UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 012826
Issued to: Henry John WESSELS

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2423

Henry John WESSELS

This appeal has been taken in accordance with 46 U.S.C. 7702 and former 46 CFR 5.30-1 (currently 46 CFR Part 5, Subpart J.).

By order dated 13 February 1985, an Administrative Law Judge of the United States Coast Guard at Alameda, California, suspended Appellant's license for one month on three months' probation upon finding proved the charge of misconduct. The specification found proved alleges that Appellant, while serving as Chief Engineer aboard USNS CONTENDER T-AGOS-2, under authority of the captioned document, did on or about 22 September 1984, while said vessel was moored in Oakland, California, wrongfully fail to perform his duties due to intoxication.

The hearing was held at Alameda, California, on 9 October 1984 and 13 February 1985. On 9 October 1984, Appellant did not personally attend the hearing but he was represented by professional counsel. Counsel entered a plea of not guilty on Appellant's behalf to the charge and supporting specification. Appellant was present with counsel when the hearing reconvened on 13 February 1985.

The Investigating Officer introduced in evidence two exhibits

and the testimony of three witnesses.

In defense, Appellant testified in his own behalf.

The Administrative Law Judge placed in evidence two exhibits.

The Administrative Law Judge rendered a written Decision and Order on 28 February 1985. He concluded that the charge and specification of misconduct had been proved and suspended Appellant's license for one month on three months' probation.

The complete Decision and Order was served on 4 March 1985. Appeal was timely filed on 18 March 1985 and perfected on 2 August 1985.

FINDINGS OF FACT

At all relevant times on 22 September 1984, Appellant was serving as Chief Engineer under the authority of his license aboard the USNS CONTENDER, a 224-foot vessel operated by the Military Sealift Command (MSC). On 22 September, the vessel was moored and operating on shore power at a berth in Oakland, California. Though the vessel's engines were secured, a generator was on line to provide auxiliary power for the vessel's computers.

The vessel's Engineering Department had three watchstanders: Chief Engineer (appellant), First Assistant Engineer, and Third Assistant Engineer. Prior to and including 22 September, the engineering personnel were standing daily eight-hour watches assigned by the Appellant with the First assistant assigned the 0000-0800 watch, the Third Assistant assigned the 0800-1600 watch, and the Appellant assigned the 1600-2400 watch. The watch schedule assignments were subject to the approval of the Master.

On the evening of 21 September, Appellant stood his normal 1600-2400 watch. Upon being relieved by the First Assistant, Appellant asked the First Assistant to stand his 1600-2400 watch the next day if Appellant was unable to return to the vessel by the beginning of the watch. The First Assistant agreed to do so. Appellant then departed the vessel to visit friends and while ashore consumed a quantity of alcohol. Appellant eventually returned to the USNS CONTENDER at approximately 1645 on 22 September.

The Third Assistant had not been informed that the First Assistant would be available to stand Appellant's 22 September 1600-2400 watch in the event Appellant did not return in time. Upon completion of his 080-1600 watch on 22 September , the Third Assistant, in an attempt to locate Appellant as his watch relief, asked the First Assistant of Appellant's whereabouts. The First Assistant then stated he would assume Appellant's watch. However, the Third Assistant would not relinquish the watch to the First Assistant because the First Assistant appeared to be intoxicated at the time.

At approximately 1700 on 22 September, the Third Assistant found Appellant in the officer's mess eating dinner. Appellant was dressed in civilian clothes and appeared to be intoxicated. Appellant made no effort to relieve the watch.

The Third Assistant contacted the Master, who then went to the mess and observed the Appellant. The Master concluded that the Appellant had been drinking and was not capable of standing his watch. The Master contacted the MSC Port Engineer, who later boarded the vessel at approximately 1715 and confirmed that Appellant "was drunk." The Port Engineer relieved Appellant of his duties, and Appellant then left the vessel.

BASES OF APPEAL

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

1. The ruling of the Administrative Law Judge that Appellant wrongfully failed to perform his duties due to intoxication was contrary to the preponderance of the evidence.

2. The sanction imposed by the Administrative Law Judge in his Order was excessive and without proper consideration of the mitigating circumstances.

APPEARANCE: Colleen Butler, Esq., of Garry, McTernan, Stender & Walsh, Inc., 1256 Market St., San Francisco, CA 94102.

OPINION

I

Appellant alleges that the Administrative Law Judge's decision was contrary to the preponderance of the evidence. Specifically, Appellant asserts that because of the agreement between Appellant and the First Assistant Engineer, the duty to stand the 1600-2400 watch was that of the First Assistant - not Appellant.

Appellant was charged with misconduct. Title 46 CFR 5.05-20(a)(1) defines "misconduct", in pertinent part, as:

> . . . human behavior which a reasonable person would consider to constitute a failure to conform to the standard of conduct which is required in the light of all the existing facts and circumstances.

