U N I T E D S T A T E S O F A M E R IC A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	VICE COMMANDANT
LICENSE NO. 682578	:	
AND	:	ON APPEAL
MERCHANT MARINER'S	:	
DOCUMENT NO. Z REDACTED	:	NO. 2615
	:	
Issued to Steven Allen Dale	:	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated October 3, 1996, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's above-captioned license and document, upon finding a charge of *misconduct* proved. The charge was supported by two specifications. First, Appellant wrongfully refused to submit to random urinalysis, and second, Appellant wrongfully failed to join his vessel.

The hearing was held on August 27, 1996, in Tampa, Florida. Appellant appeared with non-professional counsel and entered a response denying the charge and specifications. The Coast Guard Investigating Officer introduced into evidence the testimony of two witnesses and sixteen exhibits. Appellant introduced two exhibits, no witnesses, and chose not to testify. The charge was found proved, and Appellant's license and document were suspended outright for six months and for an additional six months suspension on twelve months probation.

The Administrative Law Judge's Decision and Order was served on Appellant on November 13, 1996. Appellant filed a notice of appeal on November 25, 1996, and was sent a copy of the transcript on April 19, 1997. Appellant perfected this appeal on June 14, 1997. This appeal is properly before me.

APPEARANCE: Ron Wahl, non-professional counsel, Maritime Services Consultants, 3993 14th Street NE, St. Petersburg, FL 33703, for Appellant. The United States Coast Guard Investigating Officer was Lieutenant (j.g.) Richard Batson.

FINDINGS OF FACT

At all relevant times, Appellant held the above captioned license and Merchant Mariner's Document. His Merchant Mariner's Document authorized him to serve in any unlicensed rating in the deck department including able bodied seaman and food handler. His license authorized him to serve as a Mate of Ocean Steam or Motor Vessels of not more than sixteen hundred gross tons, and also Radar Observer (unlimited).

Appellant was employed by Crowley Marine Corporation. On March 6, 1996, Nathaniel "Frosty" Leonard, Crowley Marine Corporation's Senior Port Captain, telephoned Appellant and assigned him to sail as second mate on the tug DAUNTLESS. DAUNTLESS was scheduled to depart on March 8, 1996, for a run to and from Alaska that would take about two weeks.

On the morning of March 8, 1996, Appellant went to the Crowley Marine Pier. There, he met with Michael Korinek, the Captain of the DAUNTLESS. Appellant indicated that he was assigned as second mate, and Mr. Korinek told Appellant that a drug test was scheduled for later that day. Appellant left and did not sail with the DAUNTLESS nor did he take the drug test. Crowley Marine Corporation assigned a new second mate.

Appellant was charged with *misconduct*, two specifications. First, that Appellant failed to join the DAUNTLESS when it sailed, and second, that Appellant refused to take a drug test.

BASIS OF APPEAL

At the hearing, Appellant's counsel touched on the issue of whether Appellant was actually serving under the authority of his license, since he never actually boarded the DAUNTLESS. Although not expressly raised on appeal, I address this issue on my own motion and AFFIRM the finding of the Administrative Law Judge that Appellant

was acting under the authority of his license and document at the time of the misconduct charged.

46 C.F.R. § 5.57 states that a person employed in the service of a vessel is considered to be acting under the authority of a license or document when the holding of such license or document is required by his employer as a condition of his employment. There is no requirement in the regulation the person must have actually boarded the vessel before he is considered to be "acting under the authority of that license and document". This is particularly so when he is directed by competent authority to take a random urinalysis or drug test required by law and regulations prior to going aboard the vessel or to be aboard the vessel at a certain time so that it can get underway.

The record reflects that Appellant was hired in the position of mate. Whether Appellant was hired as a "training" mate or "second" mate is irrelevant to the determination of whether he was required to have a license and document, since the evidence established that Appellant's employer, Crowley Maritime Corp. required a license and document for a person filling either position. See R-34, 37. The record also reflects that after he was hired, he failed to submit to a mandatory, random urinalysis test after being informed that he should do so by the DAUNTLESS' captain and knowingly failed to join the DAUNTLESS when it sailed on the voyage for which he was hired. See R-27, 63-64. I find that appellant's contention that he was not yet serving under the authority of his license and merchant mariner's document at the time of the charged misconduct was without merit.

