

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Robert M. TAYLOR 251617

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2505

Robert M. TAYLOR

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

By an order dated 30 October 1989, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended outright Appellant's license for three months, having found proved the charge of misconduct. The charge was supported by one specification alleging that Appellant, under the authority of his license, served as the operator of the passenger vessel M/V MISS GO-CO on 30 March 1989, without a Certificate of Inspection. The hearing was held at Houston, Texas on 24 August 1989. Appellant himself was not present at the hearing, but was represented at the hearing by a designated representative. At the hearing, Appellant's representative entered an answer of "deny" to the charges and specifications on behalf of Appellant.

The Investigating Officer introduced in evidence twelve exhibits and the testimony of two witnesses. In defense, Appellant offered in evidence three exhibits, the testimony of one witness, and his own testimony.

On 30 October 1989, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved. On 11 November 1989, he served a written order on Appellant suspending Appellant's license, for a period of three months. Appellant submitted his notice of appeal on 2 November 1989. The appeal was timely filed on 8 March 1990, following receipt of the transcript on 10 January 1990. Accordingly, this appeal is properly before the Vice Commandant for review.

FINDINGS OF FACT

On 30 March 1989, Appellant was serving as operator on board the M/V MISS GO-CO under the authority of Coast Guard issued license No. 251617. The M/V MISS GO-CO is a U.S. documented, 60 foot, 75 gross ton pleasure craft owned by Gulf Oxygen Co., Inc. Appellant's father is the owner of Gulf Oxygen Co. The M/V MISS GO-CO (Official Number 668782) was built in Taiwan in 1982 and is documented solely for recreational use.

In the Fall of 1988, a representative of the owner of the M/V MISS GO-CO approached the Senior Inspector, Coast Guard Marine Inspection Office Houston, Texas (MIO Houston) inquiring as to the requirements necessary to obtain a Certificate of Inspection for the M/V MISS GO-CO. The representative made further inquiries in January or February 1989 regarding the same matter. At both times, the Coast Guard advised the owner's representative that the vessel would not qualify for a coastwise endorsement on its Certificate of Documentation because it was foreign built. Accordingly, it could not obtain a Certificate of Inspection as a passenger vessel.

In March 1989, a confidential informant (protected under 46 U.S.C. +3315) contacted the Senior Investigating Officer, MIO Houston, and complained that the M/V MISS GO-CO was being operated by Appellant as a passenger vessel, carrying passengers for hire on Galveston Bay and Clear Lake, Texas.

During this time, a seafood restaurant in Kemah, Texas published two newspaper advertisements, stating that the M/V MISS GO-CO was available for a cruise/dinner combination for \$9.95 per couple, consisting of a dinner at the restaurant followed by a cruise on the M/V MISS GO-CO. A Coast Guard Investigating Office from MIO Houston, contacted the restaurant inquiring if he could cruise on the vessel without dinner and was told that he could obtain passage as a non-dinner passenger for a reduced fare.

On 30 March 1989, the Investigating Officer, under the guise of being an interested customer, paid \$5.00 at the restaurant and was issued a color coded ticket to board the vessel. Appellant was accompanied by the informant. After some hors d'oeuvres, the customers were divided into two groups and taken out separately since there were more passengers than could be carried on one trip.

A vessel of less than 100 gross tons, carrying more than 6 passengers is defined as a "small passenger vessel" in 46 U.S.C. SS2101(35). Accordingly, under the provisions of 46 U.S.C. §§3301 and 3311, such a vessel is required to have a Certificate of Inspection. Upon boarding the vessel, the Investigating Officer handed the ticket to the operator, Appellant. Appellant also was identified by the informant as the individual who had served as the operator on previous trips. Appellant was observed giving orders to crew members and operated the controls and helm in the wheelhouse for a time until relinquishing control to another crewmember.

The Investigating Officer observed Appellant take out at least two other groups of 15-20 passengers who had each paid \$5.00 for the cruise.

Appearance: Alton S. Beasley, J.D., 1318 N. Meyer, Seabrook, TX 77586.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's bases of appeal are as follows:

- a. The Administrative Law Judge erred in refusing to grant a continuance to Appellant as requested prior to the hearing;
- b. The Administrative Law Judge erred in finding that Appellant was serving as "master" aboard the M/V MISS GO-CO operating under the authority of his license.
- c. The Administrative Law Judge erred in finding that the M/V MISS GO-CO was carrying passengers for hire;
- d. There was insufficient evidence on the whole to support the finding of proved to the charge of misconduct.

