UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 443686
MERCHANT MARINER'S DOCUMENT,
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: William Gilbert Burke, Z-85548-D1

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2021

William Gilbert Burke

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 26 August 1974, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Appellant's seaman's documents upon finding him incompetent. The specification found proved alleges that while serving as a second mate on board SS MISSOURI under authority of the documents above captioned, on or about 3 November 1973, Appellant was, and at the time of hearing was still, mentally incompetent to perform the duties for which he held the license and documents issued by the Coast Guard.

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

The Investigating Officer introduced in evidence voyage records, the testimony of witnesses, given both in person and by deposition, and certain medical records.

In defense, Appellant offered in evidence a deposition containing further medical evidence.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 20 September 1974. Appeal was timely filed on 11 October 1974, and perfected on 13 January 1975. (In the course of this matter, Appellant is variously identified by his number 85548-D1, as either "Z" or "BK"; this is apparently due to the failure to strike one of the alternatives printed on the charge sheet. Appellant's identification has been, in fact, since 1937, a "Z-number").

FINDINGS OF FACT

On 3 November 1973, Appellant was serving as second mate on board SS MISSOURI and acting under authority of his license and document while the ship was at sea. Appearance of erratic conduct in the navigation of the vessel at that time led to subsequent observation at the U. S. Public Health Service Hospital, New York, which observation gave rise to a medical opinion that Appellant was unfit for sea duty.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the hearsay nature of the evidence renders it insufficient on which to predicate findings and that the order should be modified to permit Appellant to hold a license as "night mate" and to retain his certificate for unlicensed capacities.

APPEARANCE: Mandell and Wright, Houston, Texas, by Arthur J. Mandell, Esq.

OPINION

I

Many of the matters which Appellant argues as necessitating reversal of the findings are questions of the use of alleged hearsay. Most of these prove, in the event, to be irrelevant.

For example, it is objected that testimony of the master was permitted to refer to statements made to him by other crewmembers of the vessel who should, under 46 CFR [137.] 5.20-95 (a), have been called as witnesses because they were available to testify and whose hearsay statements hence should have been excluded. It is true that early in the proceedings the intention was stated to take the testimony of these witnesses by deposition, but this was not done. If this were all, the effect would have to be weighed. More important matter develops, however.

At the outset of the hearing the Investigating Officer announced his intention of proving certain facts and, on the strength of those facts, moving that the Administrative Law Judge exercise his authority under 46 CFR [137.]5.20-27 to require submission to examination. Prior to the conclusion of the first session, at which an entry in the Official Log Book of MISSOURI had been admitted into evidence, the Administrative Law Judge, on his own motion, read the section of the regulations applicable to medical examination in cases in which the mental condition of the person charged is in controversy and asked whether Appellant would voluntarily submit to examination by a Public Health Service Psychiatrist. The reply was that he would do so without objection if the Administrative Law Judge determined that it was proper. The Administrative Law Judge stated that he thought it would be proper "because there's a serious charge against this man ..." No reference was made to the provision in the regulations that a decision to refer a person for examination should be made "on the evidence or information submitted...by the Investigating Officer," but the potential fault here is avoided by the consent of Appellant to the procedure.

When the hearing was adjourned no firm provisions had been made for examination or for what was to be submitted to an examining psychiatrist as an aid in the examination, although it was made clear that certain depositions would be arranged for and a date of 25 January 1974 was set for reconvening.

From the record of proceedings on the date of reopening it seems clear that some transactions had taken place off the record. It is certain that the Investigating Officer sent a letter to "Dr. Sarrigiannis," later identified as Chief, Psychiatry Department, USPHS Hospital, Staten Island, N.Y., the contents of which had not been settled at hearing as proper for submission to the evaluating psychiatrist. (It appears also that the Administrative Law Judge was not involved with the arrangements for the examination since a letter from the psychiatrist refers to the letter of the Investigating Officer only, and states that report was being made to the Administrative Law Judge pursuant to the Investigating Officer's letter.)

In the Investigating Officer's letter he enclosed, in explanation of the contention that Appellant was unfit, (1) a copy of the Official Log-Book Entry admitted into evidence, (2) a copy of informal notes made by the master of MISSOURI as a chronicle of Appellant's behavior, and (3) a memorandum of the Investigating Officer "outlining the reasons for bringing charges against Mr. BURKE and the means of proof which we intend to employ." Items (2) and (3) were not made part of the record in the case.

