make assignments of which Capt. Greger was one, but the Port Agent did not assign him to vessels. After April 3rd, the situation and facts on the ground are exactly the same: SFBP had the same number of fixed number of licensees from which to make assignments, of which Capt. Greger was one, but the Port Agent did not assign him to vessels. Are we to believe that vessels are now suddenly at risk because one pilot that was NOT working prior to April 3rd remains NOT working after April 3rd? The 5/24/23 Memo fails to forward a logic for its safety inferences.

Unclear and Inadequate Disclosure to the Public of the Facts in this Matter

In addition, the recitation of Facts in the 5/24/23 Staff Memo raise additional questions for us with respect to the process employed by the Board in this matter. The Facts as presented to the Board do not present any relevant information prior to April 3, 2023, but clearly the actual matters in dispute as alleged in this matter pre-date April 3rd. Yet, these are not included in the Staff Memo recommending action to be taken against the Port Agent. These facts are critical to making an evaluation as to whether the April 12, 2023, Port Agent notifications were either reasonable or arbitrary or some other abuse of the Port Agent's assignment discretion. There is a cursory discussion of the potential of such basis of facts in the 4/16/23 Staff Letter, citing discrepancies between internal SFBP medical rules and Board licensing medical fitness determinations, but these are not included in the Staff Memo.

Further, the 5/24/23 Staff Memo Facts disclose that there was no direct petition for action presented to the Board in this matter. The Board was apparently copied on a demand letter of 4/13/23 by Capt. Greger to SFBP seeking dispatching to vessel assignments effective April 18th. It is entirely unclear from the recitation of facts in the Staff Memo or on the face of the letter itself as to why the 4/16/23 Staff Letter was sent prior to the April 18th demand date. If Capt. Greger has presented any request directly to the Board or Staff on this matter at all it is not in the record.

Procedural Basis for Board Action Needs to Be Discussed

The record is entirely bereft of a conversation or examination of how this matter – and importantly, in what capacity – is before the Board. Since we must presume from the record that Capt. Greger has never actually formally asked the Board to intervene in this matter, that creates one large initial question to be answered: what is the procedural footing of this action?

We have many questions regarding the procedural stance to date: Is the proper step for Capt. Greger to address this issue outside of his individual demand letter issued to the SFBP simply adding the Board as a copied party and assuming that the Board would take some action?

Stated another way, upon what procedural basis would, if Capt. Greger has not petitioned the Board for action, the Board act sua sponte? What is the proper threshold for making such a determination? Or should Capt. Greger pursue a remedy in Court to compel an action by the Port Agent – or the Board, if appropriate – in this matter?

And, the Board and the Staff may have different roles to play in such a matter: Are there affirmative duties, authorities, and responsibilities of Board staff to bring these matters before the Board? Or should the Staff attempt to resolve matters administratively within the scope of their duties? If so, what are they, when do they exist, what thresholds apply, what are the precedents, and how does the Board and/or the Staff know when they are to be implemented?

These questions obviously would force the Board to consider the fundamental nature of this dispute and the scope and scale of Board involvement as a result. But none have been asked or answered; for instance: Is this a business dispute amongst business partners, and if so, what is the nature of Board involvement? Is this a licensing dispute that requires an interpretation of a regulation or a statute? Is this a disciplinary matter for the Board regarding either the actions and conduct of Capt. Greger pre-dating April 12th or the Port Agent for actions and conduct of April 12th and beyond, or neither?

Assertions of Proposed Authority for Board Action Should Be Disclosed to the Board and Public as Consistent or Inconsistent Prior Board Positions Taken on the Subject of Port Agent Assignments

We would note that a number of the fundamental issues that need to be addressed have already been the subject of extensive litigation precipitated by PMSA over the role of the Port Agent as a public official and the role of the Board in supervising or directing pilotage assignments made by the Port Agent. The Board made numerous representations as to the limits of its authority in that case, but Staff has not attempted to square those assertions of limited authority with the broad assertions of authority already claimed in this instance (subject to clarification per above).

We would recommend that the Board ask the Staff to disclose, compare, contrast, and/or distinguish any asserted limits on authority in prior cases versus what is being proposed for action in this matter. This discussion will either ensure consistency within an already asserted legal framework which limits Board authority or highlight inconsistencies, to which the Board and the public will be apprised prior to the Board adopting new policies, interpretations, and positions. Without such a process we are concerned that any action which is inconsistent will not be well-reasoned, transparent, and clearly squared with the Board's other regulatory responsibilities.

