UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
vs.	:	VICE COMMANDANT
MERCHANT MARINER'S DOCUMENT NO. REDACTED	:	ON APPEAL
Issued to: JOHN BYRNES	:	NO. 2616

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

By order dated December 5, 1997, an Administrative Law Judge (ALJ) of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's merchant mariner's document upon finding a charge of *misconduct* proved. Two of the four specifications supporting the charge of *misconduct* were found proved. The first of the proved specifications alleged that Appellant, while under the authority of his merchant mariner's document aboard the S.S. EXPORT PATRIOT, had intoxicating beverages within his quarters in violation of ship regulations. The second of the proved specifications alleged that Appellant, while under the authority of his merchant mariner's document aboard the S.S. EXPORT PATRIOT, wrongfully disobeyed a lawful command of the Master to submit to a chemical test.

The hearing was held in New York, New York, on May 5 and 7, 1997. Appellant was represented by counsel and entered a plea denying each specification under the charge of *misconduct*. The ALJ heard eight (8) witnesses and entered nine (9) exhibits into evidence.

The ALJ issued a written Decision and Order (D&O) on December 5, 1997. He found the charge and two of the four specifications proved, and ordered that the Appellant's merchant mariner's document and all other Coast Guard issued documents

and licenses suspended for a period of six (6) months to begin upon the immediate surrender of such documents to the nearest Coast Guard station. Additionally, the ALJ ordered that if the Appellant was found liable for any other offenses, including the use of drugs, alcohol, failure to obey orders, or similar substantial violations, within the twelve (12) months immediately following the end of the original six (6) month suspension period, all of the Appellant's Coast Guard issued licenses and documents would be automatically revoked. The D&O were served on the Appellant on December 8, 1997. The Appellant filed a timely notice of appeal on December 30, 1997, and perfected it on February 2, 1998.

APPEARANCE: Mr. Sidney H. Kalban, 360 West 31st Street, 3rd floor, New York, New York, 10001, for Appellant. The Coast Guard Investigating Officer was Chief Warrant Officer Richard Elliot.

FINDINGS OF FACT

The Appellant was serving as an electrician/DEMAC aboard the S.S. EXPORT PATRIOT when the alleged violations occurred. Investigating Officer's (hereafter I.O.) Exhibits 4, 9 and Transcript (hereafter TR) at 189, 268. The vessel was docked in Cadiz, Spain on February 17 and 18, 1997. See TR at 24. During the evening of February 17, the Appellant consumed alcohol before he went aboard the vessel and while ashore the Appellant also purchased some wine. See TR at 269, 290. The Appellant returned to the vessel and placed the wine in his locker. See TR at 344. The company policy governing the EXPORT PATRIOT requires that any alcohol brought aboard the vessel must be immediately checked in with the Chief Steward. The Chief Steward is required to store the alcohol in the slop chest. Company policy also forbids any crewmember from

consuming alcohol while on board the vessel. See I.O. Exhibits 3, 4 and TR at 37, 65, 77, 183, 206, 221, 222. This company policy was made part of the instruction given to each S. S. EXPORT PATRIOT crewmember including the Appellant. See I.O. Exhibits 3, 4, 8 and TR at 25, 74-78.

At approximately 0150 on February 18, 1997, the S. S. EXPORT PATRIOT surged forward unexpectedly and broke away from the pier. See TR at 81. The Appellant, who was manning the capstan and winch, followed orders during this breakaway. See TR at 41, 174, 271-272. The vessel returned to the dock and moored so cargo operations could be completed at 0329 on February 18, 1997. See IO Exhibit 2 and TR at 41. After completion of cargo operations and a determination that the breakaway had not caused any damage, the ship departed the dock at 0440 hours on February 18, 1997. See I.O. Exhibit 2 and TR at 45. During the departure undocking, the third mate supervised and gave orders to the Appellant. See TR at 26, 40, 288. The third mate observed that the Appellant was overly talkative and unsteady on his feet and he believed the Appellant to be intoxicated. The third mate so notified the bridge at approximately 0600 on February 18, 1997. See I.O. Exhibit 8 and TR at 33-36, 194, 195.

