UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 500833 and MERCHANT MARINERS DOCUMENT NO.
[redacted]
Issued to: John M. Geese

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2357

John M. Geese

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 11 March 1983, an Administrative Law Judge of the United States Coast Guard at Alameda, California, suspended Appellant's license and merchant mariner's document for a period of six months, remitted on twelve months probation, upon finding him guilty of misconduct. Three specifications were found proved. The first alleges that on 7 February 1982, Appellant, while serving as second mate on board the SS PRESIDENT MADISON under authority of the above captioned documents, failed to perform his duties due to intoxication. The second and third specifications allege failure to obey direct orders of the Master to go below after being relieved of his bridge watch.

The hearing was initially convened on board the SS PRESIDENT MADISON at San Francisco, California on 16 August 1982, and continued at Alameda, California on 9 November 1982, 7 February 1983, and 14 February 1983.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specifications.

The investigating Officer introduced into evidence the testimony of three witnesses and several documents.

In defense, Appellant offered into evidence his own testimony, the testimony of one witness, a deposition, and several statements and documents.

Subsequent to the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications against Appellant were proved. He then served a written order on Appellant suspending all licenses and documents issued to Appellant for a period of six months, remitted on twelve months probation.

The entire decision was served on 14 March 1983. A petition to reopen the hearing was timely made on 4 April 1983. By order dated 27 April 1983, the Administrative Law Judge denied that petition to reopen. Appeal from the original Decision and Order was timely filed on 7 April 1983, and, after two authorized extensions, was perfected on 22 August 1983. The perfected appeal incorporates an appeal from the denial of the petition to reopen.

FINDINGS OF FACT

On 7 February 1982, Appellant was serving as Second Mate aboard the SS PRESIDENT MADISON and was acting under the authority of his license and document while the vessel was underway in the vicinity of Singapore.

After standing his 1600-2000 in-port watch on 6 February 1982 and subsequently spending about one hour preparing charts for the next voyage, Appellant went ashore in Singapore and walked to a bar. He consumed, by his own testimony, three drinks of scotch and soda within a period of about an hour, then returned to the ship. The vessel got underway at 0308 on 7 February. Upon his return Appellant slept until about 0320 when he was awakened for his 0400-0800 bridge watch. He dressed, drank a cup of coffee, and reported to the bridge at about 0350. He then familiarized himself with the vessel's course, speed, and position and relieved the Mate on watch. During this period, the Master was conning the vessel outbound through heavy traffic and the Mate on watch was engaged in taking and plotting fixes.

Shortly after Appellant assumed the watch, the Master told him to obtain a 0400 fix. As Appellant was taking this fix, he stumbled over the threshold while returning from the bridge wing. Appellant then used the wrong control on the Decca 10 cm radar while attempting to take a range, and immediately thereafter put the 3 cm radar out of tune by moving its tune control.

As Appellant was plotting the 0400 fix, the Master followed him to the chartroom and approached to look at the chart. The Master noticed that Appellant's eyes were glassy and detected the smell of alcohol on Appellant's breath. The Master asked him if he had been drinking, and he stated that he had had a few drinks, but was not drunk.

Because it was ship's policy not to permit anyone to stand a bridge watch with liquor on his breath, the Master asked Appellant to go below. The Master stated that he was not saying Appellant was "drunk". Rather than comply, Appellant followed the Master from the chartroom into the wheelhouse and belligerently stated that he was not drunk. The Master then ordered Appellant to leave the bridge, to which Appellant responded "you're crazy." Appellant went below but reappeared on the bridge within five minutes and asked the Quartermaster to confirm that he was not drunk. The Master again ordered Appellant below. Appellant responded by stating that he would see his lawyer, and finally left the bridge.

BASES OF APPEAL

This appeal had been taken from the Decision and Order of the Administrative Law Judge, and from the denial of the petition to reopen the hearing. Appellant urges:

1. That the evidence failed to establish the allegation under the first specification that Appellant failed to perform his duties due to intoxication.

2. That the evidence failed to establish the allegation under the second specification that Appellant failed to obey a direct order.

3. That the evidence failed to establish the allegation under the third specification that Appellant failed to obey a direct order.

4. That the Administrative Law Judge denied Appellant due process by improperly curtailing cross-examination of the vessel's Master.