Appellant raised three other issues on appeal. First, Appellant claims the Investigating Officer improperly conducted *ex parte* communications with witnesses allegedly in violation of the Administrative Procedures Act (APA), 5 U.S.C. § 557(d)(1). Second, Appellant claims the Coast Guard Investigating Officer failed to produce documents relevant to the investigation even though the Administrative Law Judge ordered the Investigating Officer to produce all relevant documents. Third, Appellant claims the Administrative Law Judge failed to rule on several objections raised at the hearing. I find that Appellant's claims of error are without merit and AFFIRM the Administrative Law Judge's Decision.

OPINION

I.

A license or document is subject to suspension or revocation if, acting under the authority of that license or document, the holder commits an act of incompetence, misconduct or negligence. *See* 46 U.S.C. § 7703(1)(b). A person is considered acting under the authority of their license or document if they are employed in the service of a vessel and their license is required either by law or regulation, or by their employer. *See* 46 C.F.R. § 5.57. At the time Appellant met with Captain Korinek, he was employed by Crowley Marine Corporation and committed to sail with the DAUNTLESS that day. *See* Tr. at 35. He began drawing pay for that voyage starting at midnight the night before he arrived at the pier. *See* Tr. at 64. Appellant was required as a condition of his employment to hold a Coast Guard license. *See* Tr. at 63. The DAUNTLESS could not sail until another second mate arrived to replace Appellant. *See* Tr. at 37. Based on these facts, I conclude that Appellant was operating under the authority of his license at all relevant times, and that jurisdiction is proper under 46 U.S.C. § 7703.

II. A.

Appellant claims the Coast Guard Investigating Officer conducted *ex parte* communications with witnesses in violation of 5 U.S.C. § 557(d)(1)(B). That section of the APA provides that no member of the agency, its employees or the Administrative Law Judge who is reasonably expected to be involved in the decisional process of the proceedings, shall make to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceedings.

Appellant supports this contention by providing with his appeal papers statements from Crowley Maritime Corp. employees Nathaniel F. “Frosty” Leonard and Deborah L. Lui, that someone telephoned those witnesses and interviewed them after purporting to be one “LT Baxter with the Coast Guard’s Marine Safety Office Tampa, FL” prior to the Hearing. The claim that the interviewer was “LT Baxter” was apparently false, since there was no such individual at the Marine Safety Office Tampa. These statements were not provided to Appellant prior to the hearing. Claiming this prejudiced his defense, Appellant contends he could have cross examined those Crowley employee witnesses as to whether their testimony was affected by the knowledge that someone, whom the

Investigating Officer claimed was affiliated with Appellant's counsel's office, was "impersonating a Coast Guard officer".

Prior to rendering his decision, the Administrative Law Judge apparently knew nothing about these statements or that the Investigating Officer was attempting to determine who "LT Baxter" was. Therefore, it does not appear that either the statements or the fact that the Investigating Officer was looking into who was "impersonating a Coast Guard officer" influenced the Administrative Law Judge's decision in any way.

The witness' statements Appellant points to in his appeal were consistent with their testimony at the hearing. The witnesses told "LT Baxter" essentially the same information they testified to at the hearing during his interview of them. Appellant's appeal alleges that he had experienced difficulty interviewing these witnesses prior to the hearing because they were uncooperative, and refused to communicate with Appellant's counsel "without a subpoena". Appellant claims that the above facts establish a proscribed *ex parte* communication among agency personnel, citing the statutory language from 5 U.S.C. § 557 (d) (1).

I note at the outset that 46 C.F.R. § 5.501(b) states that the Administrative Law Judge may not have *ex parte* communications with any party involved in a dispute. Appellant would have me extend the scope of this regulation to prohibit the Coast Guard Investigating Officer from contacting any of the witnesses regarding their testimony.

