UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER LICENCSE	:	
and	:	NO. 2672
MERCHANT MARINER'S DOCUMENT	:	
	:	
	:	
	:	
ISSUED TO: CLARENCE MARSHALL, Jr.	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated October 28, 2004, Judge Jeffie J. Massey, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, dismissed a Complaint against the merchant mariner credentials of Mr. Clarence Marshall Jr. (hereinafter "Respondent") upon finding not proved two charges of *misconduct* and one charge of *violation of law or regulation*.

PROCEDURAL HISTORY

On June 24, 2004, the Coast Guard filed a Complaint against Respondent's merchant mariner credentials alleging two acts of *misconduct* (refusal to submit to drug and alcohol testing and consuming alcohol while acting under the authority of his mariner credentials) and one act of *violation of law or regulation* (being under the influence of alcohol while acting under the authority of his mariner credentials). [Complaint at 2] The Complaint was properly served on Respondent via Certified Mail, Return Receipt,

and a copy was duly faxed to the ALJ Docketing Center. [Complaint at 5] Respondent filed his Answer to the Complaint on June 30, 2004, therein admitting to all jurisdictional allegations and denying all factual allegations. [Answer] Respondent requested a hearing in the matter. [*Id.*]

The hearing was held on September 30, 2004, in Morgan City, Louisiana. Respondent appeared *pro se*, testified on his own behalf, and introduced one exhibit into evidence. The Coast Guard Investigating Officers (hereinafter "IOs") called three witnesses and introduced four exhibits into evidence.

On October 28, 2004, the ALJ issued the D&O, finding the charges not proved and dismissing the Complaint. [D&O at 17] Thereafter, on November 2, 2004, the Coast Guard filed a Notice of Appeal in the matter and subsequently perfected its appeal by filing an Appellate Brief on December 27, 2004. Therefore, this appeal is properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard was represented by LCDR Ron Patrick and CWO Jason A. Boyer of U.S. Coast Guard Marine Safety Office Morgan City, Louisiana.

FACTS

At all times relevant herein, Respondent acted under the authority of Coast Guard issued merchant mariner credentials, the holding of which was a condition of his employment. [Transcript (hereinafter "Tr.") at 25; D&O at 3]

At approximately 0130 on May 22, 2004, Respondent was standing bridge watch duty as a mate on the M/V ELEFANTE GRANDE, which was moored at the public dock in Fourchon, Louisiana. [Tr. At 26; D&O at 3, 7, 73] While on duty, Respondent was approached by two fellow crewmembers, Mr. Curtis Ferrill and Mr. Robert Wood. [Tr.

at 73, 75] Respondent testified that it appeared that Mr. Ferrill had been drinking based on his mannerisms, slurred speech and manner of walking. [Tr. at 92; D&O at 11] Moreover, Mr. Robert Wood provided a written statement, which was read into the record by the ALJ, indicating that he and Mr. Ferrill were drinking vodka prior to confronting Respondent on the bridge. [*Id.*]

While on the bridge, Respondent and Mr. Ferrill engaged in a heated argument, the subject of which is not clear from the record, which escalated into a physical confrontation. [Tr. at 75; D&O at 3] During the confrontation, Respondent suffered injuries to his face, lip and eyes while Mr. Ferrill received no injuries. [Tr. at 58; D&O at 3] A careful review of the record indicates that Mr. Ferrill was the aggressor in the situation and that Respondent never fought back. [Tr. at 75; D&O at 10]

The master of the M/V ELEFANTE GRANDE, Mr. John Ryan, testified that he was awakened by the commotion on the bridge and proceeded to investigate. [Tr. at 57-58] When he arrived on the bridge, Respondent and Mr. Ferrill were no longer engaged in a physical confrontation; however, they continued to engage in a heated argument. [*Id.*] The master testified that he did not smell or detect alcohol on either man, moreover, when Respondent relieved the master of the bridge watch, the master did not notice any evidence that Respondent had been drinking alcohol. [Tr. at 61, 66-67; D&O at 15] The master testified that Mr. Ferrill was yelling racial epithets at Respondent, and fearing that the situation could escalate or become more dangerous, the master ordered the two crewmembers to be separated and contacted the vessel's owner/operator, Tidewater Marine Inc. (hereinafter "Tidewater")), and the local police. [Tr. at 58; D&O at 9]

Based upon the report of the master, the operations manager in charge of personnel for Tidewater, Mr. Charles Portier, dispatched two vehicles to retrieve Respondent and Mr. Ferrill and transported them back to Tidewater's "base of operation," which was approximately a two hour drive away. [Tr. at 26, 43, 58; D&O at 7] At approximately 0315, the trucks arrived and transported the two men separately, eventually arriving at the "base of operation" at approximately 0500. [D&O at 7; Tr. at 43, 76]

When Respondent arrived at the "base of operation," he was met by Mr. Ira Robertson, the personnel crew coordinator for Tidewater. [D&O at 8; Tr. at 43-44] Mr. Robertson testified that he smelled a "loud" odor of alcohol coming from Respondent and that Respondent's eyes were "glassy." [Tr. at 44, 48] Mr. Robertson also stated that Respondent was holding a cold pack on his eye and face, was dripping blood on paperwork, and was having difficulty trying to fill out a written statement. [*Id.* at 46] Mr. Robertson testified that he ordered Respondent to submit to an alcohol and drug chemical test and that Respondent subsequently refused. [Tr. at 44; D&O at 8] During this questioning, Mr. Robertson was on the phone with Mr. Portier, who testified that he heard Respondent refuse to submit to the drug and alcohol tests over the phone. [Tr. at 33-34; D&O at 7]

Respondent testified that he was never asked to submit to any type of drug screen and flatly denied that he consumed any alcoholic beverages before or during his watch. [Tr. at 76; D&O at 10] Respondent admitted that he did not submit to any drug or alcohol test and added that he drove himself home. [Tr. at 77; D&O at 8] The day after the incident, the master of the M/V ELEFANTE GRANDE searched the vessel and found

a half-gallon bottle of vodka, with three inches of liquid remaining in it, in the crew common shower; however, none of the remaining crew claimed ownership of it. [Tr. at 63-64]

BASES OF APPEAL

This appeal is taken from the ALJ's D&O finding all charges not proved and ordering the dismissal of the Coast Guard's Complaint. Although the Coast Guard has discussed several issues on appeal, the crux of the appellant's argument can essentially be pared down to one salient issue, to wit: the ALJ erred by ruling that Tidewater did not have "reasonable cause" to order Respondent to submit to a chemical test for alcohol pursuant to 33 CFR § 95.035 and that, as a result, Respondent did not "refuse" a chemical test under 33 CFR § 95.040(b).[1] [Coast Guard Appellate Brief at 2] The Coast Guard urges that the ALJ erred in dismissing the Complaint and that Respondent's merchant mariner credentials should be revoked. [*Id.* at 3]

OPINION

On appeal, the Coast Guard asserts that the ALJ erred by ruling that Tidewater did not have "reasonable cause" to order the Respondent to submit to alcohol testing as required by 33 CFR § 95.035. [Coast Guard Appellate Brief at 2] As a consequence of Tidewater lacking "reasonable cause" to order the chemical test, the ALJ determined that Respondent did not "refuse" to take a chemical test, and therefore, did not commit an act of misconduct. [D&O at 16]

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[1] The Coast Guard did not appeal either the ALJ's dismissal of the misconduct charge related to Respondent allegedly consuming alcohol while onboard the M/V ELEFANTE GRANDE or the violation of law or regulation charge alleging that Respondent operated the M/V ELEFANTE GRANDE while under the influence of alcohol; therefore, the dismissal of those two charges will not be addressed herein. Accordingly, only the misconduct charge predicated upon Respondent's alleged refusal to submit to drug/alcohol testing is addressed in this decision.

The applicable regulations provide that a marine employer "may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists" and states that "reasonable cause" exists when "[t]he individual is suspected of being in violation of the standards in §§95.020 or 95.025." 33 C.F.R. § 95.035. In addition, the applicable regulations make clear that "[w]hen practicable, a marine employer should base a determination of the existence of reasonable cause, under paragraph (a)(2) of this section, on observation by two persons." *Id.*

The standard applicable to the instant case is found at 33 CFR § 95.020(c): "[t]he individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." In the "Findings of Fact" portion of her D&O, the ALJ found as follows with respect to the evidence of intoxication contained within the record:

> At the time the employer requested Respondent to submit to chemical testing, no person had observed evidence that the Respondent's manner, disposition, speech, muscular movement, general appearance or behavior had been affected by an intoxicant so that it was apparent by observation.

[D&O at 3] The Coast Guard contends, in effect, that the ALJ's conclusion, in this regard, is not supported by the evidence contained in the record

In cases like this one, the determination as to whether reasonable cause exists to support a request for the administration of chemical testing is a factual determination made by the ALJ based upon all the evidence available. *See* Appeal Decisions 2625 (ROBERTSON) and 2624 (DOWNS). Thus, if an ALJ found evidence in the record to support a conclusion that a marine employer had reasonable cause to justify ordering an employee to submit to a chemical test, the employee's subsequent refusal of such a test

would be admissible as evidence of misconduct in any administrative hearing. 33 CFR § 95.040.

Prior Commandant Decisions on Appeal make clear that questions of fact are to be decided by the ALJ and will not be overturned unless they are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g.*, Appeal Decisions 2621 (PERIMAN), 2614 (WALLENSTEIN), 2608 (SHEPHERD), 2584 (SHAKESPEARE), 2581 (DRIGGERS), 2570 (HARRIS), 2474 (CARMIENKE), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA) and 2333 (AYALA). A review of the record in this case shows that the ALJ carefully considered and weighed all of the relevant evidence relating to whether the marine employer had reasonable cause to direct Respondent to undergo alcohol testing.

In her D&O, the ALJ stated that the testimony of Respondent, the master, and the statement provided by Mr. Woods were probative as to the question of intoxication. [D&O at 13-15] The ALJ further found that the testimony of the master was the most relevant to the issue. [*Id.* at 15] To that end, the ALJ noted that the master testified that when the Respondent relieved him of the watch at 2400, he did not notice any signs that the Respondent had been consuming alcohol or was intoxicated. [D&O at 15] In addition, the ALJ noted that the master testified that when he was separating Respondent and Mr. Ferrill in close quarters after the physical confrontation, he did not notice any signs of intoxication from Respondent. [D&O at 15] Finally, the ALJ found:

> In this case, I find Respondent is credible, and the record as a whole supports the key elements of his testimony. There are significant conflicts in the evidence of record, and there are significant deficiencies in the evidence presented by the USCG, both of which have resulted in my conclusion that the allegations against the Respondent have not been

> proved by the required level of evidence so that I am not convinced it is more likely than not that the Respondent committed the charged violations.

[D&O at 6-7]

Respondent testified that he had not consumed alcohol before or after being on watch, and had not refused to submit to a chemical test because he claims he was never offered one. [Tr. at 76; D&O at 10] Moreover, the statement provided by Mr. Woods indicates that he and Mr. Ferrill had been drinking, but did not suggest that Respondent was drinking. [Tr. at 92; D&O at 15] Finally, the ALJ notes that the only person who claimed to have observed that Respondent was intoxicated or appeared to be intoxicated was Mr. Robertson, who did not observe Respondent until nearly four hours after the assault by Mr. Ferrill. [D&O at 15] The ALJ determined that Mr. Robertson's testimony was not entirely credible and that, perhaps, he was mistaken in his observations. [D&O at 14-15] In particular, the ALJ attributed Mr. Robertson's observation that Respondent's eyes were "glassy" to the fact that Respondent was previously involved in a significant altercation. [D&O at 15]

The trier of fact, by virtue of her unique opportunity to observe witnesses and weigh their testimony, is assigned the duty of assessing the evidence adduced and making credibility determinations. *See, e.g.*, Appeal Decisions 2654 (HOWELL) and 2279 (LEWIS). The ALJ's conclusions on the weight to be given any particular evidence and the ultimate findings of fact deserve a degree of deference. Appeal Decision 2214 (CHRISTENSEN). A review of the record shows that there was evidence in the record to support the ALJ's conclusion that Tidewater did not have reasonable cause to direct Respondent to undergo chemical testing for alcohol use. The ALJ's approach to

resolving conflicts in the evidence were reasonable, justified, and well articulated in her D&O.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Because competent, substantial, reliable, and probative evidence existed to support the ALJ's Decision and Order, I find Respondent's basis of appeal to be without merit.

ORDER

The order of the ALJ, dated at New Orleans, Louisiana, on October 28, 2004, is **AFFIRMED**.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 31 day of December, 2007.