5. That the Administrative Law Judge erred in limiting the admissibility of a statement written by Appellant and witnessed by two crewmembers.

6. That the Administrative Law Judge erred in denying the petition to reopen the hearing.

APPEARANCE: Arnold I. Berschler, Ewq., San Francisco, California.

OPINION

I

Appellant argues that the evidence is insufficient to support the finding that he failed to perform his duties due to intoxication.I do not agree.

The evidence was sufficient to show that Appellant was under the influence of intoxicants. The Master testified that Appellant stumbled on his way into the wheelhouse and used the wrong control on two radars in an attempt to obtain a range. He stated that Appellant's eyes were glassy , that his breath smelled of alcohol, and that he admitted to drinking before assuming the watch. Upon observing Appellant in this condition, the Master relieved him from the watch. The Master's testimony is corroborated by that of the Chief Engineer, who saw Appellant after he had been relived and stated that Appellant smelled of alcohol. Although two crewman testified that Appellant did not appear to be under the influence of alcohol, the Administrative Law Judge rejected that testimony and accepted the testimony of the Master and Chief Engineer.

It is the function of the Administrative Law Judge to resolve conflicts in testimony and issues of credibility. The question of what weight to accord the evidence is committed to the discretion of the Administrative Law Judge, and will not be set aside unless it is shown that the evidence he relied upon is inherently incredible. Appeal Decisions Nos. 2333 (AYALA) and 2302 (FRAPPIER).

At the time of the incident, the ship had a policy that no one would be permitted to stand a bridge watch with the smell of alcohol on his breath. Upon relieving Appellant, the Master cited this policy and told Appellant that he was not accusing Appellant of being "drunk." Appellant argues that this statement by the Master at best shows a violation of ship's policy, and precludes a finding that he was intoxicated. The evidence, however, shows that the Appellant was under the influence of intoxicants. This justified his relief and established a failure to perform his duties due to intoxication.

II

Appellant argues generally that the evidence does not support the finding that he failed to obey an order from the Master to lay below following his relief from watch. I do not agree.

the Master testified that he followed Appellant into the chartroom and smelled liquor on Appellant's breath. He then told Appellant that he did not allow anyone to stand a bridge watch with liquor on his breath, and "asked" Appellant to go below. Based on this testimony, the Administrative Law Judge found specification proved. Appellant challenges this finding on two grounds. First, he disputes the Master's testimony regarding the conversation that took place in the chartroom. Second, he argues that even if the Master's testimony is true, the Master's "request" that he go below did not constitute an order.

Appellant's contention regarding the conversation in the chartroom reflects a conflict in the testimony between the Master and the Appellant. As noted above, conflicts in testimony and questions of credibility are to be resolved by the Administrative Law Judge. The Administrative Law Judge believed the testimony of the Master, and that testimony is not inherently incredible.

Appellant's alternative argument that when the Master asked him to go below, the "request" did not constitute and order is without merit. As the Administrative Law Judge stated in the Decision and Order:

> The relationship between the two men at the time was that of a man in command, the Master, relieving an inferior officer of a watch and sending him below because of an apparent condition of intoxication...incapacitating him to stand watch. It certainly seems that any sober, reasonable, seagoing officer in the same situation (particularly one with 30 years or so of seagoing experience) would have easily understood that he had been ordered to go below and would have immediately acquiesced and gone below.

Appellant's failure to go below following his relief in the chartroom constitutes disobedience of the Master's order.

III

Appellant argues that the evidence does not support the finding that he failed to obey a second direct order to lay below. I do not agree.

The Master testified that after he directed Appellant to go below in the chartroom, Appellant followed him into the wheelhouse and, in a belligerent manner, stated that he was not drunk. The Master testified that he then gave Appellant the second order to go below and Appellant left the bridge, but returned within five

minutes.

Appellant contends that he did not return to the bridge following the second order to resist the Master's relief order, but only to obtain a "clarification" of the basis for the order. This, however, does not help Appellant since his return to the bridge for any reason was a violation of the order to lay below. I note that upon his return to the bridge, Appellant entered into a belligerent confrontation with the Quartermaster, demanding to know whether he was "drunk," at time when the Master was directly engaged in maneuvering the vessel through an area of heavy traffic. The evidence thus shows that Appellant returned to the bridge, not to clarify but to challenge the order, in total disregard of the safe navigation of the vessel. Appellant's conduct fully supports the Administrative Law Judge's finding that his return to the bridge constituted disobedience of the Master's order to lay below.

