UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-928973-D3
Issued to: Joseph SABO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2037

Joseph SABO

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30, now 5.30.

By order dated 8 January 1975, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, revoked Appellant's seaman documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as an A.B. on board the United States SS FREDERICK LYKES under authority of the document above captioned, Appellant;

(1) did on or about 24 September 1974, while said vessel was in the port of Malili, Indonesia, wrongfully have intoxicating liquor in his possession;

(2) did on or about 7 October 1974, while said vessel was in the Port of Bangkok, Thailand, wrongfully fail to perform his duties;

(3) did on or about 18 October 1974, while said vessel was in the Port of Singapore, Republic of Singapore, wrongfully fail to perform his duties between

the hours of 0800 and 1700.

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

The Investigating Officer introduced in evidence excerpts from the Shipping Articles and the Official Ship's log, a bottle from the Appellant's shipboard quarters, a MERMARPER message and the testimony of one witness.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and three specifications had been proved. He then served a written order on Appellant revoking all documents, issued to Appellant.

The entire decision and order was served on 8 January 1975. Appeal was timely filed on 11 June 1975.

FINDINGS OF FACT

On the dates relevant to the specifications above, Appellant was serving as an A.B. on board the United States SS FREDERICK LYKES and acting under authority of his document while the ship was in the ports indicated.

At Malili, Indonesia on 24 September 1974, at 0230 the Appellant appeared to be intoxicated. A subsequent search of Appellant's quarters revealed a bottle, labeled "Artificial Fransch Brandy", about half full of an amber liquid with an alcoholic order. The standard prohibition of alcoholic beverages aboard the vessel was contained in the applicable shipping agreement.

At Bangkok, Thailand the Appellant did not perform his duties from 0800 to 1100 on 7 October 1974 and was absent from the vessel without permission.

At Singapore, Republic of Singapore the Appellant did not perform his duties from 0800 to 1700 on 18 October 1974 and was absent from the vessel without permission.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) The government failed to prove its case.

(2) The order of revocation was excessive.

(3) It was erroneous to fail to amend or strike the first specification.

(4) It was erroneous to admit the log entries, Investigating Officer Exhibits 2, 3, and 4.

(5) It was erroneous to presume as a matter of law that the contents of the bottle found in Appellant's quarters were brandy.

(6) It was erroneous to admit a MERMARPER format message as *sole* proof of the Appellant's prior disciplinary record.

APPEARANCE: Ronald K. Gurley of Kierr, Gainsburgh, Benjamin, Fallon, & Lewis

OPINION

Appellant's assignment of error to the admission of the log entries of the SS FREDERICK LYKES is without basis. The log entries in question were made in substantial compliance with 46 U.S.C. 702. Therefore the entries are *prima facie* evidence of the facts recited therein and do constitute substantial and probative evidence to support the findings of the Administrative Law Judge. (See Decision on Appeal No. 1932). It follows therefore that the second and third specifications were proved by the log entries entered as Investigating Officer's exhibits 3 and 4.

In regard to the third basis of appeal, Appellant's motion to

strike or amend the first specification was properly denied by the Administrative Law Judge. The specification clearly sets forth the facts which are the basis of the charge with sufficient detail to enable the person charged to identify the offense and to prepare a defense (Decision on Appeal No. 1914). (See also Decision on Appeal No. 1937). The specification as set forth without amendment sets forth allegations as to jurisdiction, location, time and the nature of the conduct charged.

The Appellant's fifth basis of appeal contesting the presumption as a matter of law that the contents of a bottle were brandy is without basis. The ruling of the Administrative Law Judge was that the Investigating Officer had shown prima facie that the contents of the bottle were an alcoholic beverage. This is not a presumption as a matter of law. As has been previously indicated in Decisions on Appeal Nos. 1107 and 1464 chemical analysis is not the *sole* evidence to be considered in drawing inferences about the contents of a bottle. In the instant case the inference that the contents were alcoholic is supported by significant reliable and probative evidence to wit: the color of the liquid, the odor of the liquid, and the label on the bottle. In the face of no evidence to rebut the inference I find no error. It is further noted that the investigating officer made an offer of analysis of the contents if the Appellant had produced any evidence to rebut. Appellant neither rebutted the evidence on the record nor chose to obtain his own analysis of the contents.

The Appellant finds error in the admission of the Investigating Officer's exhibit No. 6 as the *sole* proof of the disciplinary record of the Appellant.

In the issuance of his order of 8 January 1975, there is no doubt that the Administrative Law Judge considered several prior offenses of Appellant under R.S. 4450. Record of these offenses was entered in open hearing. The Administrative Law Judge not only has the right to know the record of a person against whom a charge has been found proved, he has a duty to ascertain it and evaluate it in determining an appropriate order. The ascertainment of prior record is as much a part of the hearing as is the taking of evidence. The proof of prior record is customarily, and properly, achieved by the submission by the Investigating Officer of a summary record culled from the appellant's central file. The

regulations plainly contemplate that this will be done in open hearing and in the presence, if he so chooses, of the person charged. 46 CRF 137.20-175(a). The person charged has the right to contest the accuracy of the record presented, and to furnish evidence which might serve to temper the effect of the prior record. (See Decision on Appeal nos. 1472, 1580, 1686, and 1757).

In the instant case the record indicated on its face that the exhibit was not the sole proof. It was only one part of the evidence and the appellant had ample opportunity to offer other evidence in rebuttal and to attack the weight and credibility of the exhibit. Indeed the Appellant did in fact offer evidence to temper the effect of his prior record. Appellant made no request at the time of hearing for time to prepare further rebuttal to the accuracy of the prior record as presented. No contention is made by Appellant that the record as considered by the Administrative Law Judge is in anyway not an accurate one. The manner of presentation and consideration of the Appellant's prior record, including admission of the MERMARPER message, are consistent with standards of fairness and realism. (See Decision on Appeal No. 1715).

Finally the Appellant contends that the penalty imposed was excessive. In view of the Appellant's history, with two incidents of failure to join his vessel, one incident each of intoxication and possession of intoxicating liquors, and eight incidents of failure to perform his duties in a period of less than six years, indeed six incidents of failure to perform his duties in less than two years, I find that the holding of the National Transportation Safety Board NTSB *ORDER* No. EM-26 (WINBORNE) is clearly applicable in this case. "This ...pattern of violation evinces Appellant's incorrigible tendency to shirk his duties...at his whim. Thus, he continues to break rules of shipboard discipline deemed essential to the safe and expeditions operation of merchant vessels.... We find that his misconduct herein and prior violations provide ample justification for the revocation action taken."

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 8 January 1975, is AFFIRMED.

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

Signed at Washington, D. C., this 23rd day of Sept 1975.

INDEX

Sufficiency of evidence to establish

Prior Record

Appropriateness of order

Proof of in open hearing

Requiring revocation

Revocation or Suspension

Cumulative offenses as justifying

***** END OF DECISION NO. 2037 *****

Top