

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Charles W. FUTCHER III 221-56-6855

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2464

Charles W. FUTCHER III

This appeal has been taken in accordance with 46 CFR Part 5, Subpart J. 46 CFR SS5.701.

By order dated 24 March 1986, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's license and merchant mariner's document upon finding proved a charge of misconduct. The charge was supported by four specifications which alleged that Appellant, while serving as Pilot/Mate on board the M/V CAPE MAY, on or about 31 July 1985 wrongfully fraternized with a 14-year-old female passenger, wrongfully engaged in undue familiarity with a 14-year-old female passenger, wrongfully engaged in sexual intercourse with a 14-year-old female passenger, and wrongfully failed to exclude a 14-year-old female passenger from the pilot house and bridge of the vessel, as prohibited by 46 CFR 78.10-1.

The hearing was held at Philadelphia, Pennsylvania, on 11 December 1985, 5 February 1986 and 18 February 1986.

At the hearing Appellant was represented by professional counsel and denied the charge and specifications.

In defense, Appellant introduced one exhibit and the testimony of three witnesses.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specifications had been proved. He determined that the first, second and third specifications were proved as one continuous series of acts, so as to be considered one action for the purpose of the order to be entered. The Administrative Law Judge then issued a written order revoking

Appellant's license and merchant mariner's document.

The complete Decision and Order was served on 29 March 1986. Appeal was timely filed on 9 April 1986 and perfected on 22 December 1986.

FINDINGS OF FACT

On the night of 31 July 1985, the M/V CAPE MAY, passenger-and-vehicle-carrying ferry of 2119 gross tons, departed Cape May, New Jersey at 1902, bound for Lewes, Delaware. Appellant was employed aboard the vessel as Pilot, serving under the authority of his Coast Guard license. The weather at the time was inclement, with scattered showers. At about 2000, a female passenger, without authorization, entered the vessel's wheelhouse. At the time, her clothing was wet as the result of having been exposed to the weather. Present on the bridge were the Master of the CAPE MAY, the helmsman, and Appellant. After entering the wheelhouse, the passenger entered into a conversation with Appellant. After approximately two minutes, the passenger departed at the master's suggestion.

The vessel subsequently docked in Lewes, where it remained until 2046, when it departed for the return voyage to New Jersey. Shortly thereafter, the female passenger returned to the bridge and spoke to Appellant. About fifteen minutes after departure, when the vessel had passed Harbor of Refuge Light, Appellant requested and received permission to take a meal break. Appellant said he would be in the Owner's Room, immediately below the wheelhouse, and that he would return to the bridge if the weather worsened or the vessel slowed down. Appellant and the female passenger departed the bridge.

Appellant and the female passenger went to the Owner's Room, where they engaged in sexual intercourse.

Prior to the vessel's arrival at Cape May, a patrolman of the Delaware River and Bay Authority Police, who had observed Appellant and the female passenger in the Owner's Room, spoke to the passenger, who did not give her name, but said she was a sophomore attending high school in Atlantic City and that she was 14 years old.

Subsequently, an investigation into the alleged incident was conducted by Lt. Redman of the Delaware River and Bay Authority Police. Appellant gave a statement to Lt. Redman during this investigation.

BASIS OF APPEAL

Appellant challenges the finding of the Administrative Law Judge that the female passenger in question was 14 years of age, and argues that the sanction of revocation was inappropriate.

APPEARANCE: Jeffrey S. Moller, Esq.; Clark, Ladner, Fortenbaugh & Young; 1818 Market St.; Philadelphia, PA 19103

OPINION

Appellant contends that the "pivotal" finding of fact made by the Administrative Law Judge - the age of the female passenger - was clearly erroneous, since that finding was premised on "unsubstantiated hearsay."

The questioned evidence here consists of the conversation between the Delaware River Bay Authority patrolman and the female passenger. The passenger in question was not present at the hearing. According to the patrolman, the passenger told him she was a sophomore in high school and was 14 years of age. Appellant argues that this testimony was "textbook" hearsay, that the Coast Guard did not prove the passenger's age, and that "at most a consensual sexual act was entered into."

First, it should be noted that hearsay evidence is not inadmissible in suspension and revocation proceedings. Strict adherence to the rules of evidence observed in courts is not required. See 46 CFR 5.537. Hearsay evidence may be admitted and used to support an ultimate conclusion, the only caveat being that the findings must not be based upon hearsay alone. Appeal Decision 2183 (FAIRALL).

Appeal Decision 2404 (McALLISTER).

Here, the Administrative Law Judge made a specific finding that the passenger in question was fourteen years old. The testimony of the patrolman that the girl was a sophomore in high school and was traveling with her parents was corroborated by Appellant's statements to Lt. Redman.

The central issue in this case, however, does not, as Appellant contends, concern the age of the passenger. Rather, the question is whether Appellant, while in a duty status, engaged in fraternization and sexual intercourse with a passenger. It was clearly proved at the hearing that he did. See Decision and Order at 15. Appellant urges

that revocation was improper for such an act "entirely" on the initiative of the passenger. Appeal Brief at 14.

Such conduct alone, however, has been held to be sufficient grounds for revocation. In Appeal Decision 1508 (WILLIS), the Commandant considered an appeal from the revocation of a document where the mariner involved had engaged in sexual intercourse with a passenger. In affirming the revocation order, the Commandant stated, "It would not be consistent with the obligation of promoting the safety of life and property at sea to permit a person of such moral laxness to continue to sail. . . ." While Appellant argues that Willis should be distinguished from the instant case, the cited principle remains the same. The very highest standard of care is placed on vessel officers for the personal safety of passengers and crew. Appeal Decision 2257 (MALANAPHY).

CONCLUSION

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

ORDER

The order of the Administrative Law Judge dated 24 March 1986, at New York, New York, is AFFIRMED.

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

INNIS/dri/8-10-87/Id 1604

CONCLUSION

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

ORDER

The order of the Administrative Law Judge dated 24 March 1986, at New York, New York, is AFFIRMED.

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

INNIS/dri/8-10-87/Id 1604

Commandant

Chief Counsel

Charles W. FUTCHER III, Revocation of Merchant Mariner's License

1. Appellant's license was revoked for misconduct. Although four specifications were involved, the gist of the charge was that, while acting as Pilot on the Cape May ferry, Appellant had sexual intercourse with a fourteen year old female passenger.
2. Appellant contends that the age of the passenger was the "pivotal" issue at the hearing, that it was not established, and that the revocation order is excessive. The passenger did not testify at the hearing, and the major evidence establishing her age was the testimony of a Bay and River Authority policeman, who testified that she told him she was 14 as she left the vessel after the alleged incident.
3. While Appellant's points concerning the age of the passenger in question are well made, age was adequately established. More importantly, the real issue here is not the age of the passenger, but Appellant's conduct while on duty as a licensed officer aboard a passenger vessel. Appellant does not now dispute that the incident took place. Revocation is not inappropriate for such conduct
4. There are no novel legal issues. A draft is prepared to AFFIRM the order of the Administrative Law Judge.

(G-LMI)
202-267-1527

16722/FUTCHER

Jeffrey S. Moller, Esq.
Clark, Ladner, Fortenbaugh & Young
1818 Market St.
Philadelphia, PA 19103

Dear Mr. Moller:

The Commandant has considered your appeal filed on behalf of Charles W. Futcher III. Enclosed is a copy of the Commandant's decision affirming the order of the Administrative Law Judge.

Sincerely,

F.F. BURGESS, Jr.
Captain, U.S. Coast Guard
Chief, Maritime & International
Law Division
By direction of the Commandant

Copy to:
CCGD7(m)
MSO PHILADELPHIA
ALJ COUGLIN

Blind copy to:
G-CJ
G-MMI

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Charles W. FUTCHER III 221-56-6855

DECISION OR THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2464

Charles W. FUTCHER III

This appeal has been taken in accordance with 46 CFR Part 5, Subpart J.

By order dated 24 March 1986, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's license and merchant mariner's document upon finding proved a charge of misconduct. The charge was supported by four specifications which alleged that Appellant, while serving as Pilot/Mate on board the M/V CAPE MAY, on or about 31 July 1985 wrongfully fraternized with a 14-year-old female passenger, wrongfully engaged in undue familiarity with a 14-year-old female passenger, wrongfully engaged in sexual intercourse with a 14-year-old female passenger, and wrongfully failed to exclude a 14-year-old female passenger from the pilot house and bridge of the vessel, as prohibited by 46 CFR 78.10-1.

The hearing was held at Philadelphia, Pennsylvania, on 11 December 1985, 5 February 1986 and 18 February 1986.

At the hearing Appellant was represented by professional counsel and denied the charge and specifications.

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

In defense, Appellant introduced one exhibit and the testimony of three witnesses.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specifications had been proved. He determined that the first, second and third specifications were proved as one continuous series of acts, so as to be considered one action for the purpose of the order to be entered. The Administrative Law Judge then issued a written order revoking Appellant's license and merchant mariner's document.

The complete Decision and Order was served on 29 March 1986. Appeal was timely filed on 9 April 1986 and perfected on 22 December 1986.

FINDINGS OF FACT

On the night of 31 July 1985, the M/V CAPE MAY, a passenger-and-vehicle-carrying ferry of 2119 gross tons, departed Cape May, New

Jersey at 1902, bound for Lewes, Delaware. Appellant was employed aboard the vessel as Pilot, serving under the authority of his Coast Guard license. The weather at the time was inclement, with scattered showers. At about 2000, a female passenger, without authorization, entered the vessel's wheelhouse. At the time, her clothing was wet as the result of having been exposed to the weather. Present on the bridge were the master of the CAPE MAY, the helmsman, and Appellant. After entering the wheelhouse, the passenger entered into a conversation with Appellant. After approximately two minutes, the passenger departed at the master's suggestion.

The vessel subsequently docked in Lewes, where it remained until 2046, when it departed for the return voyage to New Jersey. Shortly thereafter, the female passenger returned to the bridge and spoke to Appellant. About fifteen minutes after departure, when the vessel had passed Harbor of Refuge Light, Appellant requested and received permission to take a meal break. Appellant said he would be in the Owner's Room, immediately below the wheelhouse, and that he would return to the bridge if the weather worsened or the vessel slowed down. Appellant and the female passenger departed the bridge.

Appellant and the female passenger went to the Owner's Room, where they engaged in sexual intercourse.

Prior to the vessel's arrival at Cape May, a patrolman of the Delaware River and Bay Authority Police, who had observed Appellant and the female passenger in the Owner's Room, spoke to the passenger, who did not give her name, but said she was a sophomore attending high school in Atlantic City and that she was 14 years old.

BASIS OF APPEAL

Appellant challenges the finding of the Administrative Law Judge that the female passenger in question was 14 years of age, and argues that the sanction of revocation was inappropriate.

APPEARANCE: Jeffrey S. Moller, Esq.; Clark, Ladner, Fortenbaugh & Young; 1818 Market St.; Philadelphia, PA 19103

OPINION

Appellant contends that the "pivotal" finding of fact made by the Administrative Law Judge - the age of the female passenger - was clearly erroneous, since that finding was premised on "unsubstantiated

hearsay."

The central issue in this case, however, does not concern the age of the passenger. Rather, the question is whether Appellant, as a licensed officer in a duty status, engaged in fraternization and sexual intercourse with a passenger. It was clearly proved at the hearing that he did. See Decision and Order at 15. Such conduct alone is clearly improper. See Appeal Decision 1508 (WILLIS) (Misconduct finding affirmed where mariner engaged in sexual intercourse with twenty-three year old passenger.) The very highest standard of care is placed on vessel officers for the personal safety of passengers and crew. Appeal Decision 2257 (MALANAPHY).

The age of the passenger in question was, however, an issue at the hearing, and Appellant's argument concerning the evidence upon which the Administrative Law Judge based his conclusion that the passenger was fourteen years old is well made. The questioned evidence consists of the testimony of the Delaware River Bay Authority patrolman concerning a conversation between himself and the female passenger. He testified that the passenger, who was not present at the hearing, told him she was a sophomore in high school and was fourteen years of age. Appellant argues that this testimony was "textbook" hearsay, that the Coast Guard did not prove the passenger's age, and that "at most a consensual sexual act was entered into."

Hearsay evidence is not inadmissible in suspension and revocation proceedings, and strict adherence to the rules of evidence observed in courts is not required. (See 46 CFR 5.537). Hearsay evidence, however, is entitled to only such weight as the circumstances warrant. See Appeal Decisions 1770 (CAREY), 2183 (FAIRALL) and 2404 (McALLISTER). In CAREY, a seaman was charged with possession of narcotics in his quarters aboard a vessel. The only evidence introduced to prove the possession was an unauthenticated foreign court record, which purported to prove that the seaman had been convicted in a foreign court of having narcotics in his possession aboard the ship. The Commandant determined that this document, while admissible, was hearsay, and could not, by itself, support the findings made. In the instant case, it appears, as argued by Appellant, that the only evidence here concerning the age of the passenger is what the passenger allegedly told the patrolman. This is hearsay¹. While it has been said that findings must not be based upon hearsay alone, (See Appeal Decisions 2404 (McALLISTER), 2183 (FAIRALL), the better rule, consistent with the Federal Rules of Evidence, is that findings must not be based on hearsay alone unless the hearsay evidence falls within a recognized exception to the rule

against hearsay. See Fed. R. Evid. 801 et seq.

Here, the hearsay evidence concerning the age of the passenger was not within any recognized exception, and should not, without more, have been relied upon to prove age. (Appellant thought the passenger was older. Decision and Order at 15. There existed a general feeling of "conflict" between the licensed vessel officers and the police officers. Decision and Order at 10.)

The age of the passenger appears to have been considered by the Administrative Law Judge as a matter in aggravation. In considering the specification alleging intercourse with the passenger, the Administrative Law Judge stated, "Respondent took the risk as to her age. It does not make out the act of consenting adults. She was not an adult. She was a minor." Decision and Order at 15. I am persuaded by this language that, if the Administrative Law Judge had found the passenger to be older, his order would have been less severe. Accordingly, the order of the Administrative Law Judge should be modified.

1 The testimony of the patrolman was hearsay evidence because it was testimony of an out-of-court statement (the statement of the passenger) offered to show the truth of the matter asserted (age). See E. Cleary, McCormick On Evidence, 246, at 584 (2d ed. 1972). Another witness testified that she had "heard" the passenger was 14. (Record, Vol. 3 at 9). This testimony suffers from the same infirmity as that of the patrolman.

I note that Appellant surrendered his license and merchant mariner's document on 31 March 1986. In the interest of justice, I believe that an appropriate order in this case would be to provide for outright suspension for the period of time between 31 March 1986 and the date of this order, and to impose no further suspension.

CONCLUSION

By modifying the Administrative Law Judge's revocation order in this case, I in no way intend to convey the message that this type of conduct is acceptable. I am persuaded to modify this order for two reasons. First, the age of the passenger was not adequately established. Second, Appellant surrendered his license and document in March, 1986, and has already served a substantial period of outright suspension.

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge, except for those findings concerning the age of the passenger, which I find not supported by substantial evidence, and which are hereby SET ASIDE. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated 24 March 1986, at New York, New York, is MODIFIED to provide for outright suspension of Appellant's license and merchant mariner's document for the period from 31 March 1986 until the date of this order. Upon receipt of this order, the cognizant Officer in Charge, Marine Inspection should return Appellant's license and merchant mariner's document to him.

Signed at Washington, D.C. this day of , 1988.

INNIS/dri/8-13-87/Id 1604, revised 9-30-87, 11-27-87, 12-18-87

Commandant
Chief Counsel

Charles W. FUTCHER III, Revocation of Merchant Mariner's License

1. Appellant's license was revoked for misconduct. Although four specifications were involved, the gist of the charge was that, while acting as Pilot on the Cape May ferry, Appellant had sexual intercourse with a fourteen year old female passenger.
2. Appellant contends that the age of the passenger was the "pivotal" issue at the hearing, that it was not established, and that the revocation order is excessive. The passenger did not testify at the hearing, and the major evidence establishing her age was the testimony of a Bay and River Authority policeman, who testified that she told him she was 14 as she left the vessel after the alleged incident.
3. The real issue here, however, is not the age of the passenger, but Appellant's conduct while on duty as a licensed officer aboard a passenger vessel. Appellant does not now dispute that the incident

took place.

4. Appellant contends, correctly, that the evidence concerning age was hearsay. While hearsay evidence is admissible in these proceedings, the rule which has developed is that findings should not be based on hearsay alone. Since there is no other evidence concerning her age, the finding that she was 14 cannot be supported.

5. Age was considered by the Administrative Law Judge as a matter in aggravation. Since the fact that the passenger was 14 years old has not been adequately established, the revocation order should be modified. Revocation is an especially severe penalty. I note that the suggested range of orders published in Coast Guard regulations (46 CFR 5.569) reserves revocation for those narcotics cases where revocation is required by law, and for violent acts against other persons resulting in injury. The suggested range of orders for other forms of misconduct is suspension for a period of one to six months. I recommend that Appellant be given credit for the time he has already served (about 20 months) and that his license and document be returned to him.

6. The Chief Administrative Law Judge agrees that age was not proven, but would affirm the revocation order, based on the precedent of the WILLIS case, cited in the draft decision. The facts in WILLIS are, I think, sufficiently distinguishable from those here to justify a different result. WILLIS involved a bedroom steward who over a four-day period, had a series of liaisons with a married female passenger while a fellow crewman kept a lookout for her husband. Here, there is only a single incident in question. The Appellant in WILLIS was tried in a criminal court for rape. Here, no criminal proceedings were involved, nor does the record reflect that any were considered. In WILLIS, the Appellant had a previous record consisting of a suspension for obscene language, failure to turn to and failure to perform duties, and an admonition for absence without leave. Here, Appellant had no previous Coast Guard record. The WILLIS case was decided 22 years ago. While I do not consider this an appropriate forum to compare today's morals with those of 1965, it is a legal reality that penalties for certain forms of conduct change as time goes by.

7. There are no novel legal issues. A draft is prepared to MODIFY the order of the Administrative Law Judge as recommended above.

(G-LMI)
202-267-1527

16722/FUTCHER

Jeffrey S. Moller, Esq.
Clark, Ladner, Fortenbaugh & Young
1818 Market St.
Philadelphia, PA 19103

Dear Mr. Moller:

The Commandant has considered your appeal filed
on behalf of Charles
W. Futcher III. Enclosed is a copy of the Commandant's decision.

Sincerely,

F.F. BURGESS, Jr.
Captain, U.S. Coast Guard
Chief, Maritime & International
Law Division
By direction of the Commandant

Copy to:
CCGD3(m)
MIO PHILADELPHIA
ALJ COUGLIN

Blind copy to:
G-CJ
G-MMI

Commandant

Chief Counsel

Charles W. FUTCHER III, Revocation of Merchant Mariner's License
1. In accordance with G-CV's note of 28 December 1987, I am

resubmitting this case for your signature. The Chief Judge has indicated that he will withdraw his objections in this matter.

2. With reference to the Decision on Appeal involving Paul GIACHETTI and our regulation concerning maritime labor disputes, I will schedule a meeting with the Vice-Commandant and the Chief Judge to discuss the issues more thoroughly before a final decision is rendered in that case.

***** END OF DECISION NO. 2464 *****