

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

CLARENCE MARSHALL, JR.

Respondent.

Docket Number: CG S&R 04-0351
CG Case No. 2100406

DECISION AND ORDER

Issued: October 28, 2004

Issued by: Jeffie J. Massey, Administrative Law Judge

Appearances:

CWO Jason Boyer
LCDR Ronnie Patrick
U.S. Coast Guard
800 David Drive
Morgan City, LA

For the Coast Guard

CLARENCE MARSHALL, JR.
PRO SE

For the Respondent

PRELIMINARY STATEMENT

On July 12, 2004, the United States Coast Guard ("USCG" herein) initiated an administrative proceeding against credentials issued to Clarence Marshall by the USCG. On that same date, Respondent's Answer was received by the Docketing Center. In his Answer, Respondent Clarence Marshall ("Respondent" or "Mr. Marshall" herein) denied the factual allegations and requested an opportunity to be heard on the remedy proposed by the USCG. He also wrote in the body of the Answer:

... I Clarence disagree with all allegations on consuming alcohol or being under the influence on board M/V Elefante.

The Complaint was the subject of the hearing held in Morgan City, Louisiana on September 30, 2004. The USCG presented three witnesses: Charles Portier, an Operations Manager for Tidewater Marine (Respondent's former employer), Ira Robertson, Jr., a group coordinator for Tidewater Marine, and John Ryan, Captain of the ELEFANTE GRANDE on May 22, 2004. Respondent was the only witness to testify on his behalf.

At the end of the testimony the evidentiary record was held open, allowing the USCG a period of fourteen (14) days to submit a request that additional testimony be taken relevant to the written statement of Robert Wood, which had been admitted into evidence by the undersigned, over the objection of the USCG. No such request was submitted, so the evidentiary record was considered closed at the end of the fourteen day period (October 14, 2004).

FINDINGS OF FACT

THE FIRST ALLEGATION IN THE COMPLAINT:

1. On May 22, 2004, Respondent was acting under the authority of his Merchant Mariner's credentials as he served on board the ELEFANTE GRANDE.
2. The Vessel ELEFANTE GRANDE is a vessel subject to inspection by the USCG.
3. On May 22, 2004, there was a fight on board the ELEFANTE GRANDE, where Crew Member Curtis Ferrill attacked the Respondent.
4. As a result of this fight, the Respondent suffered moderate bodily injury, but Crew Member Curtis Ferrill did not suffer any injuries.
5. After the Respondent was removed from the vessel (at the discretion of the employer), Respondent was requested to undergo "testing", understood to be chemical testing.
6. Respondent denied that he was requested by his employer to submit to chemical testing, after he was removed from the vessel.
7. At the time the employer requested Respondent to submit to chemical testing, at least two people had had an opportunity to observe the Respondent.
8. At the time the employer requested Respondent to submit to chemical testing, only one person had indicated a suspicion of alcohol use (based on "glassy eyes", a "very loud" odor of alcoholic beverage, and the alleged statement by Respondent, that he had "had a couple of drinks on board").
9. At the time the employer requested Respondent to submit to chemical testing, no person had observed evidence that the Respondent's manner, disposition, speech,

muscular movement, general appearance or behavior had been effected by an intoxicant so that it was apparent by observation.

10. At the time the employer requested the Respondent to submit to chemical testing, no person had observed the Respondent ingest an intoxicant.
11. After Mr. Robertson asked the Respondent to submit to a chemical test, the Respondent indicated he would rather go home than do the testing, and Mr. Robertson let the Respondent leave.
12. Contrary to Mr. Robertson's testimony, the Respondent did not tell him he had "had a couple of drinks on board."

