

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 131 727
Issued to: JOHN.T. M. FOSTER

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2356

JOHN T. M. FOSTER

This appeal has been taken in accordance with 46 U.S.C.239(g) and 46 CFR 5.30-1.

By order dated 13 July 1981, an Administrative Law Judge of the United States Coast Guard, at Long Beach, California, revoked Appellant's seaman's license upon finding him guilty of misconduct. The specifications found proved allege that while serving as Operator aboard the M/V CHARGER, under the authority of the above captioned license, on or about 24 and 25 April 1981 Appellant wrongfully: operated the vessel while under the influence of intoxicating beverages while carrying passengers; molested one or more female passengers by using improper and suggestive language and placing his hands on their private parts in a lewd and lascivious manner against the female passengers' will; and used a narcotic drug by smoking a marijuana cigarette.

The hearing was held at Honolulu, Hawaii on 14 May 1981. At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and to each specification.

The Investigating Officer introduced into evidence five exhibits and called three witnesses.

In defense, Appellant offered in evidence 17 exhibits and called four witnesses. After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and the specifications had been proved. He then served a written order on Appellant, revoking all licenses issued by the Coast Guard to Appellant.

The entire decision was served on 17 July 1981. Appeal was timely filed on 10 August 1981 and perfected on 30 November 1981.

FINDINGS OF FACT

Appellant owns the M/V CHARGER and operates it as a charter boat for sport fishing. He conducts his business under the name

"Captain Mike's Sport Fishing." His wife, Stephanie Foster, acts as his booking agent, operating from a booth near the M/V CHARGER's moorings in the Lahaina Boat Harbor.

The Lahaina Yacht Club sponsored a women's fishing tournament on 25 April 1981. Stephanie Foster, Appellant's wife, solicited Mary Ann Meanor, Michelle Ashbrook, and Betsy Barnhart to participate in the tournament as members of her team. Each woman was told to bring her own food and drink and was charged \$35.00 to cover a \$15.00 entrance fee assessed by the Yacht Club, with the remaining \$20.00 being used to defray the costs of fuel for the M/V CHARGER and food for her crew. The \$35.00 fee was less than the \$40.00 to \$60.00 per passenger fee which is normally charged by Appellant.

At approximately 1800 on 24 April 1981, the M/V CHARGER departed Lahaina under the control of Appellant, with two crewmembers, Stephanie Foster, Cindy Parish, and three other female passengers aboard. It anchored off Lanai Island at approximately 2100.

During the transit to Lanai Island and while the vessel was at anchor, the events charged occurred.

BASES OF APPEAL

This Appeal has been taken from the Decision and Order of the Administrative Law Judge. Appellant urges that:

1. The Coast Guard without jurisdiction because Appellant was not acting under the authority of his license; and
2. The Administrative Law Judge erred in allowing one of the passengers to testify that one of the other women had made a statement to her about Appellant's behavior.

APPEARANCE: Mr. Jonathan D. Waxman, Esquire.

OPINION

I

Appellant urges that the Coast Guard was without jurisdiction because he was not serving under authority of his license. I do not agree.

Appellant's main argument centers around the question of whether or not the persons aboard the vessel were properly found to be passengers carried for hire. As discussed below, the record

supports the determination that the passengers were carried for hire because they paid for the trip. Since 46 U.S.C.1461(e) requires a licensed operator when carrying passengers for hire, Appellant was operating under authority of his licensed and there was jurisdiction.

Each of the passenger paid \$35 for the trip. Of this, \$15 was for the tournament entry fee. The Administrative Law Judge found that the remaining \$20 was to pay for fuel and food for the crewmembers. Appellant contests this finding and asserts that he received none of the money and that, in any event, \$35 is less than he would normally charge for such a charter. Appellant's wife acts as booking agent for his vessel and collected the money. The passengers all testified that they brought their own food. Some stated that they were told that the remaining \$20 was for fuel and some for food.

When, as in this case, an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, that determination will not be disturbed unless it is inherently incredible. Appeal Decisions 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), and 2302 (FRAPPIER). There is sufficient evidence to support the Administrative Law Judge's finding that the \$20 was used for fuel and food for the crew. The fact that other conclusions are also possible is not a reason to reverse this finding. It will no be disturbed.

Appellant also argues that the \$20 is less than was spent for the trip. He urges that the passengers could not, therefore, be considered passengers for hire. First, it is not necessary to show that Appellant made a profit. It is sufficient that the passengers provided some consideration to support the conclusion that they were carried for hire. Second, the amount of the expenses is based primarily on the testimony of Appellant's wife which the Administrative Law Judge found to not be credible. Therefore, the Administrative Law Judge's determination will not be disturbed.

Appellant also complains about the following statement by the Administrative Law Judge in the Decision and Order:

Additionally, I am not convinced that it is necessary in these cases for the Coast Guard to establish that respondent was acting under the authority of his license....

I do not agree with this statement. Under 46 CFR 5.01-30 and 35 and 46 U.S.C. 239 the Coast Guard may only proceed against an individual's license for misconduct if he was serving under authority of a license or document. This, however, is not cause to

reverse the decision of the Administrative Law Judge, since, as discussed above, there was jurisdiction.

II

Appellant urges that it was reversible error for the Administrative Law Judge to allow one of the witnesses to testify to what another witness had told her. I do not agree.

Examination of the record shows that the testimony complained of was presented to show that certain statements had been made during the course of the events resulting in the charges rather than the truth of those statements. The fact that Betsy Barnhart made the statements is evidence of her state of mind. Testimony regarding the statements was, therefore, not hearsay and was properly admitted. See Fed. R. Evid. 801. The fact that Betsy Barnhart mentioned that she was having a problem with Appellant to Mary Ann Meanor when Ms. Barnhart asked to sleep near Ms. Meanor tends to support the allegation that Appellant's touching of Ms. Barnhart was against her will.

While describing the events she had seen or heard, Mary Ann Meanor testified, in part, as follows:

A: Okay. Well, we sailed, and nothing really happened until about 9 o'clock. About 9 o'clock we were all - had decided to go to sleep early. Betsy said something about having a problem with Mike so she asked me....

Q: Excuse me, I'm going to ask you in your testimony to only testify to those things which you saw or you heard, not what you heard had happened, whatever.

A: Okay, I can understand that.

Q: Now, if someone said something to you, fine, testify to that, but if you heard that someone said something to someone else, don't.

A: Okay, I'll make it more clear. Betsy was having a problem with Michael and asked me to sleep next to her.

MR. LOWENTHAL: Excuse me, but I'm going to strike that testimony, not showing personal knowledge.

JUDGE: I understand that, but it's admissible, go ahead.

A: I'm sorry.

JUDGE: It's all right, just go ahead answer the questions, what you saw and what you heard.

A: Okay. Betsy asked me to sleep with her, next to her, and Michelle also on deck.

Q: Did she give any reason for asking you that?

A: She just said....

MR LOWENTHAL: I renew my objections.

INVESTIGATING OFFICER: Your Honor, it's direct testimony.

JUDGE: Yes, your objection is overruled.

A: She said she was having problems with Michael, that he had been grabbing at her and that she would prefer if we all slept closer together.

Q: Let me interrupt you for just a moment. When you are referring to Michael, are you referring to the Respondent, seated at the table?

A: Yes, Mike Foster.

I do not believe that this testimony went beyond the purpose for which it was relevant and admissible. The investigating Officer and Administrative Law Judge were careful to ensure that the witness testified only to what she had seen or heard and did not permit the witness to describe Betsy Barnhart's statements more than was necessary to show that she had complained about Appellant's actions.

Even if this testimony had been hearsay, it would not provide cause to reverse. Betsy Barnhart had already testified in detail to the "problem" she was having with Appellant and the manner in which he was "grabbing at her." Mary Ann Meanor then went on to testify: that she saw the Appellant "crawl on top of Betsy;" that, in her presence "he just kinda kept putting his arms around her," and; that when Appellant's wife came out "...Betsy was still laying down and [Appellant] was laying across her...." Other witnesses gave extensive testimony to many instances of similar behavior on Appellant's part during the voyage. Because of the other overwhelming evidence regarding Appellant's behavior, I do not believe that the testimony complained of could have adversely affected the findings of the Administrative Law Judge or prejudiced Appellant. Therefore, Appellant would not prevail even if the testimony had been hearsay.

CONCLUSION

The findings of the Administrative Law Judge, so far as they pertain to relevant issues, 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 13 July 1981, is AFFIRMED.

J.S. GRACEY
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 5th day of June 1984.