

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S LICENSE No. 547679 and Merchant Mariner's  
Document No. 005-46-2807

Issued to: JOHN W. BURKE

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2456

JOHN W. BURKE

This appeal has been taken in accordance with 46 U.S.C. § 7702 and 46 CFR P art 5, Subpart J.

By order of 7 October 1986, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's license and merchant mariner's document outright for three months, plus six months remitted on probation for twelve months, upon finding proved the charge of misconduct. The specification found proved alleges that Appellant did, while acting under the authority of the captioned documents, on or about 3 March 1986, at the Regional Examination Center, Boston, Massachusetts, wrongfully submit an application for a raise of grade, form CG-866, with invalid information on the sea service form, claiming ocean service onboard the SS LAKE CHARLES when the vessel was in a "lay-up " status.

The hearing was held at Norfolk, Virginia, on 7 October 1986. Appellant was present at the hearing, and was represented by professional counsel. He denied the charge and specification.

The Investigating Officer introduced in evidence the testimony of five witnesses, and also introduced three exhibits.

Appellant introduced on exhibit, his own testimony, and the testimony of one additional witness.

The complete Decision and Order of the Administrative Law Judge was issued on 11 December 1986. Appeal had already been timely filed on 14 October 1986, and was perfected on 1 April 1987.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the captioned documents.

The captioned license authorizes Appellant to serve as First Assistant Engineer of steam vessels, any horsepower, and Third

Assistant Engineer of motor vessels, any horsepower. On 3 March 1986, Appellant went to the Regional Examination Center at the Coast Guard Marine Safety Office, Boston, Massachusetts, to apply for a raise in grade of his license to chief Engineer, steam vessels, any horsepower. He filled out form CG-866, "Application for License as Officer, Operator or Staff Officer." The form contains a section in which the applicant is required to give information on the sea service he has completed, in order to determine if there is sufficient creditable service for the applicant to take the examination for the trade to which he is applying.

In order to qualify to take the examination for Chief Engineer, Appellant was required to have 360 days of service as First Assistant Engineer onboard steam vessels. Appellant listed three periods of service as First Assistant Engineer onboard the SS LAKE CHARLES covering the period from 22 October 1984 to 10 February 1986. Under the column on the form for "Waters Navigated" for these periods, Appellant placed an "O" for oceans. Counting these periods, Appellant had 371 day service as First Assistant Engineer, and was told was qualified to take the examination.

In fact, the LAKE CHARLES had been in a lay-up status at Newport New Shipbuilding continuously since 10 May 1983. The main steam generating plant had been shut down and preserved with nitrogen the lay-up period. Appellant had been employed by the ship's owner as part of a small crew that maintained the ship in a condition such that it could be put back in service in thirty days. Appellant did not bring the status of the ship to the attention of the Coast Guard Examiner.

Appellant had submitted Certificates of Discharge and pay vouchers as proof of his sea service onboard the LAKE CHARLES. The Certificates of Discharge described the service as "Coastwise (Shipyard)" or simply as "Coastwise." Some of the pay vouchers from the LAKE CHARLES contained notations of pay for shore board and shore lodging.

The certification section of the application completed by Appellant contained a notice of the possible criminal sanction for falsifying the application under 18 U.S.C. § 1001. It further stated, "I CERTIFY that the information on this application is true, and that I have not make application for a license of any type to the officer in Charge, Marine Inspection in any other port and been rejected within 12 months of this application." Appellant had previously completed the same form to receive his present license.

#### BASES OF APPEAL

Appellant makes the following contentions on appeal:

(1) The Administrative Law Judge erred in concluding Appellant had committed misconduct for violating 18 U.S.C. § 1001 when the essential element of scienter was never proven.

(2) The Coast Guard should not punish Appellant for what is at worst an unwitting error, when the Coast Guard itself negligently violated its own regulations and procedures.

(3) The Administrative Law Judge erred in disregarding reputation witnesses' testimony when weighing the evidence.

(4) Suspension was excessive in light of the circumstances, and in comparison to other cases this case should have been dismissed.

Appearance: Nourse & Bowles, One Exchange Plaza At 55 Broadway, New York, 10006, by Lawrence J. Bowles.

#### OPINION

Appellant contends that the Administrative Law Judge erred in concluding that he had committed misconduct for violating 18 U.S.C. § 1001 because the essential element of scienter was never proven. I do not agree.

Appellant was not charged with, tried for, or convicted of violating 18 U.S.C. § 1001, which provides for criminal penalties for "knowingly and willfully" falsifying documents or making false statements in any matter before a federal agency. Appellant's argument that scienter is an element of that crime, and was not proved against him may be correct, but is inapposite here. This is not a criminal proceeding.

The Administrative Law Judge found that Appellant had committed misconduct by submitting the application with invalid information, claiming time for ocean service onboard the LAKE CHARLES while the ship was in a lay-up status. (Decision and Order at 5). Appellant certified by his signature that the information on the application was true. (Decision and Order at 6). It was not all true. The LAKE CHARLES was layed up, not navigating ocean waters as Appellant indicated on the application, during periods for which Appellant sought credit for sea service.

Appellant contends that he should not have been found to have committed misconduct when the Coast Guard could have discovered that the LAKE CHARLES was in lay-up during periods when Appellant was claiming sea service. I do not agree.

Appellant claims that because the Certificates of Discharge and pay vouchers he submitted to verify his sea service should have raised questions with the license examiner about the sea service, he should not be found to have committed misconduct. Some of the Certificates of Discharge had "shipyard" on them. Some of the pay vouchers had annotations concerning "shore board" and "shore lodging" on them. The license examiner testified that if he had noticed these, he would have questioned Appellant about his sea service. (Tr. at 99, 102). The examiner in this case did not notice the annotations and did not question Appellant regarding them. (Tr. at 99-102). Appellant now claims that this oversight by the examiner protects him from the charge of misconduct.

The failure of the examiner to notice the discrepancies between Appellant's application and the supporting documents is of no help to Appellant. The misconduct charged was complete when Appellant submitted the signed application certifying the information as true, when in fact it was not true. See Appeal Decision 2223 (HEWITT). The failure of the examiner to notice the discrepancies does not change that. Following Appellant's reasoning would lead to a situation in which applicants could falsify their applications but escape any sanction if the false information is not immediately discovered. Clearly, that would not be consistent with promoting safety at sea.

### III

Appellant contends that the Administrative Law Judge erred in disregarding reputation testimony in weighing the evidence. I do not agree.

Appellant's argument is based on his analysis of criminal case law which, he claims, holds that reputation evidence must be considered, and that evidence of good character may give rise to a reasonable doubt of guilt. This is not a criminal proceeding, and the cases cited by Appellant are inapposite.

In any event, the testimony concerning Appellant's good reputation did not tend to prove that he had not submitted the application with invalid information, and therefore not relevant to finding the charge of misconduct proved. Appellant has never claimed that the information regarding the sea service on the LAKE CHARLES was correct. The Administrative Law Judge did consider the reputation evidence when determining the appropriate order to impose. (Decision and Order at 13).

### IV

Appellant contends that the order of the Administrative Law

Judge was excessive. I do not agree.

The order imposed at the conclusion of a case is exclusively within the discretion of the administrative Law Judge, and will not be modified on appeal unless clearly excessive or an abuse of discretion. Appeal Decision 2391 (STUMES). The order in this case is not clearly excessive.

CONCLUSION

Having reviewed the record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings, conclusions, or order of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated at Norfolk, Virginia, on 7 October and 11 December 1986, is AFFIRMED.

J.C. IRWIN  
Vice Admiral, U.S. Coast Guard  
VICE COMMANDANT

Signed at Washington, D.C. this 23 day of July, 1987.