The Master told the third mate to relieve the Appellant from his duties. See TR at 195. The Master also told the ship's Chief Mate to check whether or not he observed the Appellant to be intoxicated, and that he was to search the Appellant's room with the third officer and the cadet. See I.O. Exhibit 8 and TR at 84. The Chief Mate, on speaking with the Appellant, found him to be uncooperative and smelling of alcohol. The Chief Mate believed the Appellant was intoxicated. See TR at 85, 86. The third mate, the Chief Mate and deck cadet then searched the Appellant's room and found two one liter cartons of wine. See IO Exhibit 8 and TR at 87, 88, 126, 196, 197. The Master then directed the

Chief Mate, the third mate and the deck cadet to bring the Appellant to his office to be tested. See IO Exhibit 8 and TR at 196. The Appellant was loud and argumentative when brought before the Master to take a breathalyzer test and the Master believed he was intoxicated. See TR at 197-199.

The Master of the S. S. EXPORT PATRIOT was trained to give a breathalyzer test. In giving the test, the Master asked the Appellant to sit so that, in accordance with company policy and the instructions coming with the testing equipment, he could observe the Appellant for fifteen minutes before administering the test. See TR at 202, 203. The Appellant initially refused an order of the Master to sit for observation and take a breathalyzer test. See TR at 91, 197, 293, 294. After about five to twenty minutes, the Appellant told the Master he had to use the bathroom. After some discussion between the Master and the Appellant, the Appellant did eventually leave with the Master's permission. He then defecated on the deck. See TR at 92, 201, 202. The Appellant returned shortly thereafter to the Master's stateroom where he threw toilet paper towards the Master and stated, "You sir, are beneath contempt." See TR at 93, 203, 296. The Master repeated to the Appellant to sit and take a breathalyzer. See TR at 93, 203. The Appellant again refused to take the breathalyzer and left without permission. See TR at 93, 203, 296. The Appellant sailed on the S. S. EXPORT PATRIOT under articles which is a contract between the Master and seaman, including the Appellant, wherein the seaman agrees, among other things, to obey the orders of the Master. U.S. law and Coast Guard regulations govern the articles. See I.O. Exhibits 7, 8 and TR at 188, 189.

During a second search of the Appellant's stateroom, a third carton of wine was found. See TR at 129, 346. The Appellant tested negative for alcohol consumption as a

result of a test given about twenty-four (24) hours after he was originally ordered to take a test. See TR at 220.

BASES OF APPEAL

Appellant's bases of appeal are as follows:

1. That the ALJ's reliance solely on conflicting testimony renders his decision inherently incredible.
    a. The ALJ's acceptance of conflicting telephonic testimony in the face of reliable documentary evidence to the contrary is inherently incredible.
    b. The ALJ did not address the inconsistencies where the witnesses contradicted each other concerning the alcohol policy on the ship and the ALJ's reliance on conflicting testimony rather than the published alcohol policy is inherently incredible.
2. That the Master's order was unlawful, because under the circumstances, it was impossible for the Appellant to obey the command to submit to a chemical test.
    a. The appellant was unable to control his bodily functions and requiring the Appellant to sit for the test would have forced him to surrender his basic human dignity. These circumstances therefore made it impossible for the Appellant to obey the command to submit to a chemical test.

OPINION

I

Appellant's first ground for appeal is based on the assertion that the ALJ's reliance solely on conflicting testimony renders the decision inherently incredible.

It must first be stated that the ALJ has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record. See Appeal Decisions 2554 (DEVONISH), 2492 (RATH). Moreover, where there is conflicting testimony, it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. See Appeal Decisions 2474 (CARMIENKE), 2424 (CAVANAUGH), 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), 2460 (REED).