THE SECOND ALLEGATION IN THE COMPLAINT:

1. On May 22, 2004, Respondent was acting under the authority of his Merchant Mariner's credentials as he served on board the ELEFANTE GRANDE.
2. The Vessel ELEFANTE GRANDE is a vessel subject to inspection by the USCG.
3. Company policy did prohibit the use of alcoholic beverages on board the ELEFANTE GRANDE.
4. On May 22, 2004, the Respondent did not bring alcohol on board the ELEFANTE GRANDE.
5. On May 22, 2004, the Respondent did not consume alcohol on board the ELEFANTE GRANDE.

THE THIRD ALLEGATION IN THE COMPLAINT:

1. On May 22, 2004, Respondent was acting under the authority of his Merchant Mariner's credentials as he served on board the ELEFANTE GRANDE.
2. The Vessel ELEFANTE GRANDE is a vessel subject to inspection by the USCG.
3. On May 22, 2004, the Respondent was "operating" the ELEFANTE GRANDE.
4. On May 22, 2004, the Respondent was not under the influence of alcohol while operating the ELEFANTE GRANDE.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On May 22, 2004, Respondent was a holder of a Coast Guard issued license and other documents issued by the USCG, and he was acting under the authority of said documents when he was on duty aboard the Vessel ELEFANTE GRANDE.
2. The Coast Guard failed to prove by a preponderance of the evidence that sanctions are warranted against Respondent's license under 46 U.S.C. 7703, because the evidence failed to prove an act of misconduct by the Respondent on May 22, 2004.
3. The Coast Guard failed to prove that the Respondent "refused" to submit to a chemical test that was requested by his employer based on "reasonable cause" pursuant to the provisions of 33 CFR Part 95, specifically §95.035.
4. The Coast Guard failed to prove that the Respondent brought or consumed alcohol on board the vessel ELEFANTE GRANDE, in contravention of the policies of Tidewater Marine (Respondent's employer).
5. The Coast Guard failed to prove that the Respondent was intoxicated on May 22, 2004, when he was on duty aboard the Vessel ELEFANTE GRANDE.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court.” **Appeal Decision 2477 (TOMBARI)** (1998). The burden of proving a claim by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” **Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California**, 508 U.S. 602, 622 (1993)(citing **In re Winship**, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring)(brackets in original)). Under Coast Guard procedural regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR §§ 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged.

In these proceedings, the Administrative Law Judge is vested with broad discretion to determine witness credibility and resolve inconsistencies in the evidence, and the findings of the Administrative Law Judge are not required to be consistent with all the evidence in the record as long as there is sufficient evidence to justify the finding. **Appeal Decision 2639 (HAUCK)** (2003). In this case, I find Respondent is credible, and the record as a whole supports the key

elements of his testimony. There are significant conflicts in the evidence of record, and there are significant deficiencies in the evidence presented by the USCG, both of which have resulted in my conclusion that the allegations against the Respondent have not been proven by the required level of evidence so that I am not convinced it is more likely than not that the Respondent committed the charged violations. To best understand the inconsistencies and deficiencies in the record, a general discussion of the evidence of record is necessary.

The first witness called by the USCG was Charles Portier, an operations manager for Respondent's employer, Tidewater Marine. He testified that on May 22, 2004, he was on call for Tidewater and that he received a telephone call from the captain of the ELEFANTE GRANDE at about 1:30 a.m.. The Captain reported that there had been a fight on board, the harbor police had been called, and the persons involved in the fight had been separated. The vessel was moored at a public dock at the time, and both persons involved in the fight were transported (by separate vehicles) to locations away from the boat. The Crew Members transported from the vessel arrived at offices belonging to Tidewater about two hours later.¹ The Respondent was taken to a location other than Mr. Portier, who had gone to the vessel.

The witness testified that he received a telephone call from Mr. Robertson who was with the Respondent at a location away from the vessel. During this telephone call, the witness testified that he heard Mr. Robertson tell the Respondent he needed to submit to "testing" and he heard the Respondent say that he was not going to do the testing.