As these are fundamental issues which have been the subject of litigation and administrative complaints made by PMSA, including petitions to both the Office of Administrative Law and the Fair Political Practices Commission, PMSA is directly interested in any bases upon which prior Board policies, positions, or interpretations are or are not consistently applied on this subject. Depending on the nature, scope, and manner in which the Board asserts authority over the Port Agent in this manner, PMSA reserves all rights and remedies under law to revisit these prior addressed Board positions, and to press new claims as appropriate, consistent with any changes in state policy or interpretations of the Board's authorizing statutes under the Harbors & Navigation Code and any other applicable law.

In conclusion, thank you for providing us and the parties with the additional time and opportunity to submit foundational thoughts and suggestions to the Board for its consideration. As always, I am more than available to further discuss these or any other matters related to the administration of the Board and the pilotage system with the Board, the Staff, or other stakeholders. Please do not hesitate to contact me.

Sincerely,



Mike Jacob
Vice President & General Counsel

cc: Members, Board of Pilot Commissioners
Allen Garfinkle, Executive Director, Board of Pilot Commissioners
Dennis Eagan, Dep. Attorney General
Port Agent
Anne McIntyre, San Francisco Bar Pilots

**Board of Pilot Commissioners for the Bays
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April 16, 2023

Captain John Carlier
Port Agent
Pier 9 East End
San Francisco, CA 94111

Re: Piloting Assignments to Captain Ron Greger

Dear Captain Carlier:

It has come to my attention that you are not making piloting assignments to Captain Ron Greger, a San Francisco bar pilot. This is so even though Board-appointed physicians at U.C. San Francisco Medical Center (UCSF) have determined that Captain Greger is fit for duty as a pilot.

I understand that your basis for not making assignments to Captain Greger is his failure to comply with the SFBP Rules Governing Sick Leave, an internal policy of the San Francisco Bar Pilots. That rule apparently requires a pilot, to be eligible to receive monetary "sick leave distributions" from SFBP for the time the pilot is off work, to submit medical records and undergo an examination by a physician selected by SFBP to determine whether the pilot was in fact sick during the period for which sick leave distributions are sought by the pilot.

I telephoned you on April 13, 2023, to confirm whether this was in fact your basis for not assigning piloting work to Captain Greger. You declined to talk to me and instead referred me to SFBP's attorney, Kevin Baldwin, who was present with you at the time. I explained to Mr. Baldwin that any failure by Captain Greger to supply medical justification for sick leave distributions under SFBP's internal rule was not a basis for the Port Agent refusing to make assignments to him, the reason being that Captain Greger had been determined fit for duty by UCSF physicians.

Apparently on your behalf, Mr. Baldwin disagreed. His position is that your refusal to make piloting assignments to Captain Greger is justified by Captain Greger's failure to comply with SFBP's internal rule regarding sick leave distributions.

Administration by SFBP of its internal policy requiring proof of past periods of claimed sickness by a pilot as a precondition to the pilot receiving monetary sick leave distributions is of no concern to the Board. That is a fiscal issue for SFBP. What is a Board concern, however, is the Port Agent refusing to make job assignments to a pilot who UCSF physicians have determined is presently fit for duty. It may be permissible under SFBP's internal rule to deny sick leave distributions to a pilot seeking them if the pilot refuses to be examined by SFBP's doctor. But taking the additional step of refusing to make assignments to that pilot, even though UCSF

physicians have determined that the pilot is now fit for duty, is not permissible. Refusing to make assignments for this reason would short the board, in practical effect nullifying the impact of UCSF's determination that a pilot is fit for duty, and would do so for reasons that are irrelevant to, and run contrary to, the Board's concern with maintaining adequate pilot staffing levels. As you know, the Board-appointed physicians at UCSF are the sole physicians authorized by the Board's regulations to make determinations of fitness for duty regarding Board-licensed pilots. (See Cal. Code Regs., tit. 7, §§ 217–217.45.)

For the foregoing reasons, I am hereby requesting that you immediately place Captain Greger's name on the SFBP dispatch board so that he receives piloting assignments in the ordinary course.

If you decline to do so in response to this request, the matter will be placed on a Board meeting agenda with a recommendation that the Board direct you to place Captain Greger's name on the dispatch board so that he receives piloting assignments. (See Harb. & Nav. Code, § 1130, subd. (a) [port agent shall "carry out the orders of the board"].)

Respectfully,



Allen Garfinkle
Executive Director

cc: Kevin Baldwin, Esq.

TO: Members, Board of Pilot Commissioners

May 24, 2023

FROM: Dennis Eagan, Board Counsel

RE: Staff recommendation concerning Port Agent's refusal to assign a pilot who is fit for duty

The Port Agent has refused to make assignments to Captain Ron Greger, a pilot who UCSF physicians have determined is fit for duty. Staff recommends that the Board order the Port Agent to place Captain Greger on the dispatch board so that he receives assignments to pilot vessels.

Facts

Until recently, Captain Greger was absent for medical reasons and on disability leave. On April 3, 2023, UCSF physicians determined that he was fit for duty, and the Port Agent was notified of that fact on April 5, 2023.

On April 12, 2023, the Port Agent notified Captain Greger that he would not be dispatching Captain Greger for vessel assignments until such time as Captain Greger had complied with SFBP rules governing sick leave. The asserted noncompliance with SFBP rules governing sick leave was Captain Greger's alleged failure to submit sufficient medical documentation concerning his past illness and to submit to examination by a physician selected by the SFBP.

On April 12, 2023, Captain Greger notified the Executive Director of this refusal to make vessel assignments to him and the Port Agent's reason for the refusal.

On April 13, 2023, the Executive Director telephoned the Port Agent and asked to speak with him concerning his refusal to make vessel assignments to Captain Greger. The Port Agent declined to speak with the Executive Director and instead turned the phone over to SFBP's attorney, Mr. Kevin Baldwin, who was with the Port Agent at the time. Mr. Baldwin told the Executive Director that the Port Agent was not required to make assignments to Captain Greger because of his failure to comply with SFBP's internal policy requiring pilots claiming to have been sick to submit medical documentation and undergo examination by a physician selected by the SFBP.

On April 14, 2023, the Board received a copy of a letter dated April 13, 2023, from Captain Greger's attorney, Robert Weaver, to Mr. Baldwin, SFBP's attorney. This letter asserted that because Captain Greger had been determined fit for duty by UCSF physicians, the Port Agent was required to assign him to vessels. The letter asserted that refusal to assign vessels because of alleged violation of internal SFBP sick leave rules was impermissible, and that the Port Agent had other and appropriate means to ensure compliance by Captain Greger with the SFBP sick leave rules that he had allegedly violated. The letter demanded that Captain Greger be immediately dispatched for vessel assignment and requested a response to the demand by April 18, 2023.

On April 16, 2023, the Executive Director sent a letter to the Port Agent. The letter explained that SFBP's internal sick leave distribution policy has no relation to whether pilots receive assignments, and that failure to comply with that internal policy is not a legitimate basis for refusing to make assignments to a pilot. The letter requested that the Port Agent restore Captain Greger to the dispatch board immediately so that he could receive vessel assignments.

On April 17, 2023, the Port Agent responded to the Executive Director's letter. The Port Agent said he would not be dispatching Captain Greger because "This is a matter that involves the Port Agent's statutory responsibility for the general supervision and management of matters related to the business of pilots." The Port Agent concluded, "I look forward to the opportunity for the Board to weigh in on this issue."

At the Board meeting of April 27, 2023, Mr. Baldwin, on behalf of the SFBP, stated that SFBP's Policy Committee intended to consider whether to disassociate Captain Greger from the SFBP. Subsequent to the meeting, the Port Agent advised the Executive Director that the SFBP Policy Committee has voted to commence disassociation proceedings against Captain Greger. He stated that a hearing is set for June 14 before the membership, and a vote to "initiate a ballot to disassociate" Captain Greger may occur on that date.

Discussion

The position of the Board staff is that the Port Agent, under section 218 of the Board's regulations, has a duty to make vessel assignments to pilots whom UCSF physicians have determined are fit for duty. There is no exception in section 218 for pilots who have failed to comply with SFBP's internal sick leave compensation policy. The purpose of the duty imposed on the Port Agent by section 218 is to

maximize the number of pilots available for duty. The Port Agent's refusal to comply with that mandatory duty runs contrary to the Legislature's purpose to "ensure and promote the highest level of safety in pilotage" (Harb. & Nav. Code, § 1102) and provide a sufficient number of pilots (Harb. & Nav. Code, § 1170). The decision concerning the number of pilots that is sufficient is for the Board to make under sections 1170 through 1170.2 of the Harbors and Navigation Code. The Port Agent is not free to ignore that Board determination and supplant it with his own judgment concerning the number of pilots that is sufficient. And even assuming that the Port Agent could substitute his judgment for that of the Board on this issue, he could not implement his judgment concerning a decreased need for pilots by singling out one pilot alone and totally eliminating assignments to that one pilot.

Recommendation

Staff recommends that the Board order the Port Agent to place Captain Greger on the dispatch board immediately so that he receives assignments to pilot vessels.

Closed session

The April 13 letter from Captain Greger's attorney to SFBP's attorney strongly suggests that litigation is likely if the Port Agent continues his refusal to make vessel assignments to Captain Greger. Such litigation could well involve the Board as a party. For that reason, prior to any vote on the staff's recommendation, the Board will meet in closed session to receive legal advice from Board Counsel concerning this potential litigation.