The Appellant, Chief engineer aboard the USNS CONTENDER, failed to meet the standard of conduct required of him as a watchstander. The record is clear that Appellant returned to the USNS CONTENDER at approximately 1645 on 22 September in such an intoxicated state that he was in no condition to relieve the watch.

The Administrative Law Judge in his Decision and Order did find that the First Assistant apparently agreed to stand Appellant's 1600-2400 watch on 22 September if Appellant was unable to return to the vessel by 1600. Appellant would then stand the First Assistant's next 0000-0800 watch. The Engineering Department watch schedules and adjustments were normally approved by the Master. However, the evidence shows that this agreement changing the watch schedule was not communicated to the Master for his approval. Even though the First Assistant may have also breached some duty because he did not stand the 1600-2400 watch for Appellant, that did not relieve Appellant of the responsibility for ensuring that his watch was stood.

Appellant argues the agreement between Appellant and the First Assistant was a matter of common practice aboard the USNS CONTENDER. Though other evidence shows the Master authorized Appellant to approve requests for those in his department to take " a couple hours off," the record sufficiently establishes

Appellant did not have broader authority to change watches without the Master's approval. Though Appellant otherwise testified that watch changes did not have to be reported to the Master, it is the Administrative Law Judge's duty to evaluate the evidence presented at the hearing.

> "It is the function of the judge to evaluate the credibility of witnesses in determining what version of events under consideration is correct. Appeal Decision 2097 (TODD). The question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings will not be set aside on appeal. *O'Kon v. Roland*, 247 F. Supp. 743 (S.D.N.Y. 1965)."

Appeal Decision 2116 (BAGGETT), *cited with approval* in Appeal Decision 2333 (AYALKA). See also Appeal Decision 2302 (FRAPPIER).

Under the unique facts and circumstances of this case, the Administrative Law Judge did not err in finding the Appellant lacked the authority to change the watch schedule in the manner that he did. The evidence demonstrates Appellant had a duty to stand his assigned 1600-2400 watch, and that Appellant was unable to fulfill this duty due to his intoxicated condition. While Appellant may have requested another to stand his watch, he may not rely on the agreement to escape responsibility for the results.

Even assuming that Appellant had some authority to change the watch schedule, this would not support the contention here that Appellant no longer had a duty to ensure his watch was covered. Under the facts in this case, Appellant's arrangement with the First Assistant was so loosely formed that it did not amount to an assignment which the Master and Appellant were prepared to enforce. Consequently, the agreement did not fully relieve the Appellant of his watch responsibilities.

The evidence demonstrates that Appellant had a duty to insure that the 1600-2400 watch was adequately covered. Consequently, the charge and specification of misconduct was proved.

II

Appellant argues that the order of the Administrative Law Judge was excessive and not commensurate with the nature of the offense established in this case. Instead, Appellant asserts that an admonition would have been a more appropriate order based upon the Scale of Average Orders contained in 46 CFR Part 5. This argument is also without merit.

The Scale of Average Orders is for the information and guidance of the Administrative Law Judge. The orders listed for the various offenses are average only and should not in any manner affect the fair and impartial adjudication of each case on its individual facts and merits. 46 CFR 5.20-165. It is well settled that "the sanction imposed at the conclusion of a case is exclusively within the authority and discretion of the Administrative Law Judge...The Judge is not bound by the Scale of Average Orders." Appeal Decision 2362 (ARNOLD); see also Appeal Decision 2173 (PIERCE). Generally there must be a showing that an order is obviously excessive or an abuse of discretion before it will be modified on appeal. Appeal Decision 2391 (STUMES) and 2313 (STAPLES). There was no such showing here.

Appellant contends that other decisions require a reduction of the order here. However, the cases cited by Appellant do not support Appellant's contention. In *Commandant v. Pitts*, NTSB Order EM-98 (1983), the dismissal of a more serious misconduct charge warranted a lesser sanction for the remaining negligence charge. The Administrative Law Judge's order was reduced in *Commandant v. Strelic*, NTSB Order EM-92 (1981), because the appellant was found guilty only of a lesser included offense to a negligence charge. The circumstances in Appeal Decisions 2206 (CREWS) and 1755 (RYAN) were such that mitigation of the orders was appropriate.

The Administrative Law Judge ordered a one month suspension of Appellant's license on three months' probation upon finding the charge of misconduct proved. No outright suspension of Appellant's license was ordered. The sanction imposed is not unduly harsh or unwarranted and is hereby affirmed on appeal.

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. The order is appropriate.

ORDER

The order of the Administrative Law Judge dated at Alameda, California on 28 February 1985 is AFFIRMED.

J. C. IRWIN
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C. this 5TH day of JUNE, 1986.

***** END OF DECISION NO. 2423 *****

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