¹ Through this witness, the USCG attempted to introduce the (positive) results of tests administered to two Crew Members, positive for alcohol. Based on the record before me, I excluded this evidence as unreliable hearsay, finding, as a matter of law, that these results were so far removed from the personal knowledge of this witness (or any other witness present to testify) that I had no way to evaluate their validity. The USCG could have presented witnesses which could have validated these test results. Failing to do so, to protect the integrity of the evidence in the record, I concluded the test results should not be considered by me as proof that any other Crew Member was intoxicated while on board the vessel. At this point in time, having heard the USCG's entire case, I find that even if I had admitted and considered this hearsay to prove the truth of the matter asserted, my ultimate findings of fact and conclusions of law would be the same in this case.

The witness performed a search of the vessel but did not find any alcoholic beverages aboard the vessel.

The witness testified that as part of the Respondent's initial hiring process at Tidewater, the Respondent acknowledged, in writing, that Tidewater had a policy which prohibited the possession of intoxicating beverages, etc., on board their vessels.

The next witness called by the USCG was Mr. Robertson, a group coordinator for Tidewater Marine. He was on call that week, so he received a call from Mr. Portier, advising him of the situation aboard the vessel ELEFANTE GRANDE. The witness went to one of Tidewater's office, where the Respondent arrived about 5:00 a.m. He testified that he spoke with the Respondent for a few moments, and advised him that he needed to submit to "testing." He further testified that the odor of an alcoholic beverage was "very loud" and that the Respondent's eyes were "glassy."

The witness further testified that during his conversations with the Respondent, he told him it was company policy to submit a statement (about the incident) and to "do a test." After the Respondent refused to submit to a test, the witness testified that he offered him medical attention for his injuries, which were visible to one of his eyes and his lips. The witness testified that he was prepared to call someone to the Respondent's location to do a breath alcohol test. The witness further testified that the Respondent said he just wanted to go home, and in fact did leave.

The last witness called by the USCG was John Ryan, Captain of the ELEFANTE GRANDE on May 22, 2004. In fact, he came on duty the day before, where the Respondent and other Crew Members were already in place. The Crew Members were manning watches, awaiting a job assignment. Captain Ryan testified that he was on watch, and the Respondent was

the person who relieved him. During the watch change, he and Respondent conversed. Based on that conversation (and his later conversations with the Respondent, after the fight), the Captain had no reason to suspect the Respondent had been consuming alcoholic beverages.

After the Captain went off watch (at midnight), and the Respondent went on watch, the Captain went to his room and went to sleep. He was wakened by noises, which turned out to be from the fight in the wheelhouse. When he arrived in the wheelhouse, there were words being exchanged between the Respondent and Crew Member Curtis Ferrill. There was broken glass and blood on the floor; the Respondent was injured, but Curtis Ferrill was not. Curtis Ferrill was told to go downstairs, which he did, but he also kept taunting the Respondent. The taunting kept up, and eventually, the Respondent left his state room (where he had been instructed to go) and went to the level where Curtis Ferrill was. The Respondent was upset about the taunting, which included racial epithets, and the Captain concluded that it was best to call the Harbor Police.

The Captain further testified that Curtis Ferrill was supposed to be sleeping or whatever—he was not supposed to be in the wheelhouse where the Respondent was on watch.

The Captain was unable to testify that he noticed any odors of alcoholic beverages in the wheelhouse; he testified he was concerned about other things at the time.

The Captain further testified that the day before this incident, the Respondent and Curtis Ferrill had made a trip to the grocery store, to purchase supplies for the vessel. This is something that they had done before. They were gone between four to six hours, which was normal for this trip.

The Captain further testified that after some Crew Members tested positive for alcohol on May 22, 2004², he initiated his own search of the vessel for alcohol. A ½ gallon of vodka, with

² The statement about positive tests is admissible in this form, as it is not offered to prove the truth of the statement asserted, but merely as a predicate for explaining the rationale of another search for alcoholic beverages.

about three inches of liquid left in it, was found in a common shower. This was found over a day after the incident (fight) occurred. No one on the vessel claimed ownership of the vodka, but the Captain noted that at this point, three Crew Members who had been present on board the previous day, were no longer on board.