46 C.F.R. §5.501 (b) covers only the Administrative Law Judge; it does not cover the Investigating Officer. The reason is simple – the Administrative Law Judge is the individual charged by law with the decisional responsibility in the case. As such, the Administrative Law Judge must conduct all material discussions with witnesses in open proceedings on the record in the presence of both parties. Only then can the integrity of the decisional process be assured. But, not all *ex parte* communications among agency personnel are prohibited. Relevant case law interpreting 5 U.S.C. § 557 (d)(1) holds that Congress intended the provision to apply to the decision making arm of the agency in an adjudicative proceeding, not the prosecuting arm of the agency, particularly where the allegedly offending communication was not relevant to the merits of the adjudicatory

proceeding, and does not threaten interests of an open and effective response. See *Professional Air Traffic Controllers Org. v. Federal Labor Relations Agency*, 222 App. D.C. 97, 685 F2d 447 (Cir. D.C.- 1982); *Amrep Corp. v. Pertschuck*, 46 AdL 2d 72 (D.D.C – 1979). Clearly, in the context of these proceedings, agency personnel who make the decision in Appellant's case are covered by the law. Thus, 46 C.F.R. § 5.501(b) expressly makes that provision of the APA applicable to the Administrative Law Judge.

The Investigating officer, on the other hand, must be able to hold *ex parte* discussions with witnesses to prepare for the hearing. He may contact witnesses in the course of his investigations, just as counsel for Appellant may (and should) do so. That the Investigating Officer communicated with the witnesses in this case is perfectly permissible. While Appellant encountered some hostility when he contacted the witnesses to interview them initially prior to the hearing, Appellant has made no showing of bad faith by the Investigating Officer contacting the witnesses, or even telling them that "there was no LT Baxter at MSO Tampa". Further, because the Administrative Law Judge apparently did not know about it prior to rendering his decision, it could not have influenced him in his decisions. I conclude on this record that this assignment of error is without merit.

B.

Appellant's second issue is that the Coast Guard Investigating Officer failed to produce documents requested by Appellant and ordered by the previous Administrative Law Judge. Failure to produce evidentiary statements to Appellant is reversible error. *See* Appeal Decision 2043 (FISH). However, producing the documents at the hearing is acceptable, provided that (1) Appellant is granted a continuance or recess to examine the documents, and (2) Appellant does examine the documents. *See* Appeal Decision 2331 (ELLIOT). Furthermore, Appellant must show prejudice from the action. *See* Appeal Decision 2425 (BUTTNER). The Coast Guard Investigating Officer did produce the majority of the documents before the hearing. However, some of the statements were not in his possession at the time of the Order, and so they were produced at the hearing.

When the documents were introduced, the Investigating Officer provided a copy for Appellant's counsel, and Counsel had time to read them. The Administrative Law Judge granted a recess to allow Appellant to examine the documents, and Counsel cross-examined the witnesses who made the statements. If counsel needed more time to examine the statements or conduct further investigation, he should have asked for a continuance. The matter would have been within the Administrative Law Judge's discretion.

C.

Appellant's final claim is that the Administrative Law Judge failed to rule on several objections raised at trial. Appellant relies on 46 C.F.R. § 5.523 for the proposition that the Administrative Law Judge must rule on all objections during the hearing. Appellant cites numerous instances where Counsel objected, and the Administrative Law Judge allegedly failed to rule. However, appellant has not shown prejudice from any such alleged failure to rule on any objection. Furthermore, my review of the record indicates that all objections and motions were, in fact, ruled upon, or otherwise decided. A review of previous Commandant's Decisions on Appeal indicates that this issue has not been previously addressed. I will not require the Administrative Law Judges to say the talismanic words "overruled" or "sustained" in response to an objection, if the ruling is otherwise clear. For example, if a document is offered into evidence, and the Appellant objects to its admission, the Judge may indicate his or her ruling on the objection by admitting or excluding the document. As long as the Administrative Law Judge makes the substance of a ruling clear, the objection will be considered ruled upon.

CONCLUSION

The charge and specifications alleged are supported by substantial, reliable and probative evidence. In addition, a review of the record reveals no clear errors or novel policy considerations. Therefore, the finding of *proved* as relates to the charge and specifications is AFFIRMED.

ORDER

The Decision and Order of the Administrative Law Judge dated February 17, 1998, is AFFIRMED.

//S//
J. C. CARD
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 2nd day of February, 2000.