UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. [redacted]
Issued to: Alan J. Kohajda

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2344

Alan J. Kohajda

This appeal has been taken in accordance with Title 46 United States Code 239(g) and 46 CFR 5.30-1.

By Order dated October 1982, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland revoked Appellant's seaman's document upon finding him guilty of misconduct.

The specifications found proved that while serving as ordinary seaman on board the SS PENNY under the authority of the above captioned document, while the vessel was at the Port of Tamatave, Madagascar, Appellant did:

(1) On or about 0500 on 11 Dec 1981, fail to perform his assigned duty of opening cargo hatches;

(2) On or about 0500 on 16 Dec 1981, fail to perform his assigned duty of opening cargo hatches;

(4) On or about 1300 and 1330 on 18 Dec 1981, fail to perform his assigned duty as gangway watch, and was discovered aft of the liverpool house out of sight of the gangway;

(5) On or about 0000 to 0050 on 25 Dec 1981, fail to perform his assigned duty as gangway watch;

(6) On or about 0230 and 0430 on 25 Dec 1981, fail to perform his duty as gangway watch in that he was found asleep in the

crew's messroom;

(8) On or about 30 Dec 1981, assault and batter with his fists the vessel's Master, and threaten to kill said Master;

(9) On or about 30 Dec 1981, assault the Chief Mate by threatening to kill him.

The hearing was held in Baltimore on 7 July and 14 September 1982. Appellant was present at the first session of the hearing and not present at the second session. He was represented at both sessions of the hearing by professional counsel, and pled not guilty to the specifications and to the charge of misconduct.

The Investigating Officer entered into evidence three exhibits and the deposition of Second Mate Tamul. Appellant testified in his own behalf at the first session of the hearing.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that specifications one, two, four, five, six, eight, and nine, and the charge were proved, and ordered revocation of Appellant's documents.

The Decision was served on Appellant on 5 October 1982. Notice of appeal was timely filed on 21 October 1982 and perfected on 14 January 1983.

*FINDINGS OF FACT*

From 11 December through 30 December 1981, Appellant served on board the SS PENNY as ordinary seaman under the authority of his document while the vessel was in the port of Tamatave, Madagascar.

On 11 and 16 December 1981, Appellant failed to carry out his assigned duty of opening cargo hatches.

On 18 December 1981, Appellant failed to perform his duty as gangway watch by being out of sight of the gangway.

On 25 December 1981, Appellant failed to perform his duty as gangway watch on three occasions, once by being late and twice by leaving his watch and going to sleep in the crew's mess hall.

On 30 December 1981, Appellant was found slumped in a chair in his room after failing to report for his 0800 duties. On deposition, Second Mate Tamul testified that Appellant was clammy, smelled of alcohol, and that his pupils did not respond to light.

The Third Mate, Chief Medical Officer Ed Turner, finally succeeded in arousing Appellant who, according to the testimony of Second Mate Tamul, was "jittery," "hyper" and "wobbling." Because of this, a search of Appellant's locker for the cause of his condition was deemed necessary.

After the Chief Mate obtained the key from him, Appellant pulled a concealed object out of his pocket. The object was subsequently identified as a Bic lighter. The Master, afraid that it might be a knife, reached for Appellant's arm. A struggle ensued. During the struggle Appellant threatened to kill the Master and the Chief Mate. The deposition of Second Mate Tamul indicates that Appellant struck the Master many times, and the logbook entry states he "struck at the Master twice."

Appellant was subdued, handcuffed, and tied with line by the Chief Mate and Second Mate with the help of others. The Second Mate stated that he had to hold Appellant's head to prevent him from banging it against the deck. Appellant was then moved to another room where he remained in handcuffs and a long chain that allowed him to move about. A doctor was called at an undetermined time on the morning of 30 December but did not arrive until 1600. The doctor, having examined Appellant, diagnosed his condition as "Nervosite," declared him unfit for duty and dangerous, and gave him an injection of Thorazine. Appellant was given daily shots of Thorazine and kept chained in the room until he was discharged, taken to the airport, and sent home on 5 January 1982.