After being advised as to his right to testify, the Respondent did decide to give his own testimony. He testified that the Captain woke him up about 11:30 p.m. and he reported to the wheelhouse to work at midnight. At about 1:15 a.m., Curtis Ferrill and Robert Wood (another Crew Member) came into the wheelhouse. The Respondent observed that Curtis Ferrill looked like he had been drinking. The Respondent testified that he and Curtis Ferrill had had words earlier in the day, after Curtis Ferrill had been listening to a phone conversation between the Respondent and his fiancé.

Curtis Ferrill started up again with the Respondent and Robert Wood tried to step in between them; but, Curtis Ferrill charged at the Respondent, grabbing him and causing him to fall, hitting some glass and breaking it. At that point, Curtis Ferrill began wailing on the Respondent. Soon after, Captain Ryan showed up and separated them.

As for the trip to get groceries, the Respondent confirmed the basic timeframe given by the Captain. He added that once at the store, he and Curtis Ferrill split up the list so that each was shopping on his own, with his own cart. Although, they did end up checking out at the same time. In response to questioning from the USCG as to whether or not Curtis Ferrill purchased any vodka while at the grocery store, the Respondent noted that he didn't see any; and, the grocery store wasn't going to let them buy vodka on Tidewater's account, anyway.

The Respondent flatly denied that he had consumed any alcoholic beverages before or during his watch while on the ELEFANTE GRANDE. He testified that prior to his shift, after

returning from the grocery store, he showered, ate, watched a movie, then slept, before being woken by the Captain at around 11:30 p.m. The Respondent also denied that he had been asked by Mr. Robertson to submit to testing, once he arrived at Tidewater's offices. The Respondent did remember Mr. Robertson asking him if he needed medical attention. The Respondent testified that he had been on duty aboard the vessel for six days prior to these events, that he was due to be off duty the next day (because his mother had suffered a stroke). He further testified that the whole incident with Curtis Ferrill had upset him so much, that he felt like quitting his job. In fact, he produced his "pink slip" from Tidewater which had the box next to "voluntarily quit" marked, but then scratched out. Instead, the box next to "Discharge—violation of company policy" was marked.

While testifying, the Respondent asked if there had been other statements taken from other witnesses to the incident, particularly, Robert Wood. The USCG tendered a written statement from Robert Wood to the undersigned. After reviewing said statement, the undersigned decided it was probative, and, since it had been in the possession of the USCG and they had had ample opportunity to investigate its veracity, decided to read it into the record. The statement asserted that Curtis Ferrill had told Robert Wood that both he and the Respondent had bought bottles of vodka while they were on their grocery shopping trip. Mr. Wood's statement further indicated that, before the fight occurred, he and Mr. Ferrill had been in Mr. Ferrill's cabin drinking vodka. Mr. Wood's statement basically verified the version of events that occurred afterwards, as testified to by Captain Ryan and the Respondent.

ACTING UNDER THE AUTHORITY

Title 46 U.S.C. §7703(1)(a) provides that a license, certificate of registry, or merchant mariner's document may be suspended or revoked if the holder when acting under the authority of his license, certificate, or document violates or fails to comply with subtitle II of Title 46 of the United States Code, a regulation prescribed under subtitle II of the Title 46 of the United States Code, or any other law or regulation intended to promote marine safety or to protect navigable waters.

A person employed in the service of a vessel is considered to be acting under the authority of his/her license, certificate, or MMD when the holding of that license, certificate, or MMD is required by law, regulation, or by the employer as a condition of employment. 46 CFR §5.57(a). If law, regulation, or condition of his employment did not require the Respondent to have a license or MMD, then the Coast Guard does not have jurisdiction under 46 CFR §5.57(a) over the alleged violation of law. See Appeal Decision 2620 (COX) (2001). Therefore, the Coast Guard must prove Respondent was employed in the service of a vessel³ when he committed a violation of law and Respondent's merchant mariner's credentials were either (1) required by law or regulation or (2) as a condition of his employment.