IV

Appellant argues that the Administrative Law Judge denied him due process by improperly limiting the scope of cross-examination. I do not agree.

The record shows only that the Administrative Law Judge sustained objections on relevancy grounds to two questions during Appellant's cross-examination of the Master. The first question was whether the Master had ever been drunk on duty. With the second, Appellant attempted to question the Master as to the finding of a different Administrative Law Judge in a prior hearing involving and unrelated incident in which the Master had accused another officer of misconduct. Because of these rulings, Appellant now argues that the Administrative Law Judge foreclosed all inquiry into prior conduct or a prior action, and that, had the Administrative Law Judge permitted his line of questioning, he would have brought out evidence impeaching the credibility of the Master and corroborating his own.

Appellant never attempted to explain the relevance of his questions at the hearing, and the relevance is not readily apparent. The rulings of the Administrative Law Judge, therefore, do not constitute an abuse of his discretion. Beyond these two specific rulings, there is nothing in the record, nor does Appellant cite anything, to support his argument that the Administrative Law Judge improperly foreclosed cross-examination of the Master.

V

Appellant argues that the Administrative Law Judge erred in limiting the admissibility of a statement written by him immediately following the incident. I do not agree.

At the hearing, Appellant attempted to introduce a statement written by him immediately following his relief which recited that he went to see the purser and radio operator, who agreed that he was not drunk. Both those individuals signed the document as "witnesses." The Administrative Law Judge ruled that the document was the statement of neither the purser nor the radio operator, because it was simply witnessed by them. The Administrative Law Judge admitted the document into evidence, even though hearsay, as a statement of the Appellant.

Appellant contends that the circumstances surrounding the witnessing of the document indicate that the purser and radio operator intended to adopt the statement as their own. He argues that it should have been considered the statement of two additional witnesses pursuant to 46 CFR 5.20-95, which permits the introduction of hearsay where the witness is unavailable.

Whether the document should be considered the statement of the radio operator and the purser is a question of fact, and is within the discretion of the Administrative Law Judge. On its face, the document was signed by the radio operator and purser as witnesses. Therefore, the ruling of the Administrative Law Judge regarding the nature of the document is reasonable and does not constitute error.

VI

Appellant argues, finally, that the Administrative Law Judge erred in denying his petition to reopen the hearing for newly discovered evidence. I do not agree.

A petition to reopen a hearing will be granted only on the basis of newly discovered evidence. 46 CFR 5.25-1. In his petition, Appellant must show that the evidence was not known at the time of the hearing, and could not have been known through the use of due diligence. 46 CFR 5.25-5. He must also show why the evidence would probably produce a result more favorable to him. *Id*. *See* Appeal Decisions Nos. 1978 (DAVIS) and 1634 (RIVERA). Appellant has failed to make the requisite showings.

The Appellant cites as newly discovered evidence the Decision and Order and transcript from *United States v. Lambert*, Docket No. 12-0019-CJC-81, the prior hearing referred to in section IV, *supra*. The Decision and Order of the Administrative Law Judge in the *Lambert* case is simply not newly discovered evidence.

The record shows that Appellant knew of the Decision and Order at the time of the hearing, and attempted to use the findings therein to impeach the Master. Matter raised in the *Lambert* case was not admitted as Appellant failed to make any attempt to establish its relevance. Appellant cannot resurrect the issue under the rubric of newly discovered evidence merely because he obtained the actual documents relating to the *Lambert* case after the hearing. In his petition, Appellant again failed to establish that the documents are relevant, or that they would produce a more favorable result to him. In any event, the documents, as extrinsic evidence used to prove specific instances of conduct, are inadmissible. *See* Fed. R. Evid. 608(b). The Administrative Law Judge properly denied the petition to reopen.

CONCLUSION

There is evidence of a reliable and probative character to support the findings of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge, dated at Alameda, California on 11 March 1983, is AFFIRMED.

B.L. STABILE
VICE COMMANDANT

Signed at Washington, D.C., this 8th day of June 1984.

***** END OF DECISION NO. 2357 *****

Top