The Official Logbook entry contained a detailed account of pertinent events that occurred on 30 December 1981. The entry was signed by the Master and Chief Mate. It was not read to Appellant; therefore, no response was recorded.

*BASES OF APPEAL*

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

1. The Administrative Law Judge erred in ruling that the entry in the Official Logbook of the SS PENNY for 30 December 1981 was made in substantial compliance with 46 USC 702 and established prima facie evidence of the events alleged.

2. The findings of the Administrative Law Judge with respect to specifications (8) and (9) were not supported by substantial evidence of a reliable and probative character as required by 46 CFR 5.20-95(b).

3. The order of the Administrative Law Judge revoking the documents of Appellant, was an overly severe penalty under the circumstances, amounting to arbitrary, capricious and excessive action.

APPEARANCE: Kaplan, Heyman, Greenberg and Belgrad, P.A. by Harriet E. Cooperman.

*OPINION*

I

Appellant urges that the log entry of 30 December 1981 offered into evidence and related to specifications eight and nine was not made in substantial compliance with 46 U.S.C. 702 and should not have constituted prima a facie evidence of the facts therein recited. I agree. 4l CFR 5.20-107(b) provides that:

> "An entry in an Official Logbook of a vessel made in substantial compliance with the requirements of 46 U.S.C. 702, in addition to being admissible in evidence, shall constitute prima facie evidence of the facts therein recited. However, an entry not made in substantial compliance with the requirements of 46 U.S.C. 702, while admissible in evidence, does not constitute prima facie evidence of the facts therein recited."

The Administrative Law Judge admitted into evidence the entry from the vessel's Official Logbook dated 30 December 1981 and concluded that it was prima facie evidence of the facts recited therein. This entry was not made in compliance with 46 U.S.C. 702 because Appellant was neither forwarded a copy of the entry nor was the entry read to him before the vessel's departure from port. The record indicates that Appellant was not in control of himself and was administered tranquilizing medication on 30 December for a condition called "nervosite". The Administrative Law Judge concluded that Appellant was incapacitated on that date and reading the entry to him would have been fruitless. Appellant was given medication and confined in a private, air-conditioned room from 30 December 1981 until 5 January 1982. He had access to a bunk, desk, shower, and toilet. He received 3 meals daily during this period. On 5 January 1982, he was signed off the ship and taken to the airport where he was permitted to fly from Madagascar to the United States unaccompanied. This indicates that he might have been able to understand the reading of the log entry. Appellant was unable to understand the reading of the log entry on 30 December 1981; there is insufficient evidence to support a finding that he remained in that state through 5 January 1982. Therefore,

substantial compliance with 46 U.S.C. 702 has not been established.

This conclusion, however, does not require dismissal. The Administrative Law Judge did not base his findings solely on the determination that the logbook entry constituted prima facie evidence of the facts recited therein. In the Decision and Order he stated:

> "[E]ven if the logbook entry was insufficient to constitute prima facie evidence and not in substantial compliance with Section 702, the corroborative testimony of Mr. Tamul, coupled with the entry itself, is enough to constitute substantial evidence of a reliable and probative character that the assault and battery of the Master by the respondent as alleged in the eighth specification did occur."

As with specification eight, the findings in specification nine were based on "the evidence as a whole" rather that the determination that the logbook entry constituted prima facie evidence.

IIa

Appellant urges that the findings of the Administrative Law Judge regarding specification (8), that Appellant wrongfully assaulted and battered with his fists the Master of the SS PENNY on 30 December 1981 were not supported by substantial evidence of a reliable and probative character, as required by 46 CFR 5.20-95(b). I disagree.

Appellant argues that the log entries were not being kept in the normal course of business, and were, therefore, not admissible as an exception to the hearsay rule. The objection is answered in 46 CFR 5.20-107(a) which states:

> "The Official Logbook of a vessel, or a duly certified copy of an entry made therein, shall be admissible in evidence, under authority of Title 28, U.S. Code, Section 1732."

The evidence received consisted of certified copies of pertinent pages of the vessel's Official Logbook. It was, therefore, admissible.

