

The Mistake was Made at the Beginning

Maritime ministry has been engaged in the shore leave controversy since September 11, 2001. On that day, the ship visiting immigration officer lost his or her authority to waive visa requirements for seafarers. This authority was transferred to a supervisory level, and *de facto* out of the reach of mariners who only have 24 to 36 hours of port call.

Shore leave became even more restricted when the State Department dropped crew list visas. Now, every mariner had to have a D-1 visa to access shore leave.

When the International Ship and Port Facility Security Code was approved in December 2002, maritime ministers were very concerned that facilities would use the new security requirements to solve their “seafarer” problem, and that seafarer welfare agents would be banned from some facilities because they did not “have business” there.

Our representatives appeared at the Coast Guard public hearings. They lobbied strongly that any new security regulations must recognize the mariner’s right to shore leave, and must restore shore leave at facilities where it had become prohibited.

To understand why six years after the adoption of the ISPS Code, and five years after the final rules on maritime security were promulgated we are still fighting over shore leave, I believe we have to look at the very beginning of the process in the US.

What Does the IMO say about seafarers access to shore leave?

A. The ISPS Code:

Section A, 16.3 states:

“...The (*port facility*) plan shall address, at least, the following:”

Fifteen points are then enumerated. Number 15 is:

16.3.15 procedures for facilitating shore leave for ship’s personnel or personnel changes, as well as access of visitors to the ship, including representatives of seafarers’ welfare and labour organizations.

Section 16.8.14 of Part B then gives guidance on how #15 should be put into practice:

“16.8 In addition to the guidance given under paragraph 16.3, the PFSP should establish the following, which relate to all security levels:

.14 the procedures for facilitating shore leave for ship’s personnel or personnel

changes, as well as access of visitors to the ship, including representatives of seafarers' welfare and labour organizations.”

If the ISPS Code was not sufficiently clear that facility security plans were to include procedures to facilitate shore leave, further clarification was offered in the *Preamble* to the code. In par. 11, we read:

“11 Recognizing that the Convention on the Facilitation of Maritime Traffic, 1965, as amended, provides that foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety or public order, Contracting Governments, when approving ship and port facility security plans, should pay due cognisance to the fact that ship's personnel live and work on the vessel and need shore leave and access to shore-based seafarer welfare facilities, including medical care.”

Finally, the IMO has produced at least two additional documents to promote shore leave:

- a) IMO Conference Resolution 11 (adopted December 12, 2002): ***Human-Element-Related Aspects and Shore Leave for Seafarers***
- b) IMO MSC/Circ. 1112 (June 7, 2004): ***Shore Leave and Access to Ships under the ISPS Code***

In summary, the ISPS Code insists that procedures for facilitating shore leave must be addressed in every approved facility security plan. It punctuates its position by stressing in the *Preamble* that ship's personnel “live and work on the vessel and need shore leave and access to shore-based seafarer welfare facilities.... On the same day that the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea approved the ISPS Code, they also approved Conference Resolution 11. Then, eighteen months later, the IMO issued MSC/Circ. 1112 to make it perfectly clear that seafarers' rights to shore leave cannot be overlooked in facility security plans.

The Development of Subchapter H - Maritime Security

Beginning in 2003, the US Coast Guard began a rule making process that culminated on October 22, 2003. Traveling to a number of ports, they heard from seafarers, seafarer welfare workers, and ship operators about the importance of shore leave, and its need to be guaranteed in the final rule. I personally addressed this issue at the New Orleans hearing.

When the final rule was issued, subchapter H had two important variances from the ISPS Code and other IMO guidance. First, 33 CFR §105.405 does not contain section A 16.3.15 on procedures for facilitating shore leave, which is mandatory in the ISPS Code for every facility security plan.

Second, though English is one of the primary languages of the IMO, the words used in ISPS Code Section B 16.8.14 were changed in 33 §105.200(7). Where the ISPS Code speaks of “procedures for facilitating shore leave, 33 CFR §105.200(7) speaks of “...ensure coordination of shore leave....”

This is no semantic quibble. Rather, it represents a fundamental decision by Coast Guard legal experts that it did not have the authority to tell private facilities who they must allow on their property. I believe that this decision, made early in the process, is the very reason that seven years after September 11, 2001, we are still here discussing shore leave for seafarers

This legal position explains why section A 16.8.15 is missing from subchapter 8, and why the more proactive phrase “procedures for facilitating shore leave...” was rendered in a more passive form “...ensure coordination of shore leave....”