Prior to resumption of the hearing on 25 January, Appellant's counsel had seen a copy of the Investigating Officer's letter and had immediately, in writing, protested strongly to the Administrative Law Judge over the materials submitted to the doctor. He also objected to the characterization of the examination, in the letter, as having been "ordered" by the Administrative Law Judge when in fact it had been undertaken voluntarily, without order, by Appellant. The error here is almost irremediable, at this stage, because there is no way of ascertaining what proper submissions were made to the doctor. A step toward correction was made by the Administrative Law Judge, that any matters submitted to the doctor as fact would have to be proved in the course of the hearing.

Since the testimony of both the master and the chief mate, taken by deposition, was founded in large part on reports and statements of other persons in the crew and since these other persons were not deposed or otherwise called upon to give evidence, the case presented from this aspect is vulnerable to the objections

raised. If the weight of the medical opinion is to depend upon the truth of the factual submissions to the psychiatrist then the evidence of those facts must be of the quality upon which an administrative law judge himself may base finding of fact. In this respect then, hearsay alone would be insufficient and the availability of witnesses would preclude the use of hearsay statements under 46 CFR 5.20-95(a).

This is not to imply that the "evidence or information" referred to in 46 CFR 5.20-27 must, when the orderly procedure contemplated in that section is followed, be of the nature to sustain ultimate findings but only of something akin to "probable cause," with the result to be determined by the state of the entire record. Needless to say, orderly procedure calls for a settling of materials to be submitted when the section is invoked.

The determination in the instant case may be made, however, on the whole record, and even without recourse to questionable materials so that the purely evidentiary "hearsay" complaints of Appellant are avoided.

On 29 April 1974, after depositions of the master and the chief mate of MISSOURI were admitted into evidence, the Investigating Officer rested. A motion to dismiss was made for Appellant and was denied. Counsel then expressed surprise that the letter of the psychiatrist had been admitted into evidence, although it had in fact been admitted as part of Administrative Law Judge's Exhibit I on 25 January. He then declared that he desired to have Appellant appear as a witness in his own behalf, and 5 June 1974 was set for the date of continuance. Nothing of record appears on that date, but on 2 August 1974, the Administrative Law Judge convened, presumably without the parties, and recorded that at the request of, probably, the Investigating Officer, he had granted a motion to reconvene on 22 August. When the hearing was resumed on that date, it became apparent that off-the-record transactions had occurred. There is, unattached among the exhibits, an order of the Administrative Law Judge dated 6 June 1974, on motion of Appellant, to take the oral testimony of the psychiatrist at New York on cross-examination, with "both sides" permitted to question. On the the taking of the deposition before an administrative law judge in New York, the witness was identified as a witness for the defense, but the recorded deposition was

admitted into evidence as Investigating Officer's Exhibit 6. This last may have been done because Appellant sought to introduce only selected questions and answers from the document while the Investigating Officer demanded the entry of the entire testimony into the record. This testimony alone is sufficient on which to predicate the ultimate findings in this case. The doctor denied, unequivocally, that the material furnished by the Investigating Officer in December had contributed to the forming of her opinion which was, in fact, based upon the psychiatric and psychological interviews conducted, observation of Appellant, and his known medical history. The opinion was that Appellant was not fit for service at sea.

II

Appellant complains that the qualification of Dr. Sarrigiannis, the psychiatrist, as an expert was not established. While it is true that in his Decision the Administrative Law Judge is in error in referring to her as "Medical Director of the U. S. Public Health Service Hospital" (implying that she was the medical Officer in Charge of the Hospital), nevertheless, Dr. Sarrigiannis has the rank of "Medical Director" in the Service and is the Chief of the Psychiatry Department of the Hospital. This is more than adequate to sustain her qualification to testify as the actual examining psychiatrist. Further, it is noted that even upon oral cross-examination sought by Appellant her qualification was tacitly accepted. There is no issue here at all.

III

Alternatively to the requested reversal of findings, Appellant asks that the order of revocation be modified so as to:

(1) Leave the order directed only to the license and not to the certification as able seaman and entry ratings, and
(2) authorize the issuance of a license limited to service as a "night mate," without permitting service at sea.

The predicate for this request for modification is an opinion of Dr. Sarrigiannis that Appellant is capable of serving in an unlicensed capacity or in shipboard activities limited to "shoreside" periods.

For the first consideration here it is noted that an administrative law judge is not bound by the recommendations of the psychiatrist or even by the medical findings and opinion. Although the medical opinion is of great weight in the ascertainment of a medical condition, the ultimate finding as to fitness of the person is a function of the administrative law judge's authority. The disqualification of Appellant by incompetence is based upon a sound medical opinion of his condition but whether he is incompetent for all, some, or only certain duties is a matter for the sole determination of the licensing administrator, not the medical authority. The administrator's authority to evaluate, in these proceedings, has been delegated to the trier of facts for initial decision.