In this case, the ALJ heard the testimony of numerous individuals who were aboard the S.S. EXPORT PATRIOT at the time of the Appellant's misconduct as well as the testimony of the Appellant himself specifically regarding the alcohol policy of Farrell Lines, Inc. and the S.S. EXPORT PATRIOT. Additionally, the ALJ accepted into evidence the written posted alcohol policy of Farrell Lines, Incorporated as well as the signed document by the Appellant acknowledging receipt of Farrell Lines' Policy Statement on Drug and Alcohol Abuse and the Prohibition Notice on the use of drugs and alcohol. See I.O. Exhibits 3, 4. The Prohibition Notice on the use of drugs and alcohol states: "THE CONSUMPTION AND/OR POSSESSION OF BEVERAGES CONTAINING ALCOHOL BY CREW MEMBERS WHILE ABOARD THIS VESSEL IS FORBIDDEN." See I.O. Exhibit 4. The Farrell Lines' Policy Statement on Drug and Alcohol Abuse also states that:

> The unauthorized possession, sale, purchase, transfer, consumption, or transportation of any alcoholic beverage" is "…absolutely prohibited while crew members are on Farrell Lines' premises…business, or any vessel owned and/or operated by Farrell Lines." Exceptions to this prohibition are as follows: "1. When the beverage is in the manufacturer's container and the manufacturer's seal has not been broken and applicable customs declarations have been [filed] with the Master. 2. To carry out a written physician's order for patient care. 3. In conjunction with designated Farrell activities or as specifically approved by Farrell Lines or the Master.

The absence of language stating that alcohol must be given to the Chief Steward is immaterial because the Appellant was still in violation of this prohibition by not filing the appropriate documents or registering the alcohol with the Chief Steward per the instructions given to him in a lecture by Chief Mate Curtis Hall. See TR at 77-78.

Every witness who was questioned as to the alcohol policy of Farrell Lines and the S.S. EXPORT PATRIOT concurred that any alcohol brought on board was required to be turned over to the Chief Steward for containment until reaching New York. See TR at 37, 65, 77, 164, 183, 221. In his testimony, Curtis Hall stated that in a lecture to crewmembers, at which the Appellant was present, the following instructions were given:

> One of the issues, people sometimes want to purchase alcohol overseas and bring it back, and I do state to them that we will allow you to bring alcohol on board, declare it on your U.S. Customs declaration when entering in New York; however, when bringing it on board, you are to give it to the Chief Steward, label your package and give it to the steward, and he puts it under lock and key in the swab deck. See TR at 77.

Additionally, the Appellant under questioning stated that he "…was going to take it [the wine he purchased ashore] home, turn it in" and that he intended to turn it in to the steward "…in the morning." See TR at 291.

The factual findings deduced from the testimony of these individuals and the admitted physical evidence must be accepted unless such findings are inherently incredible or not supported by substantial evidence in the record as a whole. See Appeal Decisions 2601 (MCCARTHY), 2500 (SUBCLEFF), 2333 (AYALA). If such evidence is sufficient to justify a finding, it is not required that the finding be consistent with all evidence in the record. See Appeal Decisions 2601 (MCCARTHY), 2282 (LITTLEFIELD). Furthermore, if such findings can be reasonably supported, then there will be no reexamination on appeal of the ALJ's weighing of conflicting evidence. See

Appeal Decisions 2601 (MCCARTHY); 2390 (PURSER), Aff'd *sub nom* Commandant v. Purser, NTSB Order No. EM-130 (1986), 2356 (FOSTER), 2344 (KOHAJDA).

It is within the purview of the ALJ, as fact-finder, after hearing all the testimony and viewing the evidence, to determine findings. The findings of the Administrative Law Judge can only be reversed if these findings are arbitrary, capricious, clearly erroneous, and unsupported by law. See Appeal Decisions 2474 (CARMIENKE), 2390 (PURSER), 2356 (FOSTER), 2344 (KOHAJDA). Finally, it must be remembered that an appellate reviewing body should not substitute its own determination of credibility for that of the fact finder. See Appeal Decision 2474 (CARMIENKE). See Martin v. American Petrofina Inc., 779 F. 2d 250 (5th Cir. 1985); Knapp v. Whitaker, 757 F. 2d 927 (7th Cir. 1985); Government Virgin Islands v. Gereau, 502 F. 2d 914 (3rd Cir. 1974), cert. denied 420 U.S. 909, 95 S. Ct. 829, 42 L. Ed. 2d 839 (1975); Wilkin v. Sunbeam Corp., 466 F. 2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973). The rationale for these rules is that the fact-finder can be influenced by the demeanor of the witness, his tone of voice, his body language, and other matters that are not captured within the pages of a "cold" appellate record. See Appeal Decision 2474 (CARMIENKE). See Charles A. Grahn, Respondent, 3 NTSB 214 (Order EA-76, 1977), Reagan v. United States, 157 U.S. 301, 15 S. Ct. 610, 39 L.Ed. 709 (1895), Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), cert. denied 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975). Based upon these well-settled holdings, this appellate body will not retry the facts of this case unless such findings of the ALJ are "clearly erroneous." See Appeals Decisions 2474 (CARMIENKE), 2390 (PURSER), 2363 (MANN), 2356 (FOSTER).