OPINION

I

Appellant asserts that the Administrative Law Judge erred by not granting a continuance requested by Appellant on 17 August 1989, a week before the hearing. Appellant contends that this refusal prejudiced his right to confront and fully cross-examine the witnesses.

A review of the record reflects that Appellant did not raise this matter as a motion or objection at the hearing. In fact, the record does not refer in any manner to any pre-hearing discussion regarding the issue of a continuance. Appeal Decision 2497 (GUIZOTTI) states in pertinent part that "Appellant has no basis for appeal. . .

where he . . . failed to seek a ruling during the hearing and there is no record entry as to [an] alleged pre-hearing discourse."

Consequently, Appellant has no basis for appeal of this alleged error.

II

Appellant asserts that the Administrative Law Judge erred in finding that Appellant was serving as the operator of the M/V MISS GO-CO. Appellant urges that while he was in fact on board the vessel, Appellant's father (and owner of the company that owned the vessel) was actually in command of the vessel. Further, Appellant states that the Administrative Law Judge based his finding on hearsay testimony as adduced from the Coast Guard Investigating Officer who boarded the M/V MISS GO-CO. I do not agree.

The record clearly reflects that Appellant was identified by the informant as the operator of the M/V MISS GO-CO. TR pp. 69-71. Additionally, the individuals selling the \$5.00 tickets for the cruise told the passengers to give the tickets to the "Captain" who was collecting them. Appellant, as positively identified by the Coast Guard Investigating Officer, was collecting the tickets on the date in question. TR pp. 68-69.

Furthermore, Appellant was in control of the vessel for a time in the wheelhouse, getting the vessel underway from the dock, operating the throttle, wheel and controls. TR pp. 69-74, 99. Appellant was also directly observed by the Coast Guard Investigating Officer directing crewmembers to perform various deck functions such as manning the lines. TR pp. 71, 91, 97.

Appellant's father did testify that it was he, not Appellant who operated the vessel most of the time. TR pp. 151-153. However, after reviewing the record, I concur with the Administrative Law Judge's opinion that the testimony of the Coast Guard Investigating Officer who observed Appellant's activities on the M/V MISS GO-CO is both "credible and persuasive". Decision & Order, p. 25.

Accordingly, I find that the Administrative Law Judge's finding that Appellant was the operator of the vessel was supported by reliable and probative evidence and will not be disturbed. Similarly, his credibility findings regarding the witnesses on this matter are supported by the record and will stand. "Conflicting evidence will not be reweighed on appeal if the findings of the Administrative Law Judge can reasonably be supported." Appeal Decision 2472 (GARDENER); See, Appeal Decision 2424 (CAVANAUGH); Appeal Decision 2386 (LOUVIERE); Appeal Decision 2340 (JAFFEE); Appeal Decision 2333 (AYALA); Appeal Decision 2302 (FRAPPIER); Appeal Decision 2116 (BAGGETT); Appeal Decision 2460 (REED); Appeal Decision 2474 (CARMLENKE).

III

Appellant contends that the Administrative Law Judge erred in finding that the M/V MISS GO-CO was carrying passengers for hire. I do not agree.

Appellant urges that there was no proof that any consideration flowed to the owner of the vessel or to Appellant. Appellant also contends that the admission of the newspaper advertisements admitted by the Administrative Law Judge was improper. I do not agree.

The record clearly reflects that numerous individuals paid for their passage on board the M/V MISS GO-CO on the date in question. TR pp. 65-67, 97-98. The definition of "Passenger" in 46 U.S.C. +2101(21)(B) requires only that "consideration" be "contributed" for passage. It does not matter to whom the consideration is paid. Consequently, Appellant's argument that the monies that were paid went directly to the Chamber of Commerce, purportedly sponsoring the

cruise, rather than to Appellant or to the vessel owner does not negate the fact that the vessel was still operating in a passenger vessel status.

The admission of the newspaper advertisements (I.O. Exhibits 2 and 3) was not prejudicial error. These exhibits, which advertised the vessel for cruises, were material and directly relevant to the issue of whether the vessel was operating as a passenger vessel. Even if the evidence did constitute hearsay, it is well founded that strict

adherence to the Federal Rules of Evidence is not required in these proceedings. 46 C.F.R. +5.537; Appeal Decision 2432 (LEON); Appeal Decision 2413 (KEYS); Appeal Decision 2183 (FAIRALL), aff'd sub nom. Commandant v. Fairall, NTSB Order EM-89 (1981). Particularly where hearsay is relevant and material, it is generally admissible in administrative proceedings. Hoska v. U.S. Department of the Army, 677 F.2d 131 (D.C. Cir. 1982).

Accordingly, the Administrative Law Judge was free to admit this evidence providing that he did not exclusively base his findings upon hearsay alone. Appeal Decision 2404 (McALLISTER). In Appellant's case, there was ample evidence in the record apart from the newspaper advertisements (e.g. the direct observations of the Coast Guard Investigating Officer) to sufficiently support the findings of the Administrative Law Judge.

IV

Appellant asserts that the record as a whole fails to support the finding of proved to the charge and specification of misconduct. I do not agree.

Appellant's assertion is founded in the admission of hearsay by the Administrative Law Judge in the form of the I.O. Exhibits. I have addressed this issue, supra, and find that the exhibits admitted were material and relevant and that the findings are not solely based on hearsay evidence.

I find that the charge and specification were proved by a preponderance of the evidence. I do not find the admission of any of the alleged hearsay to be unfairly prejudicial to Appellant. Such bias or prejudice must be affirmatively demonstrated for corrective action to be taken. Appeal Decision 2365 (EASTMAN); Appeal Decision 2299 (BLACKWELL); Appeal Decision 1554 (McMURCHIE).

The findings of an Administrative Law Judge will not be disturbed unless they are inherently incredible. Appellant has failed to make such a demonstration in this case. The Administrative Law Judge's findings are supported by reliable, probative and substantial evidence as required in 46 C.F.R. +5.63. See, Appeal Decision 2468 (LEWIN); Appeal Decision 2477 (TOMBARI). Consequently those findings will not be disturbed.

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 provisions of applicable regulations.

ORDER

The order of the Administrative Law Judge dated on 30 October 1989 at Alameda California, is AFFIRMED.

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

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

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3. HEARING PROCEDURE

3.28 Continuance

Failure to grant not prejudicial where not raised on motion at proceeding

3.69 Motions

Failure to raise motion precludes appeal when non-jurisdictional defect

3.44 Due Process

Witness confrontation/cross-examination not prejudiced

5. EVIDENCE

5.16 Conflicting

evaluated by ALJ
Will not be reweighed on appeal if reasonably supported

5.23 Credibility of Evidence

determined by ALJ
ALJ determination upheld unless clearly erroneous/reasonably supported

5.39 Hearsay

admission not prejudicial where proved by preponderance of evidence
bias or prejudice must be proved for corrective action to be taken regarding

6. MISCONDUCT

6.251 Passengers

Carriage of without valid COI
Carriage of for consideration

As related to "consideration"
"Consideration" as a basis for

12. ADMINISTRATIVE LAW JUDGES

12.50 Findings

not disturbed unless incredible
Due process
denial of, not shown
no denial for curtailment of irrelevant direct examination

3.47.5 Evidence

evaluation of, duty of ALJ

3.64 Jurisdiction

COMMANDANT DECISIONS ON APPEAL CITED: 2497 (GUZZOTTI); 2472 (GARDENER); 2424 (CAVANAUGH); 2386 (LOUVIERE); 2340 (JAFFEE); 2333 (AYALA); 2302 (FRAPPIER); 2116 (BAGGETT); 2460 (REED); 2474 (CARMENKE); 2432 (LEON); 2413 (KEYS); 2183 (FAIRALL); 2404 (MCALLISTER); 2365 (EASTMAN); 2299 (BLACKWELL); 1554 (McMURCHIE); 2468 (LEWIN); 2477 (TOMBARI).

CASES CITED: Hoska v. U.S Department of the Army, 677 F.2d 131 (D.C. Cir.1982).

STATUTES & REGULATIONS CITED: 46 USC 7702; 46 USC 2101(35); 46 USC 3301; 46 USC 3311; 46 USC 3315; 46 CFR 5.701;

***** END OF DECISION NO. 2505 *****