It was determined here, and there is no patent error in the ruling, that the disability is of such a nature as to preclude service at sea in any capacity. This is not a case of professional incompetence,in which there might be nothing repugnant between disability to serve in a more responsible position and ability to function in a less demanding position. The psychiatric condition found affects a person's ability to serve at sea in any capacity at all.

Further, revocation is the only appropriate order for cases of this sort. Administrative law judges do not have authority to pass upon initial applications nor can they, by some reservation of decision or qualification of order retain jurisdiction to pass upon in the future what is essentially the issuance of a new license or certificate. The determination as to restoration or replacement of licenses and certificates after a finding of incompetency is necessarily reserved to the agency as licensing authority, functioning in a different capacity from that of investigation or of adjudication under the Administrative Procedure Law.

IV

With respect to Appellant's desire for an order authorizing service as a "night mate" or licensed officer limited to pier-side activities,there is one chief reason why the Administrative Law Judge could not issue such an order, as well as reasons why, on appeal, the administrator will not modify his order toward that

end. It may be noted that in the one instance in which an administrative law judge is authorized to revoke a license or certificate and order the issuance of another (professional incompetence; 46 CFR 5.20-170 (d), he is authorized to do so only for "issuance of one of a lower grade." No grade "night mate" or "mate-port activities only" has been authorized by the agency and therefore an administrative law judge could not order issuance of such a license.

Whether the administrator may or should create such a license, and authorization of one such license in the instant case would be such a creation, is another matter; there can be no hesitation in holding that such a license may not properly be authorized and that there is no abuse of discretion in failing to create one for this or any other case.

The licenses of masters and mates for inspected vessels are, indeed, the creation of Congress, by legislation, albeit in recognition of centuries old laws and customs of the sea based upon need and the realities of shipping. 46 U.S.C. 224, 224a., 226, 228. In speaking of mates, in section 228, there is a distinction made as to:

(1) chief mates of (i) ocean and coastwise steam vessels
(ii) sail vessels of over 700 tons;
(2) second and third mates (ocean and coastwise steam vessels) who shall have charge of a watch; and
(3) mates of river steamers.

The license is spoken of as "authorizing [the holder] to perform...on the waters upon which he is qualified to act..." While section 224 authorizes "classification" of licensed deck officers, this classification cannot go beyond the statutory bounds as to types of vessel and waters to be covered. Apart from mates for "river steamers" and chief mates for certain sail vessels, the only service of mate for which a license is authorized and prescribed by Congress is that aboard "ocean and coastwise steam vessels." To serve on such a vessel as mate of the watch one must be qualified to perform the duties on ocean and coastwise waters.

The concept of "night mate" is, either from the "tradition of the sea" or from the U. S. licensing laws point of view, of

relatively recent origin. The term is sometimes expressed, not too accurately, as "relief mate." Essentially, a person so employed may be expected to be assigned tasks ranging from those of a watchman on a vessel not being worked at all to those of a watchstander on a fully working ship readying for sea. This is not the place to undertake a study of the types of duty such a person may be called upon to perform or to attempt to prescribe rules as to when a person so employed must, from the effect of one law or risk of liability or another, hold a mate's license. Suffice it to say that no statute and no regulation requires, as such, a "night mate," nor a mate of some limited ability or usefulness not contemplated in the existing statutes requiring and authorizing mates' licenses. As pointed out already, these laws require that a person holding a license of the kind issued to Appellant, for steam vessels, ocean and coastwise, must be qualified to perform duties on those waters, a master, as Appellant was, preeminently over mates. (It is noted here that no question has been raised as to the possibility of revoking Appellant's license as master and issuing one as a mate, and the possibility cannot arise, from the nature of the incompetence found, but the idea of a "mate" limited to "in port," "non-navigating," "non-operational" duties is as repugnant as that of a licensed master who is not permitted to go to sea.)

As a purely practical consideration, it can also be seen that when a master or a company has in mind the performance of duties in the course of which the performer would, by law or the terms of the employer's desires, be required to hold a mate's license, the possibility is always imminent of fire, oil spills, collision, or some emergency which would necessitate getting the moored vessel underway. ("Moored" here must contemplate conditions of being at anchor and of being made fast to a pier. No delineation of the variety of possible anchorages need be undertaken.) In short, the responsibility, the need for leadership, the facing of critical decisions, all may easily be as great as or even exceed those in the underway situation. It would be anomalous for the agency to put a stamp of approval, relied upon by a master or employer, on a licensee who is unable to perform the fundamental and ultimate tasks for which he is licensed, by reason of incompetence.

I find that not only was the Administrative Law Judge correct in not granting the request of Appellant for an order to issue a mate's license limited to in-port service only, for the reason that

he could not order issued what the agency itself has not provided for, but that the administrator, by the strictures of the statutes and the absence of good reason to attempt to expand such of the licensing activities as may be discretionary, may not authorize issuance of a license which would be a contradiction in terms.