The Appellant further contends that the ALJ's acceptance of conflicting telephonic testimony is inherently incredible and that use of witness testimony by

telephone does not establish witness credibility. Title 46 C. F. R. § 5.535(f) specifically authorizes the ALJ to take the testimony of a witness by telephone, "When testimony would otherwise be taken by deposition." See Appeal Decisions 2476 (BLAKE), aff'd NTSB Order No. EM-156 (1989), aff'd Blake v. Department of Transportation, NTSB, No. 90-70013 (9th Cir. 1991), 2575 (WILLIAMS), 2546 (SWEENEY), 2492 (RATH), 2538 (SMALLWOOD). The use of telephonic testimony promotes flexibility, judicial economy, and efficiency by expediting the proceedings when the prospective witness must travel long distances. See Appeal Decisions 2476 (BLAKE), aff'd NTSB Order No. EM-156 (1989), aff'd Blake v. Department of Transportation, NTSB, No. 90-70013 (9th Cir. 1991), 2538 (SMALLWOOD), 2492 (RATH), 2503 (MOULDS). By allowing telephonic testimony, merchant seamen who are subpoenaed as witnesses do not have to miss vessel departures. Additionally, telephonic testimony affords respondents immediate access to individuals who can provide testimony on their behalf, individuals who would normally be unable to do so because of commitments at sea. Unlike other professions, the merchant marine is one in which its members are routinely outside of the United States for extended periods, usually in excess of six months. Moreover, when merchant mariners return to shore, they may be outside the jurisdiction of the court and, therefore, beyond the subpoena power of the court. By allowing telephonic testimony, such problems are avoided for all parties concerned.

In suspension and revocation hearings, the acceptance of telephonic testimony is consistent with the constitutional concept of due process and is sufficient to protect the legitimate interests of the Appellant. See Appeal Decisions 2492 (RATH), 2476 (BLAKE); aff'd sub nom., Commandant v. Blake, NTSB Order EM-156 (1989; aff'd sub nom., Blake v. Department of Transportation, NTSB, No. 90-70013 (9th Cir. 1991).

Further, this regulation allowing for telephonic testimony provides for an "orderly, dignified, and credible procedure," ensuring proper identification of all parties and reliable cross-examination. See Appeal Decisions 2492 (RATH), 2476 (BLAKE). A review of the transcript in this case illustrates that the ALJ took great care to ensure that the taking of telephonic testimony was conducted in a dignified and credible manner. See TR at 19-69, 70-145, 185-239. Finally, it must be reiterated that the ALJ has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record. See Appeal Decisions 2554 (DEVONISH), 2492 (RATH).

II

The Appellant's final basis of appeal is the contention that the Master's order was unlawful because it was impossible for the Appellant to obey the command of submitting to a chemical test. In addressing the Appellant's assertion, it is first necessary to distinguish between a lawful and an unlawful order and the defenses which are available to a charge of disobedience. First, "disobedience to a lawful order is an offense in any kind of jurisprudence." See Appeal Decision 1857 (POUTER). "If there is an order and if there is disobedience, the only defense can be that the order was not lawful." See Appeal Decision 1857 (POUTER). "This unlawfulness may be established by evidence that; the person who gave the order had no authority to give it, or that; the circumstances of the individual who was given the order were such as to make performance impossible." See Appeal Decision 1857 (POUTER). These defenses may establish the unlawfulness of the order. See Appeal Decision 1857 (POUTER).

The orders of the Master of a vessel are given special recognition and protection by the laws of not only the U.S. but of the international community. The Master has a

great responsibility in ensuring the safety of his vessel and crew. It is general maritime law's long recognition of the Master's responsibility for the safety of the ship that serves as the basis for the authority of the Master to order an individual, such as the Appellant, to submit to a chemical test. See Appeal Decision 2098 (CORDISH). This responsibility was articulated in the case of the Styria, 186 U.S. 1, 22 S. Ct. 731 (1901) in which the Court stated:

> The Master of a ship is the person who is entrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention.