Appellant argues that certain discrepancies between the deposition and the logbook "raise extremely serious question concerning the credibility of this witness and the reliability of his testimony". He points to the following:

| *Logbook entry* | *Deposition* |
|---|---|
| Appellant struck at the master twice. | Appellant struck the Master many times. |
| Appellant produced key to his locker when ordered to do so. | Appellant's keys were not voluntarily surrendered, they were taken from him. |

In Appeal Decision no. 2302 (FRAPPIER), I stated:

> "It is function of the judge to evaluate the credibility of witnesses in determining what version of events under consideration is correct. Appeal Decision No. 2097 (TODD). The question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings will not be set aside on appeal. *O'Kon v. Roland 247 F.Supp. 743 (S.D.N.Y. 1965)*."

See also Appeal Decisions 2099 (HOLDER) and 2108 (ROYSE). The discrepancies noted were not significant, but instead were minor variations that could result when two witnesses are reporting the same event. The Administrative Law Judge's findings based on them are not unreasonable and will, therefore, not be disturbed.

Appellant also complains that the deposition was taken in the absence of the Administrative Law Judge, Investigating Officer, and Appellant. The deposition was, however, taken in accordance with CFR 5.20-140 and the order of the Administrative Law Judge. There was adequate notice given for the deposition and no objection to it was made by Appellant. It is sufficient that the individual charged is given the opportunity to personally interrogate the witness or have a representative do so in his behalf at the place where the deposition is taken, or submit cross-interrogatories for the witness to answer under oath. See Decision on Appeal Nos. 2115 (CHRISTEN) and 2170 (FELDMAN). There is no requirement that the Administrative Law Judge, Investigating Officer and Appellant be present at a deposition. Appellant's complaint in this regard is without merit.

IIb

Appellant contends that the findings of the Administrative Law Judge regarding specification nine, that Appellant assaulted the Chief Mate, were not supported by substantial evidence of a reliable and probative nature. I disagree.

An assault has been recognized by the Commandant to include an element of apprehension of harm coupled with the apparent present ability to inflict injury. Appeal Decision No. 2198 (HOWELL). The specification alleged that Appellant assaulted the Chief Mate by threatening to kill him. The issue is whether the necessary elements to constitute an assault existed at the time. Throughout the incident described by the logbook entry and the deposition, Appellant was continually battering the Chief Mate. Under these circumstances, it was reasonable for the Administrative Law Judge to conclude that the Chief Mate was placed in apprehension of further battery by Appellant's threat to kill him. The findings of the Administrative Law Judge regarding this specification are not unreasonable and will not be disturbed.

III

Appellant complains that the Order of the Administrative Law Judge is overly sever under the circumstances and exceeds that awarded in other cases and provided for in the Table of Average Orders. I disagree that the order is excessive.

The Administrative Law Judge is not bound by the Table of Average Orders found in 46 CFR 5.20.165 in determining an appropriate sanction. The regulation states that the table is provided for guidance only and is not intended to limit the orders of the Administrative Law Judge. I have previously held that:

> "...Since the Table is merely for guidance purposes, it would be folly to read more authority into its pronouncements than would be accorded by the Administrative Law Judge in a case. As I have stated before, the entry of an appropriate order is peculiarly within the discretion of the presiding Administrative Law Judge, absent some special circumstances....Thus an order of revocation may, in some circumstances, be entered even in the event of a first offense when deemed appropriate."

Decision on Appeal No. 2240 (PALMER). See also Decision on Appeal Nos 2313 (STAPLES) and 1585 (WALLIS).

The order in a particular case is peculiarly within the discretion of the Administrative Law Judge and, absent some special circumstance, will not be disturbed on appeal. I do not find this case to be one of special circumstance and will not disturb the Order.

*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 applicable regulations.

*ORDER*

The order of the Administrative Law Judge dated at Baltimore, Maryland on 1 October 1982 is AFFIRMED.

B. L STABILE
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C., this 28th day of March 1984.

***** END OF DECISION NO. 2344 *****

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