

U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA :  
UNITED STATES COAST GUARD :  
 : DECISION OF THE  
vs. :  
 : COMMANDANT  
MERCHANT MARINER'S LICENSE :  
NO. 667738 and : ON APPEAL  
MERCHANT MARINER'S DOCUMENT :  
NO. 415-64-7011 : NO. 2573  
 :  
Issued to: Gerald J. Jones, :  
Appellant. :  
\_\_\_\_\_ :

This appeal has been taken in accordance with 46 U.S.C.  
7702 and 46 C.F.R. 5.701.

By order dated July 13, 1993, an Administrative Law Judge of the United States Coast Guard at Morgan City, Louisiana, revoked appellant's license and merchant mariner's document upon finding a misconduct charge proved. The three specifications supporting the charge alleged that Appellant, while serving as the operator of three different towing vessels, did, without consent, on three occasions, i.e., on or about August 29, 1992, July, 1990, and August, 1990, act in a perverse manner by fondling the anal area or genitals of the deck hand on each of the three vessels.

At the initial hearing on April 7, 1993, the Appellant appeared without counsel. In response to the Administrative Law Judge's inquiries, the Appellant indicated he wanted representation by professional counsel. Appropriately, on his own motion, the Administrative Law Judge continued the hearing

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until April 28, 1993, to allow Appellant to obtain representation. At the April 28, 1993, hearing, and thereafter, the Appellant has been represented by counsel. On counsel's advice, Appellant denied the charge and its supporting specifications.

During the hearing, the Coast Guard Investigating Officer introduced into evidence six exhibits and the testimony of three witnesses.

In defense, the Appellant and his wife testified.

On July 13, 1993, the Administrative Law Judge rendered a written Decision & Order finding the charge and specifications "proved", and revoking the captioned merchant mariner's credentials.

Appellant timely filed an appeal on August 5, 1993, which was perfected on December 27, 1993. Therefore, this appeal is properly before me.

Appearance: Karl E. Lewis, Jr., Esq., 209 Goode Street, Suite 200, Ledet Building, Houma, Louisiana 70360.

#### FINDINGS OF FACT

Appellant's license authorized service as operator of uninspected towing vessels upon the Great Lakes and inland waters excepting waters subject to regulations for preventing collisions at sea. At all relevant times, Appellant served as operator of the specified vessels under the authority of his license as a condition of employment. Appellant's merchant mariner's document

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was endorsed for service as tankerman for Grade B and all lower grades.

On August 29, 1992, the Appellant served as the operator of the towing vessel M/V LUGGER 21, also known as the M/V TOUPS #5. While serving as operator on this date, the Appellant fondled the anal area and placed his finger in the rectum of the deck hand of the M/V LUGGER. The Appellant did this act while the deck hand slept. The Appellant's fondling of the deck hand woke the deck hand who then kicked or pushed the Appellant away from him and left the M/V LUGGER 21. The deck hand had not given the Appellant permission to touch his body.

In the evening of August 29, 1993, the deck hand from the M/V LUGGER 21 reported this incident to his employer, the operating company of the M/V LUGGER 21, Central Boat Works of Berwick, Louisiana.

During the period 17 through 23 July, 1990, the Appellant served as the operator of the M/V CAPTAIN GUS. Sometime during this period, while the deck hand slept and while the M/V CAPTAIN GUS was underway, the Appellant secured the vessel's wheel and went to the vessel's bunk room. In the bunk room, without permission, the Appellant placed his hand in the boxer shorts worn by the vessel's deck hand and fondled the deck hand's penis. The Appellant fondled the deck hand's penis until the deck hand awoke and told the Appellant to stop. Near the time of the incident, the deck hand reported the incident to his employer, Central Boat Works.

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At the special request of the deck hand's employer, the same deck hand that had been on the M/V CAPTAIN GUS with the Appellant, July 17-23, 1990, returned to work a brief stint with the Appellant on the M/V MISS AIMEE during the period 16 through 21 August 1990. During this period, the Appellant served as the operator of the M/V MISS AIMEE. Sometime during this period, while the vessel's deck hand slept and while the vessel was moored, without permission the Appellant placed his hand in the boxer shorts worn by the vessel's deck hand and fondled the deck hand's penis. The Appellant fondled the deck hand's penis until the deck hand awoke and told the Appellant to stop. The deck hand also reported this incident to his employer, Central Boat Works.

