

NTSB Order No.
EM-5

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the National Transportation Safety Board
at its office in Washington, D. C.,
on the 7th day of August, 1969.

WILLARD J. SMITH, Commandant, United States Coast Guard

vs.

THOMAS E. HOWELL

Docket ME-7

OPINION AND ORDER

The appellant, Thomas E. Howell, has appealed to this Board from the decision of the Commandant, revoking his ratings as a qualified member of the engine department (QMED).¹ The Commandant's decision was taken following an appeal to him by the appellant (Appeal No. 1720) from the initial decision of Coast Guard Examiner Daniel H. Grace. The examiner's decision ordered revocation of appellant's merchant mariner's document, including entry ratings of messman and ordinary seaman, as well as QMED endorsements for fireman, watertender, oiler, and junior engineer.² The Commandant modified the examiner's order by restoring a merchant mariner's document to appellant, endorsed only for the entry ratings previously held.³

The charge upon which appellant was brought before the examiner and the examiner's findings, affirmed by the Commandant, related to appellant's failure to meet the color sense requirements

¹A qualified member of the engine department holds a certificate of service issued by the Coast Guard. Appeal to this Board from a revocation of certificates by the Commandant is authorized under 49 U.S.C. 1654(b)(2). The Board's rules of procedure governing such appeals are set forth in 14 CFR Part 425.

²A copy of the examiner's initial decision is attached as Exhibit A.

³A copy of the Commandant's decision is attached hereto as Exhibit B.

of a QMED endorsement.⁴ The fact that such requirements do not apply to the entry ratings held by appellant accounts for the Commandant's modification of the examiner's order.

The question of appellant's competency to hold QMED ratings arose in the first instance at the port of Mobile, Alabama. There, upon application to the Coast Guard for QMED endorsement of his mariner's document, he was given the physical examination prescribed for all QMED applicants, administered by the U. S. Public Health Service. At that time, he failed to pass the routine test for color vision and, for that reason, was found incompetent for QMED endorsement by the examining physician.

Shortly thereafter, appellant made his second application for a QMED endorsement at the Coast Guard's Marine Inspection Office in New York. This time, he passed the physical examination given by the Public Health Service at that port and was found to have normal color sense. The Coast Guard at New York on the following day issued appellant a document bearing the QMED endorsements now revoked, and he immediately entered service as a Fireman/Watertender aboard the SS TEXACO MINNESOTA.

Upon investigation of these facts, the Coast Guard at Mobile arranged for a re-examination of appellant's color sense at Mobile. On this occasion, appellant again failed to pass and the medical officer administering the tests, Dr. Davidson, noted on his clinical record that he "failed color vision -- decisively". The Coast Guard investigating officer at Mobile thereupon charged appellant with incompetence, under authority of 46 U.S.C 239(g). The acts of incompetency alleged in the charge was appellant's service as a Fireman/Watertender on the SS TEXACO MINNESOTA without possessing the color sense required for employment in that QMED rating, in accordance with Coast Guard regulations 46 CFR §12.15-5(b) and §10.02-5(e)(4).⁵ It was further alleged that

⁴These requirements are set forth infra; see footnote 5.

⁵"§12.15-5 Physical requirements. * * *(b) The medical examination for qualified members of the engine department is the same as for an original license as engineer, as set forth in §10.02-5 of this subchapter. If the applicant is in possession of an unexpired license, the officer in charge, Marine Inspection, may waive the requirement for a physical examination."

§10.02-5 Requirements for original licenses. * * *(e)
(4) Applicants for original engineer's licenses shall be examined only as to their ability to distinguish the colors red, blue,

appellant's vision deficiency "remains existing."

Acting as his own counsel at the hearing, appellant took the position at the outset of admitting that he was "partial color blind and a borderline case." (Tr., p. 6.) He further conceded that he had twice failed to pass the color sense tests given at Mobile, each time consisting of the pseudo-isochromatic plate test and the "Williams" lantern test. He presented the written statement of an ophthalmologist in Mobile, one Dr. Sellers, to the effect that appellant was known to him "about twenty-five years ago" as having a partial red-green color blindness. In taking the plate test, according to Dr. Sellers, appellant has a typical red-green color blindness but, by the lantern test, appellant "could easily differentiate the vivid colors without difficulty."

Dr. Davidson testified concerning appellant's color sense tests at Mobile, giving it as his opinion that: "He's definitely not borderline. On the [second] test he was shown the same color about ten straight times, and he couldn't even tell the same color twice. That is why I consider it definite, there's no sense of color vision. . . ." (Tr., p. 11.) Dr. Davidson further testified that there must have been some error made in the tests given appellant in New York since color blindness "never gets better or worse, it stays the same." (Tr., p. 14.) Appellant attempted to refute this testimony by stating that he had passed the New York tests in the normal way; that he believed there was a great variety in the machines used and the way they are handled; and that he had recently taken such tests given by the Public Health Service at New Orleans, Louisiana, with a machine having "much easier colors". (Tr., p. 13.) While admitting he had also failed the tests in New Orleans, appellant indicated that he was scheduled to receive another test there, so that the examiner adjourned the hearing in order to receive the results of that examination. Appellant requested that these tests "seek out how much color vision I have got rather than that I failed the test"; (Tr., p. 16.) and the examiner agreed.

Concerning appellant's color sense tests in New Orleans during the adjournment of the hearing, the report of one Dr. Harkey showed that he had failed both the color plate test and the lantern test by reason of a red-green deficiency. Appellant claimed that the applicable regulations calling for an ability to distinguish the colors red, blue, green, and yellow, were not followed, because "in the end there was a white color"; and he called the white color

green and yellow. No applicant for original license as engineer shall be disqualified for failure to distinguish colors if any of his required experience is served prior to May 1, 1947."

green" for the simple reason that the regulations do not call for but four colors". (Tr., pp. 28, 29.) Appellant also complained that he was given the color plate test, which he had "always failed," and that he was tested individually for each eye, but that he nonetheless felt he had done much better than he did on previous tests at Mobile.

On the evidence recited above, which was undisputed at the hearing, the examiner concluded that appellant was incompetent to hold a QMED endorsement of his merchant mariner's document. The examiner's ultimate findings that appellant did not possess the color sense required for QMED ratings at the time of his employment aboard the SS TEXACO MINNESOTA or thereafter, as alleged in the charge, was based primarily upon the evidence concerning the three color vision acuity tests taken and failed by appellant at Mobile and New Orleans.

In appealing the examiner's decision pro se, to the Commandant and this Board, appellant attacks the fairness of the tests conducted at Mobile and New Orleans. Concerning the New Orleans tests, his argument against the use of a white color is based on the Coast Guard regulation §10.02-5(b)(4) that he was to be examined only on his ability to distinguish the colors red, blue, green, and yellow.⁶ This is defeated by his own insistence at the hearing that the New Orleans test should not be conducted according to the normal standards but rather to determine the degree of his disability. Concerning the tests at Mobile, appellant does not contend that he was tested beyond the four required colors, but that the "turning back and forth on the same color [is] exactly contrary to commonly accepted criteria or rules for giving the Williams lantern test." It is obvious, however, that such testing would not have misled a person with normal color sense and that a test procedure wherein the required colors were shown in a standardized rotation would be meaningless, since QMED applicants would be able to pass by the simple expedient of committing the rotation to memory.

Appellant also raises on appeal various issues outside the record of the hearing. During the pendency of his appeal to the Commandant, he took it upon himself to receive a second examination of his color sense acuity by the Public Health Service at the port of New York. At his request, the medical report of that test was filed with the Commandant for consideration of a recommendation made therein that appellant be granted some type of waiver for advancement to qualified ratings not requiring normal color vision. The Commandant also received a letter on appellant's behalf from

⁶See §10.02-5(b)(4) at footnote 5.

the Chief Engineer of the SS MAYO LYKES, commenting favorably on his performance as a wiper on a voyage taken subsequent to the hearing, on his ability to identify indicator lights in that vessel's engineroom, and recommending him for a higher rating than wiper. The Commandant properly refused to consider these matters as going beyond the limits of his authority to review the examiner's decision, under 46 U.S.C. 239(g).⁷ Appellant is advised by the Commandant's decision that the route for consideration of a waiver of physical requirement in his case "would have to be through those officials to whom the power to issue documents has been delegated."⁸

To the Board, appellant has presented extracts of letters he claims to have received following the Commandant's decision, purporting to show that manufacture of the "Williams" lantern has been discontinued and that this machine is no longer considered an adequate test for color sense. He also alleges numerous extraneous and undocumented matters, such as the excessive drinking and foul language of other personnel aboard various ships on which he has served, his ability in operating automobiles for over 35 years to observe traffic signals, the fact that he passed a color vision test for enlistment in the Marine Corps in 1932, his rejection by the Navy because of color vision deficiency in 1944, and his various legal troubles over a great number of years. These matters are far removed from the central issue in the case, namely appellant's ability to meet Coast Guard requirements for QMED ratings, and any attack upon the utility of the "Williams" lantern test to determine his ability to distinguish the required colors is without foundation in the record.

Upon consideration of the appellant's brief in light of the entire record, therefore, we discern no basis for his contention that color vision tests were administered to him in an unfair manner at Mobile and New Orleans. The record contains competent medical opinion as to the results of these tests, indicating that appellant failed to pass a normal ability to distinguish the colors red and green a short time before his employment aboard the SS TEXACO MINNESOTA in a QMED rating and, by two subsequent tests, that the same vision deficiency persisted at the time of the

⁷46 U.S.C. 239(g) provides that the decision of the Commandant shall be based solely on the testimony of record. See also 46 CFR 137.35-5.

⁸The Coast Guard's denial of waiver under such circumstances would not be reviewable by this Board under existing law and applicable regulations. See Commandant v. Voutsinas, Order EM-1, adopted October 24, 1968.

hearing. In our view, such medical opinion provides substantial evidence of record, both probative and reliable, in support of the examiner's findings of fact, as affirmed by the Commandant. This Board adopts these findings as its own. We further agree that the sanction imposed by the examiner, as modified by the Commandant, is fully warranted under the circumstances of this case.⁹

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it is hereby denied; and
2. The order of the examiner, as modified by the Commandant, revoking all QMED endorsements of appellant's merchant mariner's document be and it hereby is affirmed.

REED, Chairman, and LAUREL, McADAMS, and THAYER, Members of the Board, concurred in the above opinion and order.

(SEAL)

⁹The medical record of appellant's second color vision examination in New York is not properly a part of the record of these proceedings. However, in order to avoid misinterpretation of our review, it should be noted herein that appellant failed both the color plate and "Williams" lantern tests that were given on that occasion. The examining physician's report states that appellant showed a strong red-green color deficiency according to both tests and that appellant would not be safe at sea in situations requiring reliable red and green color discrimination.