

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Stephen S. BARTLETT Z-1239770

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2471

Stephen S. BARTLETT

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By his order dated 16 June 1987, an Administrative Law Judge of the United States Coast Guard at Los Angeles/Long Beach, California, revoked Appellant's License and Document upon finding proved the charge of misconduct. The three specifications thereunder found proved allege that Appellant, while serving under the authority of the captioned document and license, on board the SS PRESIDENT F.D. ROOSEVELT: (1) on 11 August 1986, wrongfully had in his possession Valium (Diazepam); (2) on 11 August 1986, wrongfully attempted to enter the room of a crewmember; and (3) on 18 August 1986, wrongfully falsified a government document by giving false information regarding his prior record when seeking to upgrade his license.

The hearing was held at Long Beach, California on 16 December 1986, 8 and 29 January 1987, and on 18 February 1987. At the hearing, Appellant was represented by professional counsel and entered an answer of deny to the charge and specifications.

FINDINGS OF FACT

On 11 and 18 August 1986, Appellant was the holder of a Merchant Mariner's Document and a Third Mate, Steam and Motor Vessel, Any Gross Tons, Oceans, License.

On 11 August 1986, Appellant was serving under the authority of his document and license as the Third Mate aboard the S.S. PRESIDENT F.D. ROOSEVELT, a merchant vessel of the United States, proceeding from Oakland, California, to Yokohama, Japan. At approximately 1230 A.M. on 11 August 1986, Appellant attempted to open the stateroom door of Able Seaman Peter Liptay without authority. That incident was officially logged on 11 August 1986 by the Master. On 11 August, the Master and the Chief Mate conducted a search of Appellant's stateroom to determine if he was in possession of any unauthorized keys. During the course of the search, 18 tablets of Valium (Diazepam) and other miscellaneous pills and drug paraphernalia were discovered. At that time, Appellant admitted to the Master that the Valium was Appellant's and that he held no prescription for the Valium tablets. The Valium was turned over to the Coast Guard Investigating Officer upon completion of the voyage and was subsequently transferred to the City of Long Beach Police Department for analysis. The tablets were positively identified as Valium (Diazepam), which is a controlled substance as defined in 21 U.S.C. 812 and 21 CFR 1308.14.

On 18 August 1986, Appellant appeared at the U.S. Coast Guard Marine Safety Office, Los Angeles/Long Beach, California and executed, in writing, an application for a raise in grade of his license. On the application, Appellant checked the box indicating that no administrative action had been invoked against his Merchant Mariner's Document or License. In fact, Appellant's license had been suspended for a period of three months, with nine months probation on 2 September 1982 by the Coast Guard for Appellant's negligence in failing to properly monitor cargo operations.

BASES OF APPEAL

This appeal has been taken from the order imposed by the

Administrative Law Judge. Appellant contends that:

(1) The Administrative Law Judge improperly denied several of Appellant's Proposed Findings of Fact;

(2) The Commandant has improperly deprived the Administrative Law Judge of judicial discretion in the imposition of an order to suspend or revoke a license;

(3) The specification detailing the possession of Valium should be dismissed because of a break in the chain of custody of the evidence;

(4) The fact that the possession of valium occurred in foreign waters should be considered a mitigating factor;

(5) The Administrative Law Judge improperly refused to exercise discretion since the facts of the case dictate that a revocation is an inappropriate sanction.

OPINION

I

Appellant argues that the Administrative Law Judge improperly denied several of Appellant's Proposed Findings of Fact which, he alleges, affected the outcome of the case. These Proposed Findings of Fact state that: (1) Appellant had no intention of entering Able Seaman Liptay's room on 11 August 1986 and, on the contrary, Appellant was merely waiting in the passageway for the elevator; (2) Appellant and Able Seaman Liptay had stood a watch together on a prior voyage where Liptay was negligent at the helm and caused the ship to go dramatically off course. Liptay was subsequently reprimanded by the Appellant and a personality clash developed between the two men; (3) On 10 August 1986, as on other occasions when Appellant and Liptay were relieved from watch, the vessel's cargo lights were turned on at midnight, creating a navigational hazard; (4) On 11 August 1986, Appellant sought out the source of the cargo lights being turned on, suspecting that Liptay was seeking to retaliate for the corrective measures taken against him by Appellant; (5) When

Appellant made his application to the Coast Guard for an upgrade of his license on 18 August 1986, he copied the application from a previous one, mistakenly failing to indicate a 1982 license suspension and probation.

The Administrative Law Judge did not err in determining that Appellant failed to produce sufficient credible evidence to substantiate his Proposed Findings of Fact. The only evidence of any kind submitted by the Appellant was his own, self-serving, written declaration admitted into evidence as Respondent Exhibit "A". The Administrative Law Judge properly attached less weight to that document (which was not subject to cross examination) than to the sworn testimony of the government witnesses that was subject to cross examination by Appellant's counsel. Although Appellant's counsel did elicit information from witnesses on cross examination, it was not error for the Administrative Law Judge to determine that neither that information nor Appellant's written declaration credibly supported his Proposed Findings of Fact. It is the duty of the Administrative Law Judge to determine witness credibility and weigh the evidence. Appeal Decisions [2424 \(CAVANAUGH\)](#), [2423 \(WESSELS\)](#), [2404 \(MCALLISTER\)](#).

The testimony of the vessel Master, Chief Mate, and Able Seaman Liptay was consistent, reliable, and sufficiently detailed for the Administrative Law Judge to properly deny the unfounded Findings of Fact proposed by Appellant. Consequently, the decision of the Administrative Law Judge to deny Appellant's Proposed Findings of Fact was neither arbitrary nor incredible and will not be disturbed. Appeal Decisions [2356 \(FOSTER\)](#), [2344 \(KOHAJDA\)](#), [2340 \(JAFFE\)](#), [2333 \(AYALA\)](#), and [2302 \(FRAPPIER\)](#).

II

Appellant argues that the Commandant of the Coast Guard cannot deprive an Administrative Law Judge of discretion by imposing a regulation that mandates revocation. The statutory language of 46 U.S.C. 7703 reads:

A license...or merchant mariner's document issued by the Secretary may be suspended or revoked if, when acting under the authority of that license...or document, the holder - (1) has violated or failed to comply with this sub- title, or any other

law or regulation intended to promote marine safety or to protect navigable waters; (2) has committed an act of incompetence, misconduct, or negligence.

Appellant has interpreted this language to mean that the Administrative Law Judge retains full discretion in every case as to whether to invoke a sanction of revocation. Appellant's interpretation is incorrect. The discretion to award an appropriate sanction is vested in the Secretary pursuant to 46 U.S.C. 7703. Pursuant to 46 U.S.C. 7701, the Secretary is authorized to prescribe regulations to carry out the Suspension and Revocation Proceedings. The authorization to accomplish both of these tasks was in turn delegated to the Commandant of the Coast Guard in 49 C.F.R. 1.46. Pursuant to that explicit delegation, the Commandant has promulgated Part Five of Title 46, C.F.R., which includes 5.59, requiring mandatory revocation of documents or licenses by the Administrative Law Judge when a charge of misconduct for use, possession, sale, or association with dangerous drugs is found proved. This regulation is binding on the agency and has the full force and effect of law. See, *National Latino Media Coalition v. F.C.C.*, 816 F.2d 785 (C.A.D.C. 1987), *AFL&CIO v. Donovan*, 757 F. 2d 330 (C.A.D.C. 1985), *Smith v. Russelville Production Credit Ass'n.*, 777 F. 2d 1544 (11th Cir. 1985). Consequently, the Administrative Law Judge is required to issue an order of revocation, where as here, possession of drugs is found proved. Appeal Decision [2303](#) (HODGE MAN). Accordingly, Appellant's contention of an abuse of discretion, citing to *Montgomery v. Commissioner of Internal Revenue*, 367 F. 2d 917 (9th Cir. 1966), is unfounded. Appellant further asserts that 46 C.F.R. 5.59 is inconsonant with 46 U.S.C.7703 and consequently a nullity based on the court holding in *Pacific Gas & Elec. Co. v. United States*, 664 F.2d 1133 (9th Cir. 1981). That case, however, held a regulation to be null only where it was interpreted to create a rule "out of harmony" with the statute in issue. Such is not the case here, where the regulation (46 C.F.R. 5.59) is in complete harmony with the language of the statute (46 U.S.C. 7703). That statute authorizes revocation for drug possession, and the implementing regulation in 46 C.F.R. 5.59 carries out that authorization. Drug possession alone is sufficient to mandate revocation under the provisions of 46 C.F.R. 5.59. Appellant admitted that the pills discovered in his stateroom were Valium, belonged to him,

and were not obtained with a prescription. (Transcript Page 45). Moreover, the quantity and the type of controlled substance found in Appellant's possession viewed in conjunction with the type and amount of drug paraphernalia seized are also significant factors. (Transcript at Page 45). Revocation is clearly warranted and specifically mandated by regulation in this case.

III

Appellant urges that the specification alleging wrongful possession of Valium should be dismissed due to a break in the chain of custody of the Valium tablets. I find no merit to Appellant's argument. The Appellant himself identified the tablets as Valium, belonging to him, and obtained without a prescription. (Transcript Page 45, A.L.J. Decision and Order, Page 18) Consequently, the chain of custody in this case is not a critical factor. See, Appeal Decision KEYS ([2413](#)). In any event, the sufficiency of the chain of custody goes only to the weight of the evidence, not to its admissibility. See, *U.S. v. Shackelford*, 738 F. 2d 776 (11th Cir. 1984), *U.S. v. Lopez*, 758 F. 2d 1517 (11th Cir. 1985), *U.S. v. Wheeler*, 800 F. 2d 100 (7th Cir. 1986). There is sufficient testimony in the record, coupled with the Appellant's admissions, to indicate that any perceived tampering with the evidence in this case is a matter of the barest speculation and without merit. (Transcript Pages 22-35, 116-133). If the Administrative Law Judge finds the evidence credible on the issue of the chain of custody of the evidence, his judgement will not be supplanted unless arbitrary and capricious. Appeal Decision VAIL ([2202](#)).

IV

Appellant submits that the possession of the Valium while the vessel was located in foreign waters is a mitigating factor since some foreign jurisdictions permit possession of certain controlled substances. I find this argument without merit. Appellant is a United States citizen. He was licensed as a Third Mate under U.S. statutes and regulations, serving under the authority of his document and license, on a U.S. Flag Vessel, properly engaging in the foreign trade. Appellant was, consequently, subject to all U.S. laws and established norms of conduct expected of U.S. Merchant Seamen and Licensed Officers.

A long line of cases have held that a U.S. flag vessel is constructively a floating part of the United States of America. Accordingly, personnel on board are subject to the jurisdiction of the United States on the high seas or in foreign waters. *U.S. v. Flores*, 53 S. Ct. 580, 289 U.S. 133 (1933), *U.S. v. Bowman*, 43 S. Ct. 39, 260 U.S. 94 (1922), *U.S. v. Martinez*, 700 F. 2d 1358 (11th Cir. 1983), *U.S. v. Riker*, 670 F. 2d 987 (11th Cir. 1982), *U.S. v. Conroy*, 589 F.2d 1258 (5th Cir. 1979). Appellant's possession of Valium was contrary to those established norms and accordingly constituted misconduct pursuant to 46 C.F.R. 5.27. The fact that one or more foreign nations allow possession of Valium without a prescription holds no significance and has no bearing on this case. There is simply no mitigating value to this assertion.

V

Appellant submits that the Administrative Law Judge improperly refused to exercise discretion, urging that the sanction of revocation constitutes an inappropriately harsh disposition of the case.

Appellant's argument is without merit for the reasons set forth previously in Opinion II of this decision.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge, dated at Long Beach, California on 16 June 1987 is AFFIRMED.

CLYDE T. LUSK, JR.
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 6th day of October, 1988.

5. EVIDENCE

5.52 Jurisdiction

narcotics possession in foreign waters

5.11.1 Chain of Custody

goes only to weight, not admissibility

5.115 Testimony

credibility determined by ALJ

9. NARCOTICS

9.03 Agency Policy

policy of revocation, reason for

CDA's cited: 2424 (CAVANAUGH), 2423 (WESSELS), 2404
(MCALLISTER), 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE),
2333 (AYALA), 2302 (FRAPPIER), 2413 (KEYS), 2202 (VAIL), 2303
(HODGEMAN)

Federal Cases cited: *National Latino Media Coalition v. F.C.C.*, 816 F. 2d 785 (C.A.D.C. 1987), *AFL & CIO v. Donovan*, 757 F. 2d 330 (C.A.D.C. 1985), *Smith v. Russelville Production Credit Assn.*, 777 F. 2d 1544 (11th Cir. 1985), *Montgomery v. Commissioner of Internal Revenue*, 367 F. 2d 917 (9th Cir. 1966), *Pacific Gas & Elec. Co. v. U.S.*, 664 F.2d 1133 (9th Cir. 1981, *U.S. v. Shackelford*, 738 F. 2d 776 (11th Cir. 1984), *U.S. v. Lopez*, 758 F. 2d 1517 (11th Cir. 1985), *U.S. v. Flores*, 53 S. Ct. 580, 289 U.S. 133 (1933), *U.S. v. Bowman*, 43 S. Ct. 39, 260 U.S. 94 (1922), *U.S. v. Martinex*, 700 F. 2d 1358 (11th Cir. 1983), *U.S. v. Conroy*, 589 F. 2d 1258 (5th Cir. 1979).

Statutes Cited: 21 USC 812, 46 USC 7701, 7703.

Regulations Cited: 46 CFR 5.59, 5.27, 21 CFR 1308.14, 46 CFR 1.46.

***** END OF DECISION NO. 2471 *****

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