BASES OF APPEAL

On appeal, the Appellant argues:

I) because the charge and specifications are of a criminal or quasi criminal nature, all elements of the specifications must be proved beyond a reasonable doubt;

II) using a beyond reasonable doubt standard of proof, it was clear error for the Administrative Law Judge to find the specifications and charge proved; and,

III) revocation of the Appellant's merchant mariner credentials constitutes cruel and unusual punishment.

OPINION

I

Appellant argues that the charge of misconduct and the three supporting specifications are of a criminal or quasi criminal nature and therefore must be proved using a criminal standard of proof, i.e., they must be proved beyond a reasonable doubt. I disagree.

Suspension and revocation proceedings are not criminal or quasi criminal in nature; they are remedial. 46 C.F.R. 5.5. The charge in the instant case was against the Appellant's merchant mariner's credentials and was done to "maintain standards . . . [of] conduct essential to the promotion of safety at sea." *Id.*; 46 U.S.C. 7701(a); see also Appeal Decision 2167 (JONES) ("as has been stated often, the nature of revocation and suspension proceedings is remedial, not punitive" (citations omitted)).

The Appellant argues that a U.S. Coast Guard license and merchant mariner's document are "valuable property rights which fall under the protection of Amendment V to the United States Constitution" and therefore, "all elements of the crime charged shall be proved beyond a reasonable doubt." Appeal Brief at 4-5. This argument is contrary to well established law. Suspension and revocation proceedings conducted under 46 C.F.R. Part 5 are conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 551-559. 46 U.S.C. 7702(a). The procedural safeguards precedent to the suspension or revocation of a merchant mariner's credential are, therefore, those required by

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the Administrative Procedure Act and the Coast Guard implementing rules. The standard of proof for Administrative Procedure Act proceedings is a "preponderance of evidence." See Steadman v. Securities Exch. Comm'n., 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981). The regulation which equates this standard of proof to suspension and revocation proceedings tracks the language of the Administrative Procedure Act, 5 U.S.C. 556(d), and requires that charges and supporting specifications must be proved with "reliable, probative, and substantial evidence." 46 C.F.R. 5.63; see also Appeal Decisions 2570 (HARRIS), 2541 (RAYMOND), 2477 (TOMBARI), 2474 (CARMLENKE), 2468 (LEWIN). Accordingly, the Appellant's argument is without merit.

## II

The Appellant next argues that there is not credible testimony that supports finding the specifications and charge proved beyond a reasonable doubt, and it was clear error for the Administrative Law Judge to so find. Although Appellant's argument is grounded on the misconception, as discussed in section I of this opinion, that the specifications must be proved beyond a reasonable doubt, I will briefly address his argument in terms of the proper standard of proof.

The Appellant argues that the testimonies of the deck hands should be discredited as they were "discontented" or "disgruntled" employees and their testimonies were rebutted by the Appellant. The Administrative Law Judge explicitly disagreed

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with this assertion, Decision & Order at 22, and I concur with the Administrative Law Judge's assessment. The hearing transcript does not give any indication that the deck hands testified in an attempt to get back at their employer; any animosity apparent appeared to be only directed against the Appellant.

The Appellant also asserts that there was no evidence corroborating the deck hands's testimonies. Although corroborating testimony is not required, I disagree with Appellant's assertion. Shortly after the incidents, the deck hands involved told their employer of the incidents involving the Appellant. Transcript (TR) at 46-48, 60-61, 68-69. Their statements were corroborated by their employer who recalled their reports to him. TR at 79, 84. The testimony of the employer that similar incidents involving the Appellant where reported to him by different deck hands over two years apart, adds considerable credibility to the deck hand's statements.

If I were to accept Appellant's arguments, that the deck hands were not truthful, it would lead me to a highly improbable concocted scenario occurring over several years--I do not choose to do so. As previously stated: "Where there is conflicting testimony it is the function of the Administrative Law Judge, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence." Appeal Decision 2474 (CARMLENKE) citing Charles A. Grahn, Respondent, 3 N.T.S.B. 214 (Order EA-76, 1977); Appeal Decisions 2424 (CAVANAUGH), 2386

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(LOUIVIERE), 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), 2116 (BAGGETT), 2460 (REED). The Appellant points to other minor, perceived inconsistencies; however, I find that the Administrative Law Judge has correctly applied the law and evaluated all of the evidence. I find no reason to upset the Administrative Law Judge's findings.

### III

Alternatively, Appellant argues that revocation of the Appellant's merchant mariner credentials "constitutes cruel and unusual punishment prohibited by Amendment VIII of the United States Constitution." Appeal Brief at 9. Insofar as I may address the non-Constitutional nature of the Appellant's argument, I disagree.

Congress has provided that merchant mariner credentials may be suspended or revoked for acts of misconduct. 46 U.S.C.

7703(1)(B). The regulations implementing the suspension and revocation procedures require the investigating officer to seek revocation when an act of sexual molestation or an act of perversion is found proved. 46 C.F.R. 5.61.

Perversion was specifically pled and proved in each of the supporting specifications, and, although not stated in the Decision & Order, the evidence also supports findings of sexual molestation.

While Administrative Law Judges may be guided by 46 C.F.R. 5.61 in the selection of an appropriate order, they are afforded

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considerable deference in the selection of an order. Appeal Decisions 2551 (LEVENE), 2512 (OLIVO), 2423 (WESSELS), 2331 (ELLIOT). Absent some special circumstances, e.g., an order that is obviously excessive, arbitrary, capricious, or an abuse of discretion, the order will not be modified on appeal. See Appeal Decisions 2551 (LEVENE), 1994 (TOMPKINS), 1751 (CASTRONUOVO). The selection of an appropriate order by the Administrative Law Judge should involve the consideration of the promotion of safety of life at sea and the welfare of individual seamen. See Appeal Decisions 2017 (TROCHE), 2551 (LEVENE), 2570 (HARRIS). The Appellant argues that he needs his merchant mariner credentials as their deprivation in effect prevents him from earning a living and supporting himself and his wife. This need, however, is subservient to the remedial purpose of suspension and revocation proceedings to promote safety at sea. See Appeal Decision 2346 (WILLIAMS). The Appellant also argues that his actions were different from other instances where merchant mariner credentials were revoked for acts of perversion. Appellant specifically points to Appeal Decision 415 (MARKS) where a mariner's certificate of service was revoked because the mariner made improper advances towards a sixteen year old passenger by touching the passenger's penis through his trousers. I agree with Appellant that passengers are entitled to special protection; however, merchant mariners are also entitled to protection from molestation. This incident is further aggravated by the facts that: three separate incidents of perversion were

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found proved; the victims of the Appellant's acts, the deck hands, were sleeping when the incidents occurred; and the Appellant held a position of authority over the victims. Revocation has been upheld as an appropriate sanction for other incidents involving assault or perversion. See, e.g., Appeal Decision 1561 (CONKLIN) (third mate wrongfully engaged in act of sexual perversion with a member of the crew).

As the Administrative Law Judge issued an order suggested by 46 C.F.R. 5.61, that is in accordance with orders discussed on appeal for prior similar acts, and one that would promote safety at sea and the welfare of individual seamen, I do not find that the Administrative Law Judge's order warrants modification on appeal. I find Appellant's actions so contrary to good order and discipline at sea, that revocation is the most appropriate sanction.

#### CONCLUSION

The findings of the Administrative Law Judge are supported by and in accordance with reliable, probative, and substantial evidence. The Administrative Law Judge correctly applied the law and evaluated all of the evidence. The Order issued by the Administrative Law Judge is appropriate.

#### ORDER

The Decision and Order of the Administrative Law Judge dated July 13, 1993, are AFFIRMED.

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ROBERT E. KRAMEK

Admiral, U.S. Coast Guard

Commandant

Signed at Washington, D.C., this 17th day of January, 1996.