To find that a law or regulation required Respondent to hold a license or MMD, the vessel's certificate of inspection or a description of the vessel must be admitted into evidence. See Appeal Decision 2283 (FUEHR) (1982). The testimony in this case shows the description of the ELEFANTE GRANDE, establishing it was subject to inspection. Further, the testimony in this case reflects that it was necessary for the ELEFANTE GRANDE to have a mate onboard

³ Employed in the service of a vessel does not require respondent to have boarded the vessel. Appeal Decision 2615 (DALE) (2000) (Respondent was acting under the authority of his MMD when his employer had assigned him to a vessel, but Respondent had not boarded.).

while the vessel was “operating.” In this case, Respondent held a Coast Guard issued MMD and a license authorizing him to serve as mate of steam or motor vessels of various tonnage, under various conditions (IO Ex. 03). At the time in question, Respondent was employed as mate aboard the offshore supply vessel ELEFANTE GRANDE, which according to the testimony, was a ship of the type included within the purview of Respondent’s license. Therefore, the Coast Guard has proved Respondent was acting under the authority of his merchant mariner credentials, because he was employed as mate aboard the ELEFANTE GRANDE and his license and MMD were required by law for him to serve aboard that vessel. I now turn now the question of whether the Coast Guard has proven by a preponderance of the evidence that Respondent committed one or more acts of misconduct and/or violated a law or regulation.

INTOXICATION AND INTOXICATING BEVERAGES

Based on the record as a whole, it is undisputed that no person observed the Respondent drinking alcoholic beverages on May 22—while on board or before boarding the vessel. While Mr. Wood’s statement reflects that the Respondent purchased a bottle of vodka before returning to the ship from the grocery shopping trip, he has no personal knowledge of this—his statement is based on what Curtis Ferrill told him. Mr. Ferrill certainly demonstrated an animosity towards the Respondent—he did physically and verbally attack him—and it is not surprising that he would make a statement against the interests of the Respondent. On this issue, I further note that only one bottle of vodka was found on board during the search conducted by the Captain. If he had found two bottles, Mr. Wood’s statement would be corroborated. Since only one bottle was found, it seems that Mr. Ferrill was not speaking the truth about what the Respondent had done.

On the other hand, it certainly appears likely that Mr. Ferrill was consuming alcoholic beverages while on board the vessel. Intoxication would explain his physical aggression and inflammatory insults. That part of Mr. Woods' statement could be true. But, since what Mr. Ferrill did or didn't do is not an issue of fact or law squarely before me in this proceeding, I decline to make any ultimate conclusions in this area.

Turning back to the Respondent, the only suggestion of intoxication comes from the testimony of Mr. Robertson. While there is no clear cut motive for Mr. Robertson to not tell the truth, his testimony must still be evaluated based on the record as a whole. He reported that as of 5:00 a.m.—some hours after the Respondent left the vessel—the smell of an alcoholic beverage was “very loud” and the Respondent's eyes were “glassy.” Could Mr. Robertson have been perceiving only what he was pre-disposed to see? Certainly by this time he had been told about the fight on board, and most likely, Mr. Portier had communicated other details to him about the assailant—Mr. Ferrill. Had Mr. Robertson been told by Mr. Portier that Mr. Ferrill and/or Mr. Woods had failed breath tests? Was he just assuming the Respondent had been drinking because he had been in a fight? These questions are raised by the record as a whole, and there is an absence of evidence in the record so that I cannot resolve them in favor of the USCG, the party that carries the burden of proof.

