UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: George Francis BLAKE (REDACTED)

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2476

George Francis BLAKE

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

By order dated 16 December 1987, an Administrative Law Judge of the United States coast Guard at Alameda, California, revoked Appellant's Merchant Mariner's Document. This order was issued upon finding proved a charge of misconduct supported by a single specification. The specification found proved that Appellant, while serving as an Able-Bodied Seaman aboard the G/T CHEVRON OREGON, under the authority of the captioned document, did, on or about 26 December 1986, while said vessel was at the loading/unloading facility offshore of El Segundo, California, wrongfully have in his possession certain narcotic drugs, to wit, marijuana.

The hearing was held at Alameda, California, on 22 July 1987. The Appellant was represented by professional counsel at the hearing and entered an answer of deny to the charge and specification. The Investigating Officer introduced a total of six exhibits which were admitted into evidence, and called three witnesses, two of whom testified in person, and one who testified via a conference telephone connection from Long Beach Coast Guard Marine Safety Office. Appellant introduced no evidence and called no witnesses on his own behalf. The Decision and Order was served on Appellant on 18 December 1987. A notice of appeal was received by the Administrative Law Judge on 13 January 1988. Following receipt of the transcript, Appellant's counsel

perfected his appeal by timely filing his brief on 5 May 1988.

FINDINGS OF FACT

Appellant was serving under the authority of his captioned document as an Able-Bodied Seaman on board the G/T CHEVRON OREGON on 26 December 1986 while said vessel was at a loading/off-loading terminal offshore of El Segundo, California. Appellant's Merchant Mariner's document authorizes him to serve in the capacity of "Able Seaman, Any Waters, Unlimited, Wiper, Steward's Department (FH)"" and was issued to him at San Francisco, California on 17 October 1975.

The G/T CHEVRON OREGON is a U. S. Flag Vessel, operated by Chevron Shipping Company. Appellant signed on for service on board the G/T CHEVRON OREGON at San Francisco, California on 17 December 1986. At approximately 7:00 P.M. on 26 December 1986, the G/T CHEVRON OREGON was preparing to depart the offshore facility near El Segundo, California. The Master, Mooring Master and Chief Mate were on the bridge. The Master, while standing on the bridge wing, noticed a strong odor of marijuana coming from the exhaust ventilator for the crew heads which vented near the bridge wing. The Master visually identified five of the six deck department crewmembers working on the main deck. The only deck department crewmember absent was Appellant. The Master and Chief Mate proceeded to Appellant's quarters and entered through a closed but unlocked door. When they entered, they encountered a pungent odor of marijuana. The Master observed some green specks of plant material floating on the water in the toilet bowl. Upon opening the drawers of Appellant's desk, the Master found half of a partially smoked cigarette (which later tested positive for marijuana). He also found a small "bud" of marijuana about the size of a dime in one of the desk drawers.

Appellant was summoned to the Master's Office where he acknowledged awareness of Chevron's policy that no marijuana was permitted to be brought aboard company vessels. He further admitted that he had a small amount of marijuana in his possession. The Appellant was then discharged from the vessel at 8:53 P.M., 26 December 1986. The Master retained the seized evidence in his office safe until 29 December 1986 when he personally gave the evidence to Mr. Robert D. Greer, a Chevron Security Agent. In the presence of the Master, the agent used a field test to examine the evidence. The evidence tested positive for the presence of Tetrahydrocanabinol (THC), the predominant chemical in marijuana. The Security Agent retained the evidence in his office in a locked file until 18 February 1987, at which time it was turned over to a Coast Guard Investigating Officer. The Investigating Officer in turn surrendered the evidence to the Long Beach Police Department on 19 February 1987 for analysis. That analysis determined that the cigarette contained marijuana.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. In summary, Appellant asserts that:

(1) The Administrative Law Judge improperly permitted the introduction of telephonic testimony;

(2) The Administrative Law Judge improperly permitted the introduction of illegally obtained evidence that was the product of an illegal search and seizure;

(3) The seized evidence should be excluded and the charge dismissed due to a break in the evidentiary chain of custody;

(4) The sanction of a mandatory revocation for possession of a minute quantity of marijuana is inconsistent with the sanctions for other offenses and is an extreme, inhumane, and inappropriate sanction that violates the Eighth Amendment of the United States Constitution and denies Appellant the equal protection of the law.

OPINION

I

Appellant argues that the Administrative Law Judge improperly admitted telephonic testimony when he permitted the Investigating Officer to introduce and have admitted the telephonic testimony of Mr. Greer, the Chevron Security Agent. Mr. Greer testified that he had received the seized substance from the Master of the CHEVRON OREGON, and that the substance tested positive for the presence of Tetrahydrocanabinol. Appellant's argument is without merit. Personal confrontation of the witness is not a right of the Appellant at Suspension and Revocation proceedings. 46 C.F.R. 5.535(f) specifically permits the Administrative Law Judge to take testimony by telephone when such testimony would otherwise be taken by written deposition. Such procedures are designed to expedite the proceedings when long distances must be travelled by the prospective witness. Moreover, these procedures are consistent with the constitutional concept of due process and are sufficient to protect the legitimate interests of the Appellant. Appeal Decision 2252 (BOYCE). In this case, the telephone procedures employed by the Investigating Officer and the Administrative Law Judge credibly insured the identity of the witness, permitted adequate questioning and cross-examination under oath, and were governed by decorum and sufficient formality normally used at in-person proceedings (Transcript pp. 81-

95). Consequently, the telephone procedures used by the Investigating Officer and the Administrative Law Judge were consonant with the provisions of 46 C.F.R. 5.535(f). Therefore, the telephonic testimony was appropriately admitted by the Administrative Law Judge.

II

Appellant next asserts that the Administrative Law Judge permitted the introduction of illegally obtained evidence, seized from an illegal search of Appellant's stateroom. Appellant's assertion is without merit. Suspension and Revocation proceedings are strictly administrative in nature. Appeal Decision 2167 (JONES), Appeal Decision 1931 (POLLARD), affirmed sub nom. Commandant v. Pollard, NTSB Order EM-33, (1973), Appeal Decision 2379 (DRUM). Consequently, the constitutional constraints governing criminal proceedings are not applicable here. Appeal Decision 2135 (FOSSANI JR.), U.S. v. *Janis*, 428 U.S. 433 (1976). The Master of the G/T CHEVRON OREGON was authorized to enter and search Appellant's stateroom where, as here, he had a legitimate concern for the safety of the vessel. This authority can be traced back to the court holding in the case of The STYRIA, 186 U.S. 1 (1901). In regards to Appellant's case, the Master of the vessel personally smelled the strong odor of marijuana coming from an exhaust vent immediately prior to the vessel's departure. (Transcript pp. 46-47). Detecting the probable use of a dangerous drug at this critical time created a reasonable and legitimate concern for the safety of the ship. The probable cause requirements attendant to a criminal case are not applicable here. Appeal Decision 2202 (VAIL). Additionally, it must be stressed that a ship's master cannot violate the Fourth Amendment to the U.S. Constitution by conducting a warrantless search, since he conducts that search in his capacity as a private citizen, not as a Federal or State official. Appeal Decision 2115 (CHRISTEN), affirmed sub nom. Commandant v. *Christen*, NTSB Order EM-71 (1978).

III

Appellant argues that the evidence seized from his stateroom was erroneously admitted by the Administrative Law Judge because the chain of custody was defective. I disagree. Appellant contends that the evidence seized from his stateroom was put in an unmarked envelope by the Master and subsequently turned over to the Chevron Security Agent. Appellant urges that the lack of identifying information on the envelope effectively breaks the chain of custody of the evidence.

Appellant himself admitted to the Master that he was in possession of marijuana on board the vessel. (Transcript Pg 50). Consequently, the chain of custody in this case is not a critical

factor. Appeal Decision 2413 (KEYS). 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. Shackleford*, 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, (Transcript Pgs. 82-92) coupled with Appellant's admissions, to overwhelmingly confirm the contents of the evidence envelope and to effectively rule out any perceived tampering. The Administrative Law Judge found the evidence credible on the issue of the chain of custody. His decision to admit the evidence was not arbitrary nor capricious and will therefore not be disturbed. Appeal Decision 2202 (VAIL).

IV

Appellant argues that the regulation mandating revocation for use or possession of marijuana is inconsistent with recommended regulatory sanctions covering other offenses and is so extreme and inhumane as to violate the Eighth Amendment as cruel and unusual punishment. He further asserts that it creates a sanction that deprives Appellant of equal protection. I disagree.

The statutory language of 46 U.S.C. 7703 provides that the Secretary may suspend or revoke a merchant mariner's document or license for misconduct, incompetence, negligence, or violation of law. The Commandant has been delegated that authority in 49 C.F.R. 1.46. Pursuant to that delegation, the Commandant has duly promulgated 46 C.F.R. 5.59 which mandates revocation of documents or licenses by the Administrative Law Judge when a charge of misconduct for possession or use of a dangerous drug is found proved. Appeal Decision 2303 (HODGEMAN). The above-referenced statute and regulations are consistent with the Congressional intent to remove those individuals who possess dangerous drugs from service aboard American Flag vessels. See, 46 U.S.C. 7704; *House Report No. 338*, 98 Cong., 1st session 177 (1983). The Eighth Amendment to the U.S. Constitution is directed at punishment imposed for violation of the criminal statutes. *Powell v. Texas*, 392 U.S. 651, 88 S. Ct. 2145 (1968). Appellant's assertion is inappropriate based on the fact that Suspension and Revocation proceedings are purely administrative and remedial in nature. Moreover, I do not consider the sanction of revocation as excessive or inhumane when one considers the significant loss of life or property that can occur as a result of drug use by crewmen aboard merchant vessels. The Appellant made a conscious decision to wrongfully bring a dangerous drug on board his ship, even though he admittedly knew the explicit company prohibition against such an action. (Transcript, Pg. 50). The sanction of revocation is reasonably and realistically proportionate to the potential dangers

inherent in the misconduct. Finally, the Suspension and Revocation procedures provided for in 46 U.S.C. 7702 are in full consonance with the Administrative Procedure Act set forth in 5 U.S.C. 551-559. The fact that various state jurisdictions maintain lesser sanctions for possession of dangerous drugs, as Appellant asserts, is of no consequence. The pertinent above-referenced federal statutes and implementing regulations were duly promulgated, based on specific Congressional intent and are binding on the agency with the full force and effect of law. *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 Association*, 777 F. 2d 1544 (11th Cir. 1985). Accordingly, Appellant's argument is without merit.

CONCLUSION

The findings of the Administrative Law Judge are supported b y 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 Alameda California on 16 December 1987 is AFFIRMED.

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

Signed at Washington D.C., this 30th day of NOVEMBER , 1988.

5. EVIDENCE

5.11.1 CHAIN OF CUSTODY

goes only to weight, not admissibility
admission by Appellant of possession of drugs
weakens attack on chain of custody

5.95 SEARCH AND SEIZURE

admissibility of evidence

authority to search

5.115 TESTIMONY

telephonic testimony permissible

9. NARCOTICS

9.03 AGENCY POLICY

policy of revocation, reason for

policy and sanction do not violate 8th Amendment as cruel & unusual punishment

CDA's cited: 2252 (BOYCE), 2167 (JONES), 1931 (POLLARD), 2379 (DRUM), 2135 (FOSSANI JR.), 2202 (VAIL), 2115 (CHRISTEN), 2413 (KEYS), 2303 (HODGEMAN),

