

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Willie Lee GRACE, JR. 267-84-7120-D1

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2504

Willie Lee GRACE, JR.

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By an order dated 17 October 1989, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Appellant's Merchant Mariner's Document upon finding proved the charge and specification of misconduct for possession of a controlled substance, marijuana.

The specification alleges that Appellant, while serving under the authority of his above captioned document as seaman on board the M/T KENAI, a merchant vessel of the United States, did, on 6 January 1989, possess a controlled substance.

The hearing was held at Houston, Texas on 20 March and 2 August 1989. Appellant appeared and was represented by professional counsel. Appellant's case was joined with that of another respondent with the consent of Appellant.

The Investigating Officer called three witnesses, who testified under oath, and presented nine exhibits which were admitted into evidence. Appellant testified under oath in his own behalf. Upon finding proved the charge and specification of misconduct, the Administrative Law Judge revoked Appellant's document.

The complete Decision and Order was served on Appellant on 18 October 1989. Appellant filed a Notice of Appeal on 17 November 1989 and the appeal brief was timely filed on 30 May 1990, following two authorized extensions. Accordingly, this matter is properly before the Commandant for disposition.

FINDINGS OF FACT

At all times relevant, Appellant was serving as a seaman aboard the M/T KENAI, a merchant vessel of the United States. Appellant, at all times relevant, was the holder of the above captioned merchant mariner's document issued by the U.S. Coast Guard.

On 6 January 1989, the M/T KENAI was transiting the Gulf of Mexico enroute to Texas City, Texas from Panama. As part of a routine company pre-arrival inspection for contraband items, the master and the chief mate conducted an inspection of the vessel including crewmember staterooms.

Appellant kept his stateroom locked during the entire voyage from Panama to Texas City, Texas. Appellant did not share the stateroom with any other crewmember. Appellant had been given \$800.00 in advance salary which he kept in his locked stateroom.

While searching Appellant's stateroom, having entered with a pass key, the master and the chief mate discovered a leafy green substance in a cellophane bag in Appellant's unlocked attache case. This substance later tested positive as marijuana. The substance was locked in the master's safe and subsequently turned over to the U.S. Coast Guard personnel who boarded the M/T KENAI. A Coast Guard Boarding Officer conducted a field test in the presence of the master.

The complete test result was positive for marijuana.

Appearance: Mr. Theodore R. Johns, Attorney at Law, 1635
Washington Blvd., Beaumont, Texas 77705

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant asserts in his appeal that:

1. The charge and specification are overly broad so as not to provide adequate notice;
2. The Administrative Law Judge erred in joining Appellant's case with that of another respondent;
3. The Administrative Law Judge erred in admitting pages 23 and 24 of the vessel's official log book into evidence over Appellant's objection;
4. The Administrative Law Judge erred in admitting the Coast Guard boarding officer's field test notes into evidence over Appellant's objections;
5. The Administrative Law Judge erred in finding by a preponderance of the evidence that Appellant possessed a controlled substance at the time alleged.

OPINION

I

Appellant urges that the charge and specification are overly broad, alleging possession of a "controlled substance," but not specifically naming the substance. Accordingly, Appellant urges that he was not provided adequate notice to prepare a defense. I do not agree.

At the hearing, Appellant, represented by professional counsel, raised no objection to the charge and specification as drafted and amended at the hearing. A review of the record indicates that the charge and specification were thoroughly discussed by the Administrative Law Judge and the parties present. See, TR pp. 21-24. Accordingly, Appellant and his counsel were fully aware of the nature of the charge and specification, indicated no need for further preparation, and chose to go forward with the hearing.

It is firmly established that there can be no subsequent challenge or appeal of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise. Appeal Decision 1776 (REAGAN); Affirmed sub nom. Commandant v. Reagan, NTSB Order No. EM-9; Appeal Decision 1792 (PHILLIPS); Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841 (D.C. Cir. 1950). Accordingly, Appellant's contention at this time is not properly raised.

Furthermore, these proceedings are remedial in nature and are not strictly bound by the procedural pleading requirements governing civil litigation or criminal prosecutions. The main requirement is that Appellant fully "understood the issue" and "was afforded full opportunity" to justify his conduct. Appeal Decision 2478 (DUPRE); REAGAN, supra; PHILLIPS, supra. The charge and specification in Appellant's case provide sufficient notice of the issue to the extent of allowing Appellant a reasonable opportunity to defend his actions before the Administrative Law Judge.

II

Appellant asserts that the Administrative Law Judge erred in joining Appellant's case with that of another respondent with a drug

conviction. Appellant urges that this joinder implied guilt by association and improperly influenced the Administrative Law Judge. I do not agree.

The Appellant initially agreed before the commencement of the hearing to the joinder with another drug related case. See, Decision & Order, p. 2. Appellant subsequently objected to the joinder during the hearing.

Joinder of cases is an accepted procedure, particularly where, as here, the parties agree to a joinder before commencement of the hearing and the interests of judicial economy will be served by such a joinder. Joinder is permissible, as long as the hearing is properly managed with sufficient decorum, and the record with respect to each respondent is individualized and adequate to support the findings. Appeal Decision 2096 (TAYLOR & WOODS); Appeal Decision 1875 (SYLVES).

In this case, because the charges against both respondents arose from the same contraband inspection, joinder of the cases saved time and expense for the witnesses, the Investigating Officer, and the Administrative Law Judge. Additionally, the record reflects a properly managed hearing free of confusion or disruption. Similarly, the record is precise and individualized with respect of Appellant's case, clearly detailing all pertinent testimony, evidence and defense motions and argument. Accordingly, I find no prejudicial error in the joinder of these cases.

III

Appellant contends that the Administrative Law Judge erred in admitting pages 23 and 24 of the M/T KENAI's official log book into evidence over Appellant's objection. Appellant urges that page 23 of the log is undated and consequently not in compliance with the procedural requirements of 46 U.S.C. +11502. Appellant fails to state a basis for his assertion that it was error to admit page 24 of the log. I do not agree that it was error to admit these log book pages in evidence.

A review of the record indicates that, at the hearing, Appellant did not object to the admissibility of the log entries, only to the "truth of the matter stated." TR pp. 35-36. It is well established that absent clear error, in order to preserve such an issue on appeal, Appellant was required to make an objection at the hearing. 46 C.F.R. +5.701(b)(1); Appeal Decision 2458 (GERMAN); Appeal Decision 2376 (FRANK); Appeal Decision 2400 (WIDMAN); Appeal Decision 2384 (WILLIAMS); Appeal Decision 2184 (HAYES); Appeal Decision 2463 (GREEN); Appeal Decision 2463 (DAVIS).

Moreover, Appellant's assertion has no basis in fact. Title 46 C.F.R +5.545(b) specifically permits the admission of log book entries "made in substantial compliance with the procedural requirements of 46 U.S.C. 11502." Contrary to Appellant's assertion, the log entry in issue (I.O. Exhibit 5) was dated. Additionally, it met all other procedural requirements of 46 U.S.C. +11502.

Accordingly, Appellant's assertion is without merit.

IV

Appellant asserts without merit that the Administrative Law Judge erred in admitting the Coast Guard Boarding Officer's notes regarding the field test of the marijuana. Appellant urges that the notes are inadmissible because there was no probative evidence to show that the field test was accurate, the chain of custody of the marijuana was not proved and the notes were the fruits of an illegal search. I do not agree.

Contrary to Appellant's contention, probative evidence was produced that the field test was accurate. The Coast Guard Boarding

Officer testified in detail to his background, education and experience in utilizing the field test in issue. TR pp. 96-103. The test was witnessed by the vessel master and the test results were recorded. See, I.O. Exhibits 8, 9. This testimony and documentation constituted probative evidence that the field test was properly administered and accurate in its identification of the substance as marijuana.

At the hearing, Appellant failed to produce any evidence to sufficiently rebut the accuracy or validity of the field test. "A positive field test allows the inference that the substance is a narcotic." Appeal Decision 2252 (BOYCE); Appeal Decision 2384 (WILLIAMS). Accordingly, the Administrative Law Judge did not err in determining that the substance tested was in fact marijuana.

Appellant's reference to the chain of custody of the marijuana to challenge the admissibility of the field test notes is misplaced. Sufficiency of the chain of custody goes only to the weight of the evidence as determined by the Administrative Law Judge and has no bearing on admissibility. Appeal Decision 476 (BLAKE), aff'd. sub nom. Commandant v. Blake, NTSB Order EM-156 (1989); U.S. v. Schackelford, 738 F.2d 776 (11th Cir. 1984); U.S. v. Lopez, 758 F.2d 1517 (11th Cir. 1985); U.S. v. Wheeler, 800 F.2d 100 (7th Cir. 1986).

Furthermore, the record sufficiently reflects that the confiscated marijuana was adequately maintained in a secured location by the master and subsequently transferred to the Coast Guard Boarding Officer for field testing. TR. pp. 50-53, 57-58, 76-78, 82-84, 105-106. This evidence effectively rules out any perceived tampering by individuals not in the chain of custody. Appeal Decision 2476 (BLAKE).

Appellant's reference to an illegal search is similarly misplaced. Suspension and Revocation proceedings are strictly administrative in nature. Appeal Decision 1379 (DRUM); Appeal Decision 2167 (JONES); Appeal Decision 1931 (POLLARD); aff'd sub nom. Commandant v. Pollard, NTSB Order EM-33 (1973). Consequently, the constitutional constraints governing criminal proceedings are not applicable here. Appeal Decision 2476 (BLAKE); Appeal Decision 2135 (FOSSANI); U.S. v. Janis, 428 U.S. 433 (1976).

The master of the M/T KENAI was empowered with full authority to enter and search Appellant's stateroom because he had a legitimate concern for the safety of his vessel. BLAKE, supra. This authority is firmly entrenched in maritime law. See, The STYRIA, 186 U.S. 1 (1901).

Accordingly, Appellant's basis of appeal and its supporting assertions are without merit.

V

Appellant asserts that the Administrative Law Judge erred in finding proved by a preponderance of the evidence that Appellant was in possession of a controlled substance. Appellant urges that the substance was never produced as evidence at the hearing and that Appellant was not found to be in actual control of the marijuana when it was discovered. Appellant contends that the marijuana, although discovered in Appellant's attache case in his locked stateroom, could have belonged to someone else. I do not agree.

To find possession of a narcotic or a controlled substance, it is not necessary to find personal and exclusive possession of the substance by Appellant. The mere fact that others may have had access to the space where the marijuana was discovered does not preclude a finding that the controlled substance was in the constructive possession of Appellant. Appeal Decision 2493 (KAAUA); Appeal Decision 1195 (DIAZ); Appeal Decision 1906 (HERNANDEZ).

In Appellant's case, the record reflects that Appellant was the sole assigned occupant of the stateroom in which the marijuana was discovered. The only keys other than the one issued to Appellant were pass keys in the exclusive possession of the master and chief mate. TR p. 177. Appellant himself admitted that he kept his stateroom locked during the entire transit from Panama to Texas City, Texas. TR pp. 170-171. Furthermore, there is no indication that anyone on board the vessel would have had any motive to "plant" the marijuana in Appellant's attache case. TR p. 167.

Accordingly, the Administrative Law Judge's finding that the marijuana was Appellant's is supported by the record and will stand.

Even though the marijuana itself was not produced as evidence at the hearing, the Administrative Law Judge weighed the testimony and evidence and found it sufficient to support a finding of proved to the charge of possession of marijuana. I concur. The Administrative Law Judge will only be reversed if the findings are arbitrary, capricious, clearly erroneous and unsupported by law. Appeal Decision 2482 (WATSON); Appeal Decision 2474 (CARMIENKE); Appeal Decision 2390 (PURSER); Appeal Decision 2344 (KOHAJDA); Appeal Decision 2340 (JAFFE); Appeal Decision 2333 (AYALA).

The testimony of the master, chief mate and Coast Guard Boarding Officer is credible, consistent and corroborative in demonstrating that marijuana was discovered in Appellant's stateroom and was the property of Appellant. The field test of the marijuana was conducted by a trained, knowledgeable Boarding Officer, a record of the test results was retained, and a proper chain of custody of the marijuana was established. Neither the validity nor the accuracy of the test was rebutted by Appellant.

The Administrative Law Judge's findings that the aforementioned witnesses testimony was credible is supported by the evidence as is the finding that Appellant's testimony was not credible. Decision & Order, pp. 9-10. Conflicting evidence will not be reweighed on appeal, where as here, the Administrative Law Judge's determination can be reasonably supported. Appeal Decision 2468 (LEWIN); Appeal Decision 2390 (PURSER), Aff'd sub nom. Commandant v. Purser, NTSB Order EM-130 (1986); Appeal Decision 2356 (FOSTER); Appeal Decision 2344 (KOHAJDA); Appeal Decision 2340 (JAFFE); Appeal Decision 2333 (AYALA).

Accordingly, the findings of the Administrative Law Judge are supported by the record and will stand.

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 law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated on 17 October 1989 at Houston, Texas is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 20th day of August 1990.

GRACE: 2504

2. PLEADINGS

2.29 Defective

Specification not overly broad when all parties understand, do not request continuance and choose to go forward with hearing;

2.60 Pleadings

Sufficiency of

2.90 Specification

Notice, sufficiency of

Defect, cured where issues actually litigated
Defect, cured where issues are understood and opportunity afforded to defend conduct

5. EVIDENCE

5.03 Admission

log book entries permitted under 46 USC 11502;

drug test notes admissible

5.23 Credibility of evidence

ALJ determination regarding drug possession and drug test results upheld

ALJ determination upheld unless clearly erroneous

5.33 Documentary

official records, log book as;

drug test notes and records

9. NARCOTICS

9.98 Possession

personal/exclusive control not required to find possession

10. MASTER, OFFICER, SEAMEN

10.20 Master

Search vessel, including staterooms; master's authority

Search authority not governed by constitutional constraints because of administrative proceeding

12. ADMINISTRATIVE LAW JUDGES

12.50 Findings

Will be upheld unless evidence inherently incredible

13. APPEAL AND REVIEW

13.10 Appeals

Admission of evidence not issue on appeal where no objection made at hearing;

17. HEARING PROCEDURE

3.62 Joinder

Appropriate and not error when agreed to by Respondent

Permissible when hearing managed with decorum and individualized record of proceedings

Desirable to serve interests of judicial economy

CITATIONS

Appeal Decisions cited: 1379 (DRUM), 2167 (JONES), 1931 (POLLARD), 2476 (BLAKE), 2493 (KAAUA), 1195 (DIAZ), 1906 (HERNANDEZ); 2482 (WATSON); 2474 (CARMLENKE); 2390 (PURSER); 2344 (KOHAJDA); 2340 (JAFEE); 2333 (AYALA); 2468 (LEWIN); 2356 (FOSTER); 2135 (FOSSANI); 2252 (BOYCE); 2384 (WILLIAMS); 2458 (GERMAN); 2376 (FRANK); 2400 (WIDMAN); 2384 (WILLIAMS); 2184 (HAYES); 2463 (DAVIS); 2096 (TAYLOR & WOODS); 1875 (SYLVES); 2478 (DUPRE);

NTSB Cases Cited: Commandant v. Blake, NTSB Order EM-156 (1989); Commandant v. Pollard, NTSB Order EM-33 (1973); Commandant v. Reagan, NTSB Order No. EM-9; Commandant v. Purser, NTSB Order EM-130 (1986).

Court Cases Cited: The STYRIA, 186 U.S. 1 (1901); Kuhn v. CAB, 183 F.2d 839 (D.C.Cir. 1950); U.S. v. Schackeford, 738 F.2d 776 (11th Cir. 1984); U.S. v. Wheeler, 800 F.2d 100 (7th Cir. 1986); U.S. v. Janis, 428 U.S. 433 (1976).

Statutes & Regulations Cited: 46 USC 7702; 46 USC 11502; 46 CFR 5.701; 46 CFR 5.701 (b)(1); 46 CFR 5.45(b);

***** END OF DECISION NO. 2504 *****