Whatever the circumstances, I find the Respondent's straightforward denial about the use of intoxicating beverages aboard the vessel is compelling because it is not contradicted by other evidence in the record. While Mr. Robertson might *believe* he smelled alcoholic beverages, I find an absence of corroborating evidence in the record to support this testimony. In the face of the Respondent's credible denial that he had been drinking, I must resolve this conflict against Mr. Robertson. Further, I examined the entire evidentiary record, seeking out confirmation of

Mr. Robertson's testimony concerning the Respondent's allegedly "glassy" eyes—there was none. Based on the record as a whole, it is more likely than not that the Respondent's eyes appeared the way they did because of the altercation and the time of morning, rather than because he was intoxicated. I conclude that Mr. Robertson truthfully testified to what he saw—but the reason for what he saw is more likely than not to be the altercation and time of morning, rather than intoxication.

Lastly, I focus on the Captain's testimony. In my estimation, his testimony is key with respect to the issue of intoxication. He is the person who was in the best position to make observations of the Respondent. He spoke with the Respondent in the wheelhouse at midnight. He spoke with the Respondent after the fight. He observed nothing to suggest that the Respondent had been drinking intoxicating beverages. He was the only witness presented by Coast Guard that had been in the company of the Respondent immediately before and immediately after the altercation. Coincidentally, he is the one person presented by the USCG who was in the company of the Respondent during the period immediately after the time he would have been drinking intoxicating beverages, if in fact he had brought intoxicating beverages aboard after the grocery shopping trip. I find the Captain's testimony credible.

CHEMICAL TESTING

Turning to the issue of whether or not the Respondent refused to submit to chemical testing, we must begin the analysis of this issue with a reference to the regulations that authorize an employer to ask an employee to submit to chemical testing.⁴ "Reasonable cause for directing

⁴ The Complaint presented in this case fails to specifically cite to the regulation authorizing a request for a chemical test based on "reasonable cause." Because the theory of this allegation was that the Respondent committed an act of Misconduct, the Complaint should have cited the exact rule, statute, regulation or other formal duly established rule

a chemical test” is codified at 33 CFR §95.035, and defines reasonable cause for testing an “individual operating a vessel”. The direction can come from a law enforcement officer or a marine employer, such as Tidewater. There are two circumstances under which it is possible for reasonable cause to exist. The first, the occurrence of a marine casualty, is not applicable here. The second circumstance allows for testing when an individual is suspected of being in violation of § 95.020 (operating a vessel with an alcohol concentration of .04 percent by weight or more in their blood), or, operating a vessel and the effect of intoxicants consumed by the individual on the individual’s manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.⁵ When an individual is suspected of being intoxicated, “*when practicable* a marine employer should base a determination of the existence of reasonable cause . . . on observation by two persons.” See §95.035(c), emphasis added.

Based on the record before me, I find that on May 22, 2004, it was “practicable” for Tidewater Marine to base its determination of reasonable cause [of intoxication on the part of Respondent] on the observation of two persons. I further find that Tidewater did not do so. Instead, Tidewater relied solely on the observations of Mr. Robertson. Mr. Portier did not see the Respondent on May 22. Captain Ryan did see the Respondent on May 22, but failed to note any indication of intoxication. Accordingly, although I conclude, based on the record before me, that the Respondent was asked by Tidewater to take a chemical test, I further find that Tidewater lacked, as a matter of law, the requisite “reasonable cause” to make this request. Therefore, I do not find that the Respondent refused to submit to chemical testing on May 22, 2004.

violated. While I have chosen to overlook this deficiency in this case, a properly plead Complaint would not be so inappropriately plead.

⁵ This section also refers to a suspected violation of 95.025, which clearly is not applicable here.

ORDER

IT IS HEREBY ORDERED that the administrative action against Respondent Clarence Marshall, Jr.'s Coast Guard issued licenses shall be dismissed and removed from the docket.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004.
(Attachment A).

Done and dated October 28, 2004
New Orleans, Louisiana


JEFFERY J. MASSEY
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD