UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Debra K. KAAUA (REDACTED)

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2493

Debra K. KAAUA

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

By order dated 9 May 1988, an Administrative Law Judge of the United States Coast Guard at Honolulu, Hawaii, revoked Appellant's Merchant Mariner's Document. This order was issued upon finding proved a charge of misconduct supported by two specifications. The specifications found proved were that Appellant, while serving as an Ordinary Seaman/Waitress aboard the SS INDEPENDENCE, under the authority of the captioned document, on or about 11 March 1988, while said vessel was at sea, did wrongfully have in her possession certain narcotic drugs, to wit, marijuana, and did wrongfully have in her possession certain drug paraphernalia, to wit, a pipe and rolling papers.

The hearing was held at Honolulu, Hawaii, on 9 May 1988. The Appellant was represented by professional counsel at the hearing and entered an answer of deny to the charge and to each specification. The Investigating Officer introduced a total of six exhibits which were admitted into evidence, and called two witnesses, one of whom testified in person, and one whom testified via a conference telephone connection from the Naval Investigative Service Forensic Science Laboratory at Pearl Harbor, Hawaii. The Appellant introduced eight exhibits which were admitted into evidence, and called one witness who testified in person. Appellant also voluntarily testified in her own defense.

The Decision and Order was served on Appellant on 13 June 1988. Notice of appeal was received by the Administrative Law Judge on 9 June 1988. Following receipt of the transcript, Appellant's counsel perfected her appeal by timely filing a brief on 17 October 1988.

FINDINGS OF FACT

Appellant was serving under the authority of her captioned document as an Ordinary Seaman/Waitress on board the SS INDEPENDENCE on 11 March 1988 while said vessel was at sea. Appellant's Merchant Mariner's Document authorized her to serve in the capacity of "Ordinary Seaman, Wiper, Steward's Department (FH), Lifeboatman" and was issued to her at Baltimore, Maryland on 20 September 1984.

The SS INDEPENDENCE is a U. S. flag passenger vessel, owned by American Global Lines, Inc., and operated by American Hawaii Cruises, both of Honolulu, HI. Home-ported in Honolulu, the SS INDEPENDENCE is operated as an inter-island cruise ship calling at various ports in the State of Hawaii on a weekly itinerary.

Appellant signed on for service on board the SS INDEPENDENCE at Honolulu, Hawaii on 23 January 1988 in the capacity of "Ordinary Seaman/Assistant Head Waiter".

Late on the evening of 11 March 1988, while SS INDEPENDENCE was at sea, the Master ordered Chief Mate Sloane to inspect the Maitre d'Hotel's cabin, CA-19. Sloane, accompanied by the Ship's Chairman and Third Steward, proceeded to Cabin CA-19, arriving there a little after 2300. Sloane knocked on the door and announced his identity. He heard a response through the door of "Just a minute", and then the sounds of someone putting on clothes. When he knocked again, the door was opened and the inspection party entered. The two crewmembers assigned to the cabin, Maitre d'Hotel Stuart Schroeder and Appellant, were present. These two individuals admitted that they were officially assigned to the room.

Sloane searched the common areas of the room and the locker which Schroeder indicated was his without finding any signs of drugs. While searching the locker which Appellant admitted was hers, Sloane found a small aluminum pot on the locker shelf above the rod from which Appellant's clothing was hanging. The pot was covered by one or two pieces of clothing as well as some of the miscellaneous items on the shelf.

When Sloane lifted the pot from the shelf and looked into it, he found a black plastic and blue metallic smoking device (a pipe- "drug

paraphernalia") together with a package of Zig-Zag cigarette rolling papers. Bringing the pot into the open and showing its contents to the occupants of the cabin, Sloane asked "What is this?" Schroeder replied, "It is a pipe". When Sloane asked each of the occupants of CA-19 whether the pipe and papers were theirs, each denied ownership and, in fact, denied knowledge of the items being on the shelf, while at the same time saying the pot had been there for years. Sloane confiscated the smoking device and cigarette papers and later placed them in a plastic envelope which he sealed.

Appellant signed off SS INDEPENDENCE on the vessel's arrival at Honolulu on 12 March 1988. The Certification of Shipping Articles identifies her cause of leaving the vessel as being "rotation".

The items seized from CA-19 (black plastic and blue metallic pipe, and Zig-Zag cigarette rolling papers) were subsequently transmitted to the Naval Investigative Service Forensic Science Laboratory at Pearl Harbor via a continuous chain of custody. An analysis of scrapings of the residue from the inside of the pipe revealed the presence of marijuana.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. The Appellant raises four issues:

(1) Whether the Administrative Law Judge's decision was based upon substantial evidence;

(2) Whether the findings of fact of the Administrative Law Judge are clearly erroneous;

(3) Whether the details, circumstances and facts developed at the hearing were sufficient to rebut the presumption of wrongful knowledge;

(4) Whether the decision of the Administrative Law Judge constitutes an error of law.

Reduced to the essentials, Appellant contends that the Administrative Law Judge abused his discretion by finding that the evidence was sufficient to substantiate the fact of possession of narcotic drugs and drug paraphernalia and, further, that Appellant's testimony failed to rebut the presumption of wrongful knowledge raised by the fact of possession.

Appearance by: Christopher R. Evans, Esq., 1126 Alakea Street,

Honolulu, Hawaii, 96813.

OPINION

I

Appellant argues that since the ship's operators had reserved cabin CA-19 for the use of the maitre d'hotel and the relief maitre d'hotel, which she was neither, she could not be found to have possessed the items found therein. This argument is not persuasive. Appellant admitted to Chief Officer Sloane that she had, in fact, been officially assigned to the room and that the locker containing the seized articles had been within her personal use during the six weeks prior to the Chief Officer's inspection. (Tr. 156, 158, 159).

Appellant further relies on an opinion, expressed by Chief Officer Sloane during his testimony, that the metal pot did not appear to have been made the object of concealment. This, contends the Appellant, strongly infers that Appellant had no idea of the pot's contents. However, the evidence shows that the pot was found at the back of the shelf in the locker, with several items surrounding and covering it. (Tr. 34, 49, 51). The Administrative Law Judge is capable, and legally competent, to draw his own conclusions from these facts with respect to attempted concealment and its implications. His decision to disregard the inference drawn by the Appellant was not arbitrary and capricious and is supported by the record.

Appellant contends that the locker from which the items were seized was not an area under her exclusive ownership and control. Therefore, Appellant continues, wrongful possession by her was not proved. However, Appellant's interpretation of the applicable standard of proof is in error. Proof beyond a reasonable doubt is not the standard to be applied in administrative proceedings, Appeal Decision 2346 (WILLIAMS). Possession of contraband on the SS INDEPENDENCE need not have been 'personal and exclusive' as that term is used in the criminal context. See Appeal Decision 2238 (MONTGOMERY), reversed on other grounds sub nom *Commandant v. Montgomery*, NTSB Order EM-87.

The point is settled that it is unnecessary for possession to be 'personal and exclusive' and the mere fact that others may have had access to the place of concealment does not preclude a finding that the property concealed was in the possession of the person charged. *Borqfeldt v. United States*, 67 F.2d 967 (9th Cir. 1933), *Ng Sing v. United States*, 8 F.2d 919 (9th Cir. 1925).

Appeal Decision 1906 (HERNANDEZ). See also Appeal Decision

1262 (PETERS), and Appeal Decision 1195 (DIAZ).

Appellant calls attention to the fact that no fingerprint examination of the seized items was conducted, and states that such a test would have been conclusive as to Appellant's connection with those items. However, negative results of such a test would have had varying evidentiary value and would not necessarily have exculpated Appellant. Such results could indicate that the evidence had been wiped clean or that it contained fingerprints of a third party who might have handled the evidence in Appellant's presence. In the final analysis, it is clear that a fingerprint examination could have added to the sufficiency of the evidence; however, failure to conduct this analysis does not diminish the sufficiency of the evidence contained in the record.

Appellant draws the inference, from the lack of tangible amounts of loose, leafy marijuana accompanying the pipe and vague references to a break-in of Cabin CA-19, that some third party put the pipe and papers into the pot. This inference is entirely conjectural and not supported by the record.

II

Appellant argues that, even if the fact of possession is established, the presumption of wrongful knowledge was rebutted by her testimony and that the Administrative Law Judge abused his discretion by finding otherwise.

I do not believe the matter before me is yet ripe to decide whether the Administrative Law Judge abused his discretion in discrediting Appellant's rebuttal testimony. The record is incomplete due to the absence of a specific finding by the Administrative Law Judge as to the credibility of Appellant's testimony that she had no knowledge of the drugs or paraphernalia. Such a finding is required, and is a specific function with which an Administrative Law Judge is tasked. See, Appeal Decision 1165 (REDMAN); Appeal Decision 2156 (EDWARDS); Appeal Decision 2116 (BAGGETT); Appeal Decision 2472 (GARDNER).

While the Administrative Law Judge's failure to render findings on the issue of credibility constitutes error, it is not reversible error. The evidence contained in the record supports actual possession. However, it does not support an unrebutted prima facie case of wrongful possession. The Appellant offered rebuttal testimony. Considering the record in its totality, the proper disposition is to remand the case for appropriate findings on credibility.

CONCLUSION

The findings of the Administrative Law Judge with regard to actual possession of narcotic drugs and drug paraphernalia are supported by substantial evidence of a reliable and probative nature. I find that the hearing was conducted in accordance with the requirements of applicable law and regulations with the exception that the Administrative Law Judge failed to issue specific findings regarding the credibility of Appellant's testimony.

ORDER

The case is REMANDED to the Administrative Law Judge with instructions to issue specific findings regarding the credibility of Appellant's testimony and to WITHDRAW the original decision and order and RENDER a new decision and order based upon the record of the original hearing and the additional findings.

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

Signed at Washington D.C., this 11th day of January, 1989.

3. HEARING PROCEDURE

3.111 WITNESS

credibility of, determined by ALJ

4. PROOF AND DEFENSES

4.99 PROOF

by substantial evidence

criminal standard inapplicable

6. MISCONDUCT

6.271 POSSESSION OF

Marijuana

Drug paraphernalia

9. NARCOTICS

9.105 REVOCATION

mandatory by regulation

12. ADMINISTRATIVE LAW JUDGES

12.01 ADMINISTRATIVE LAW JUDGE

evidence, duty to evaluate

12.29 CREDIBILITY

determined by ALJ

CDA's cited: 2238 (MONTGOMERY), 1906 (HERNANDEZ), 1262 (PETERS), 1195 (DIAZ), 1165 (REDMAN), 2156 (EDWARDS), 2116 (BAGGETT), 2472 (GARDNER).

Federal Cases Cited: *Borqfeldt v. United States*, 67 F.2d 967 (9th Cir. 1933); *Ng Sing v. United States*, 8 F.2d 919 (9th Cir. 1925).

***** END OF DECISION NO. 2493 *****

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