Coast Guard representatives reported that some facilities argued that they were not going to allow shore leave, therefore there was nothing to coordinate, and they were then in compliance with §105.200(7). Sadly, the Coast Guard accepted this reasoning, approved their facility plans, and placed the property rights of facilities over the human rights of mariners.

When Coast Guard representatives explained above actions to members of Merchant Marine Personnel Advisory Committee’s Task Statement 59 work group, the members were astonished.

First, we found it incredible that after the Coast Guard told facilities how high fences needed to be, where lights had to be, how the MARSEC signs had to be displayed, and thousands of other details about maritime security, the one human element, shore leave was not in their purview, and was exclusively the right of the facility.

Second, as Capt. Andy McGovern, the chairman of MERPAC pointed out, the decision failed to distinguish between a person and a class of persons. A facility could argue that because of past problems, a particular person was not welcomed ashore. If a facility barred a specific mariner from shore leave, it would be directing a specific reason toward a specific person.

However this is different from barring a class of people from coming ashore because the facility does not want to deal with them, or because they are not mandated to do so.

Task Statement 59 recommended the Coast Guard reconsider its legal position, to change the language of subchapter H to better mirror the ISPS Code, and to report to the IMO, in accord with Resolution 11, the negative impacts seafarers were suffering with the US implementation of the ISPS Code. These recommendations were approved by the full MERPAC Committee as recommendations to the Coast Guard Commandant and the Secretary of the Department of Homeland Security.

Since March of 2007, when the Task Statement 59's recommendations were approved, I have

continued to reflect on the legal opinion that started this whole thing. I have come up with two additional reasons why this Coast Guard opinion is inadequate.

First, since the 1990's the Coast Guard has promoted an industry-government program called *Prevention through People*, or *PTP*. *PTP* tries to develop partnerships between the Coast Guard and the different elements of the maritime industry. *PTP* promotes cooperation, develops best practices, and applies these practices in the industry. The very first *PTP* guiding principle is:

“Honor the Mariner: Seek and respect the opinion of those who "do the work" afloat and ashore.”

Mariners and seafarer welfare agents feel that the Coast Guard did not follow its first *PTP* guiding principle. Today, mariners feel even stronger about this issue because after five years, the Coast Guard is still not respecting the opinion of those who do the work afloat and ashore.

Second, the House of Representatives in its 2007 Coast Guard Authorization bill introduced language that mandated shore leave in every facility security plan approved by the Coast Guard. The section read:

“Each facility security plan approved under section 70103© of title 46, United States Code, shall provide a system for seamen assigned to a vessel at that facility and representatives of seamen’s welfare and labor organizations to board and depart the vessel through the facility in a timely manner at no cost to the individual.”

The 2003 legal opinion of the Coast Guard argued that it lacked the authority to compel facilities to allow shore leave. However, the law passed by the House of Representatives is not an authorizing law. It does not give the Coast Guard authority to do something that it previously did not have. Rather, section 306 is a prescriptive law. It calls upon the Coast Guard to do something that the House of Representatives believes the Coast Guard can do. That is, mandate that each facility security plan that it approves provide a system for shore leave.

In conclusion, shore leave has been a battle between US and foreign mariners and facility operators for five years because the Coast Guard took the legal position that it did. With this decision, property rights were placed above human rights, the rights of a class of people were denied, and the Coast Guards guiding principles were laid aside. It is true that many Captains of the Port have personally intervened to try to gain shore leave for visiting mariners. However, these are pleas without authority, and as I have seen in my own port, are either ignored, or only complied with minimally.

We will only stop having these forums when a poor legal opinion is withdrawn, and subchapter H conforms more closely to the language and the spirit of the ISPS Code and other IMO documents.

One final word. As a Latin Rite Catholic priest, I am morally outraged about this whole battle. I am tired of visiting ships where people have figured out how to unload cargo, but can't figure out how to let men and women ashore. This is the worst type of economics. It reduces the person to being of less value than the cargo he or she transports. It is also directly contrary to more than one hundreds years of Catholic social teaching of which I am fully committed.

Since Pope Leo XIII in 1891, the Church has continually challenged the free market, and demanded that the person be at the center of the economy, and be respected.

I fully concur with the words of Pope John Paul II, when he wrote in 1981:

“Work is in the first place "for the worker" and not the worker "for work." Work itself can have greater or lesser objective value, but all work should be judged by the measure of dignity given to the person who carries it out.”

The denial of shore leave ignores the human dignity of mariners, and reduces their value to the work they do.