Federal Cases Cited: *The STYRIA*, 186 U.S. 1 (1901), *U.S. v. Janis*, 428 U.S. 433 (1976), *U.S. v. Shackleford*, 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), *Powell v. Texas*, 392 U.S. 651, 88 S. Ct. 2145 (1968), *National Latino Media Coalition v. FCC*, 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).
Statutes Cited: 46 USC7702-7704, 5 USC 551-559

Regulations Cited: 46 CFR 5.535(f), 49 CFR 1.46, 46 CFR 5.59, fenses

contributory fault not a defense to negligence

.50 Lookout

adequacy of, a question of fact

adequacy of, where operator acting as

failure to maintain

7. NEGLIGENCE

.70 Negligence

consequences/damage not an element of

contributory fault not a defense

specification, sufficiency of

10. MASTERS, OFFICERS, SEAMEN

.33 Operator

acting as sole lookout

duty to ensure proper lookout posted

11. NAVIGATION

.16 Collision

failure to maintain proper lookout
contributing to

failure to take early action to avoid

11. NAVIGATION

.16 Collision

in fog

.31 Fog

operator acting as sole lookout

collision in

failure to sound proper fog signals

.53 Lookout

adequacy of, a question of fact

adequacy of, where operator acting as

failure to maintain

.65 Navigation Rules
Rule 5 (lookout), legislative history discussed

12. ADMINISTRATIVE LAW JUDGES

.01 Administrative Law Judge

evidence, duty to evaluate

.29 Credibility

determined by ALJ

CITATIONS

Appeal Decisions Cited: *2188 (GILLIKEN); 2358 (BUISSET); 2319 (PAVELEC); 2468 (LEWIN); 2420 (LENTZ); 2421 (RADER); 1758 (BROUSSARD); 2390 (PURSER); 2046 (HARDEN); 2363 (MANN); 2356 (FOSTER); 2344 (KOHAJDA); 2340 (JAFFEE); 2333 (AYALA); 2415 (MARSHBURN); 2380 (HALL); 2175 (RIVERA); 2096 (TAYLOR/WOODS); 1670 (MILLER); 2424 (CAVANAUGH); 2386 (LOUVIERE); 2302 (FRAPPIER); 2116 (BAGGETT); 2460 (REED).*

NTSB Cases Cited: *Charles A. Grahn, Respondent*, 3 N.T.S.B. 214 (Order EA-76, 1977); .

Federal Cases Cited: *Steadman v. SEC*, 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981); *Kuhn v. CAB*, 183 F.2d 839

(D.C. Cir. 1950); *Citizens State Bank of Marshfield, MO v. FDIC*, 752 F.2d 209 (8th Cir. 1984); *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); *Aloha Airlines v. CAB*, 598 F.2d 250 (D.C. Cir. 1979); *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (1933); *Chesapeake & O R. Co. v. Martin*, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931); *United States v. Caldwell*, 820 F.2d 1395 (5th Cir 1987); *United States v. Bales*,

813 F.2d 1289 (4th Cir. 1987); *Carter v. Duncan-Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984); *Martin v. American Petrofina Inc.*, 779 F.2d 250 (5th Cir. 1985); *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985); *Government of Virgin Islands v. Gereau*, 502 F.2d 914 (3rd Cir. 1974), cert. denied 420 U.S. 909; *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973); *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 19 S.Ct. 233, 43 L.Ed. 492; *Reagan v. United States*, 157 U.S. 301, 15 S.Ct. 610, 39 L.Ed. 709 (1895).

Statutes Cited: 5 U.S.C. 556(d); 46 U.S.C. 7702; 33 U.S.C. 1602, Rules 5 and 8; 46 U.S.C. 7703.

Regulations Cited: 46 CFR 5.63; 46 CFR 5.5; 46 CFR 5.25; 46 CFR 5.27; 46 CFR 5.29.

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