UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. (redacted)
Issued to: Sverre F. PAULSEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2451

Sverre F. PAULSEN

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 21 January 1985, an Administrative Law Judge of the United States Coast Guard at Alameda, California revoked Appellant's document upon finding proved the charges of Misconduct and Use of Narcotics. The misconduct charge was supported by two specifications. The first alleged that Appellant, while serving as Fireman/Watertender aboard SS Constitutional, under authority of the captioned document, did on or about 22 February 1984 while the vessel was at sea enroute to Nawiliwili, Kauai, wrongfully use narcotics, to wit: Cocaine. The second misconduct specification alleged that while serving as in the same capacity at the same time and place Appellant wrongfully distributed cocaine to a member of the crew. The specification under the charge of Use of Narcotics alleged that Appellant, while serving as Fireman/Watertender aboard SS Constitution, being the holder of captioned document, was on or about 22 Feb 1984 while the vessel was en route to Nawiliwili, Kauai, a user of narcotics and did use certain narcotics, to wit: cocaine.

The hearing was held at Honolulu, Hawaii, on 10, 22, 23, and 24 March 1984. The hearing in this case was consolidated with four other cases arising from incidents aboard the Constitution.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charges and

specifications.

The Investigating Officer introduced in evidence six exhibit and the testimony of six witnesses.

In defense, Appellant introduced in evidence one exhibit, the testimony of one witness and his own testimony by telephone.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications, had been proved, and entered a written order revoking all licenses and documents issued to Appellant.

The complete Decision and Order was served on 5 February 1985. Appeal was timely filed on 30 September 1985 and perfected on 11 March 1986.

FINDINGS OF FACT

On February 22 and 23, 1984, Appellant was serving as a Fireman/Watertender on board the SS CONSTITUTION under authority of his document. The CONSTITUTION is a United States flag passenger vessel which is operated as an inter-island cruise ship calling at various points in the state of Hawaii.

On the evening of Wednesday, February 22, 1984, at approximately 2200 hours, Appellant and Mark Myers, another crew member, were talking together in the passageway outside the door of a third crewmember, Chester Artis. The three went to Appellant's room, where Artis and Myers asked Appellant if he knew where they could get some cocaine. Appellant responded that he did and proceeded to obtain it for them. The three of them then divided the one gram of cocaine that Appellant had obtained into thirds, and injected it into their arms. Appellant then obtained a second gram, which was divided and injected in the same manner.

Appellant told Artis that his share of the cocaine would cost $120. Artis could not pay at that time, but said that he would give Appellant the money the next day. Appellant took Artis' Merchant Mariner's Document as security for the repayment of the money. Appellant never returner the document, and it was taken from Appellant during the course of the hearing process.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant contends:

1. He was denied due process of law by virtue of the absence of an up-to-date index for the Decisions and Orders of the Commandant for the period from July 1983 until the case was commenced and the appeal initially prepared. He further argues that he was denied due process of law by virtue of the absence of any index of the Decisions and Orders of the National Transportation Safety Board (NTSB) for maritime cases.

2. The Investigating Officer failed to make out a *prima facie* case in that there was no competent evidence identifying the substance allegedly involved as cocaine, and there was no evidence corroborating the assertions of Artis concerning the distribution and use of cocaine.

3. Prejudicial error was committed:

a. in admitting the testimony of state narcotics agent Timothy Culler,

b. in admitting and then rejecting the results of a polygraph examination and testimony with respect thereto,

c. in ordering certain of the persons charged to undergo physical examinations which could not have been relevant to the charges made,

d. in excusing the primary witness before the close of testimony.

APPEARANCE: Frederick G. Harris, Esq., 1776 Ygnacio Valley Road, suite 210, Walnut Creek California, 94598

OPINION

I

Appellant contends that his due process rights were violated due to the lack of an up-to-date index for Commandant's Opinions and Orders at the time of commencement of the case and at the time when the appeal was initially prepared. I disagree.

In making this claim, Appellant cites 5 USC, the Freedom of Information Act. Title 5 USC 552(a)(2) provides, in pertinent part:

> [E]ach agency . . . shall make available for public inspection and copying . . . final opinions, . . . as

> well as orders made in the adjudication of cases. . . . Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public . . . . Each agency shall promptly publish, quarterly or more frequently, and distribute . . . copies of each index or supplements thereto . . . . A final order, [or] opinion, . . . that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if - (i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.

The statute itself sets out the available remedy: An agency cannot rely on unindexed decisions as precedent. In this case no unindexed opinions have been relied upon by the Administrative Law Judge, nor was the lack of an index raised as an issue at the hearing. Further, since a current index was provided to Appellant for use in this appeal, he has not cited a case that was unavailable either during the hearing or during the appeal which would have affected the outcome in this case.

While the issue concerning the adequacy of NTSB indexes is beyond the scope of these proceedings, I note the Administrative Law Judge relied on no NTSB cases in his decision and order. Thus, Appellant has suffered no prejudice whether or not the NTSB index was in compliance with the requirements of 5 USC 552.

II

Appellant argues that there was no competent evidence that the substance involved in this incident was cocaine. He argues that Artis, who testified that he saw Appellant inject cocaine into his arm, (Record at 100) is not an expert, a chemist, or a medical doctor, and that Artis "performed no chemical analysis." Brief at 11. The Administrative Law Judge, however, determined:

> On 24 and 25 February 1984 and at all other times involved here Chester Criston Artis . . . could easily identify cocaine by taste and by its feel when rubbed between his fingers. He was personally very familiar with its effects . . . on the human body when injected into the blood stream. Decision and Order at 9.

Artis testified that the substance Appellant injected into his own (Appellant's) arm was "the same cocaine that I just injected." He also testified that the physical effects that he observed in Appellant after the injection - increased heart rate, exhilaration, release of energy - were "the same . . . that I've experienced." Record at 101.

There is no requirement that identification of a substance as a narcotic be accomplished by expert identification or laboratory analysis . The identification need only be accomplished by sufficient evidence. Appeal Decision 2065 (TORRES), affd sub nom. *Commandant v. Torres*, NTSB Order EM-66 (1978). In this case, identification by an individual "very familiar" with cocaine and its effects constitutes sufficient evidence. As the Administrative Law Judge stated:

> Under all of the circumstances here, it is considered that Artis' testimony constitute "substantial evidence of a reliable and probative nature." Decision and Order at 20.

Appellant argues at length that the testimony of Artis was not credible. Indeed, credibility is one of the central issues in this case, due to the contradictory statements of the parties. In addressing this issue, the Administrative Law Judge stated:

> [T]here is far more truth in Artis's testimony than counsel for [Appellant] would have us believe . . . . There is nothing in [Appellant's] testimony which tends to discredit or contradict Artis. Decision and Order at 20.

The Administrative Law Judge went on to accept Artis' testimony as "believable." Decision and Order at 22.

"It is the function of the Administrative Law Judge to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. Appeal Decision 2340 (JAFFEE), 2333 (AYALA), 2320 (FRAPPIER) and 2116 (BAGGETT)." Appeal Decision 2386 (LOUVIERE).

There has been no showing here that the Administrative Law Judge's determination of what events occurred was either arbitrary and capricious or inherently incredible. Accordingly, I will not disturb it on appeal.

III

Appellant argues finally that several instances of prejudicial error were committed by the Administrative Law Judge.

Appellant's first assignment of error concerns urinalysis tests which were ordered by the Administrative Law Judge with respect to the other individual facing charges at this consolidated hearing. Appellant voluntarily underwent a urinalysis test ten days after the date in the specifications when he allegedly used cocaine. The investigating officer argued that the test results should be given no weight, since they were taken more than seven days after the alleged use. Record at 331. Appellant now argues that the investigating officer was "attempting to use the proceedings to bootstrap further investigation," and "[t]hat such tests were ordered in the circumstances is an abuse of this quasi-judicial process." Brief at 21, 22. However, the test taken by Appellant was accorded no weight by the Administrative Law Judge in his determination that the charges and specifications had been proved, and Appellant's argument is not persuasive.

Second, Appellant argues that a state narcotics agent, Mr. Culler, was allowed to testify "over objection and out of order concerning the veracity of Mr. Artis." As noted *supra*, however, Artis' credibility was a major issue in this case, and had been previously attacked on cross-examination by Appellant. As the Administrative Law Judge explained, there was sufficient attack in the cross examination to justify permitting Mr. Culler to testify in rebuttal. Record at 254. *See* Fed. R. Evid. 608 (Rehabilitation permitted once character for truthfulness of witness has been attacked.)

Next, Appellant avers that, in an effort to establish the veracity of Artis' testimony, "the Investigating Officer offered testimonial evidence of a polygraph examination of Mr. Artis." Brief at 22. This evidence was admitted in evidence, then later excluded by the Administrative Law Judge. Decision and Order at 21. In excluding the polygraph examination and the accompanying amplifying testimony, the Administrative Law Judge stated:

> [T]he polygraph examination and accompanying testimony are inconclusive and offer no persuasive evidence either for or against believing Artis. Decision and Order at 21.

The general rule regarding the admission of evidence that should have been excluded in a case with no jury is that there is a presumption that the Judge disregarded the inadmissible evidence and based his decision on competent evidence. *Builder's Steel*

Co. v. Commissioner, 179 F. 2d 377 (8th Cir. 1950); E. Cleary, *McCormick On Evidence*, 60, at 137 (2d ed. 1972).

> One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon evidence which he regard as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does consider competent or material. *Builders Steel Co.*, 179 F. 2d at 379.

Finally, error is alleged in that, at the conclusion of his testimony, Artis was excused and allowed to leave the jurisdiction "eve though Mr. Paulsen's counsel had previously indicated that he might wish to recall Mr. Artis." Brief at 22. Appellant claims that the alleged error substantially prejudiced the preparation of the defense. I disagree. As the Administrative Law Judge indicated, counsel for Appellant failed to be "absolutely definite" as to whether or not he would need the witness again. There was no attempt to have Artis subpoenaed or to request a continuance in order to secure his presence or telephonic deposition. The Administrative Law Judge is given broad discretion to determine how a hearing will proceed. *See Cella v. U.S.*, 207 F. 2d 783, 789 (7th Cir. 1953) certiorari denied 347 U.S. 1016 (1953). The Administrative Law Judge was within his discretion to dismiss the witness.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision of the Administrative Law Judge dated at Alameda, California on 31 January 1985, is AFFIRMED.

James C. IRWIN
Vice Admiral, United Stated Coast Guard
ACTING COMMANDANT

Signed at Washington, D. C. this 11th day of June, 1987.

***** END OF DECISION NO. 2451 *****

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