The courts have demonstrated that "the Master is regarded as the individual primarily charged with the care and safety of the vessel and the crew." See Appeal Decision 2098 (CORDISH). In CORDISH, I considered the authority of a Master to order a search for drugs of a crewmember. This decision stated that:

> The presence of drugs aboard a vessel is a direct threat to the Master's ability to carry out this duty, a threat whose seriousness is illustrated by the severe sanctions provided in 46 U.S.C. § 239b for violation of the drug laws of the United States by a seaman … the order to the Appellant commanding him to empty his pockets during the course of a search for drugs is within the powers given to the Master by maritime law.

See Appeal Decision 2098 (CORDISH).

The possession of drugs is not the only situation that poses a threat to the safety of a vessel. The presence of a possibly intoxicated crewmember aboard a vessel is also a "direct threat to the Master's ability to carry out this duty" to ensure the safety of the vessel and its crew. Based upon this need for safety, as well demonstrated in Appeal Decision 2098 (CORDISH), it is therefore concluded that the order to the Appellant commanding him to sit for a chemical test is within the powers given to the Master by maritime law.

The Appellant contends that the Master's second order to sit for a chemical test was unlawful because of the impossibility of performance on the part of the Appellant. From the Appellant's testimony, it is important to note that after receiving the first order to sit for a chemical test the Appellant was permitted by the Master to relieve himself after expressing a need to do so. See TR at 293-294. However, it is even more significant to note that upon the Master's second request for the Appellant to sit for a chemical test, the Appellant did not express a further desire to relieve himself. Rather, the Appellant simply stated: "You, sir, are beneath contempt. You are beyond." See TR at 295. After this statement, the Appellant testified that he returned to his stateroom and did not take a chemical test until the following day on February 19, 1997. See TR at 302.

In addressing the Appellant's contention that the order of the Master was unlawful because of the impossibility of performance on the part of the Appellant, it must be restated that it is within the purview of the ALJ, as fact-finder, after hearing all testimony and viewing the evidence, to determine findings of fact. See Appeal Decisions 2474 (CARMIENKE), 2390 (PURSER), 2363 (MANN), 2356 (FOSTER). The findings of the ALJ can only be reversed if such findings are arbitrary, capricious, clearly erroneous, and unsupported by law. See Appeal Decisions 2474 (CARMIENKE), 2390 (PURSER), 2363 (MANN), 2356 (FOSTER). Without such showings, this body will not disturb the decision of the ALJ. I conclude that the findings of fact by the ALJ were neither arbitrary nor capricious.

In Appeal Decision 1857 (POUTER), the Commandant also considered a charge of *misconduct* for failure to obey the order of a Master. In (POUTER), the Commandant correctly noted that the only thing to be considered in an appeal of such a charge is whether the Appellant's evidence should necessarily have convinced the ALJ that the

Master's order was unlawful. See Appeal Decision 1857 (POUTER). In denying the Appellant's appeal in (POUTER), the Commandant stated: "The evidence did not convince the Examiner or the case would not be here in the first place. On the other hand, if there is substantial evidence to support the findings, they will be upheld. Only if there is no substantial evidence to support the findings should I disturb the Examiner's findings." See Appeal Decision 1857 (POUTER).

The same assessment may be made in the present case brought by the Appellant. The testimony and evidence presented at the Appellant's hearing did not convince the ALJ that the Master's order was impossible to obey. Moreover, this appellate body concludes, based upon the record, that there is substantial evidence to support the ALJ's determination that the order was not impossible to obey. Upon his request, the Appellant was permitted by the Master to attend to his physical needs despite having been given an order to sit for a chemical test. After the satisfaction of his physical needs, the Appellant still refused to obey the order of the Master to sit for a chemical test. Based upon the circumstances of this refusal, I find that it was indeed possible for the Appellant to carry out the order requesting his compliance with a chemical test.

CONCLUSION

After reviewing the entire record and considering all of Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the ALJ. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The Decision &Order of the Administrative Law Judge dated December 5, 1997, 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.