V

Some comment must be made on collateral activities not germane to the issues presented at hearing or on appeal but of some significance in the disposition of the matter for the future.

Pending appeal from the initial decision, Appellant applied to the Administrative Law Judge for issuance of a temporary license and a certificate for service in the unlicensed ratings held by him, pursuant to 46 CFR (137.) 5.30-15. The Investigating Officer filed with the Administrative Law Judge a reply to the "motion", stating that "The United States Coast Guard has no objection to the issuance of a temporary license to Respondent William Gilbert Burke limiting said license to discharging his duty as a night mate. Further it has no objection to restoring Respondent his seaman document No. Z-85548-D1, in accordance with Rule 137-30-15."

This statement of the Investigating Officer has no foundation in fact. The cited section is clearly expressive of agency policy. When a suspension or a revocation is ordered under conditions of such a nature "that the presence of the person charged on board a vessel, either immediately or for the indefinite future, would be incompatible with the requirements of safety of life or property at sea," no temporary authority should be issued pending appeal. On analysis, it can be seen from the remedial nature of these proceedings that in the case in which revocation is ordered the issuance of a temporary license or certificate is entirely inconsistent with the need and purpose of the order, and it would be anomalous to authorize even pending appeal the shipment of a person who had, after hearing, been found to possess such qualities as to render a vessel unseaworthy for an unsuspecting owner. See *Boudoin* v *Lykes Bros. SS. Co.,* 348 U.S. 336.

The Administrative Law Judge properly denied the request. On 18 October 1974, Appellant obtained a temporary restraining order in Civ. 74-H - 1411 in the U.S. District Court for the Southern

District of Texas, which ordered the return of his license and merchant mariner's document and prohibited action under the Administrative Law Judge's order, pending a hearing on Appellant's motion for a temporary injunction. The license was to be limited to service as "night mate" only.

The order was *not* literally complied with; that is, the actual license and document were not restored to Appellant, but, instead, a temporary license and document,executed in manner and form like an ordinary temporary authorized by an administrative law judge pending an appeal, was issued by the senior Investigating Officer, Marine Inspection Office, Houston, on 22 October 1974, with service under authority of the temporary limited to vessels "not navigating or berthed in the United States *only*." This temporary expired, on its own terms, on 5 November 1974. A "license" of this sort is not authorized under the regulations for the reasons set out above, as recognized by the Administrative Law Judge who had stated, in his order on Appellant's request for a temporary, "Furthermore, there is no provision for issuance of a night mate only license." The temporary seems to have been issued here, with the stated condition, as a good-faith attempt to comply with the court order and,at the same time, retain physical custody of the revoked papers. The issuance of this document does not create an estoppel to effective assertion of the position that there is no such thing, under the statutes, as a "night mate license."

On 7 November 1974 the Court issued a temporary injunction preventing administrative effectuation of the Administrative Law Judge's order pending the Commandant's decision on appeal "and/or " final judgement of the court. Appellant was ordered not to use his license (identified as a license "as second mate") for signing on any vessel for the purpose of sailing on any voyage, foreign or domestic, but only "to obtain employment as night mate." It was ordered that the paragraph containing these conditions be attached to Appellant's license. It was also provided that Appellant was free to sail in any unlicensed capacity for which he held an endorsement on his merchant mariner's document.

It is not known whether the District Court gave weight to the Investigating Officer's submission mentioned above, but the

submission, in view of its plain departure from published policy, is not considered as creating an estoppel any more than does the action of the Senior Investigating Officer at Houston.

It may be noted that the final order of the court did not go to issuance of a license which, on the reasoning stated herein, is not authorized under law and which, in view of the undefined nature of the position of "night mate," is essentially meaningless, but to physical attachment of a provision of the court's order to a license valid on its face. There is no need for speculation as to who would utilize a person holding such credentials for what sort of employment or what form of liability might be incurred as a result, with "unseaworthiness" often found while a vessel is moored *Seas Shipping Co*. v *Sieracki*, 1946, 328 U.S. 85; *Crawford* v *Pope & Talbot, Inc*, CA 3, 1953, 206 F. 2nd 784, *Ross* v *Steamship Zealand*, CA 4, 1957, 240 F. 2nd 820) or even in a drydock (*Oakes* v *Graham Towing Co.,* D.C.E.D. Pa., (1950), 135 F. Supp. 732).

CONCLUSION

The findings of the Administrative Law Judge are supported by the requisite evidence and are not arbitrarily or capriciously arrived at. His order is the only appropriate order for remedying the condition found.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 26 August 1974, is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 7th day of May 1975.

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