UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. redacted
Issued to: Fannie L. M. ROGERS

DECISION OF THE COMMANDANT ON APPEAL NO. 2289
UNITED STATES COAST GUARD

2289

Fannie L. M. ROGERS

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 23 September 1981, an Administrative Law Judge of the United States Coast Guard at Port Arthur, Texas revoked the seaman's document of Appellant, upon finding her guilty of misconduct. The specifications found proved allege that, while serving as a Steward/Utility on board USNS MAUMEE under authority of the document above captioned, Appellant (1) did on 18 January 1981 while said vessel was at sea, wrongfully assault with a dangerous weapon, to wit, a pair of scissors, a member of the crew, John M. Wilson; and (2) did on 12, 13, 14, and 15 January 1981 while said vessel was at sea, wrongfully refuse to perform her duties by "not turning to."

Appellant did not appear at the hearing. The Administrative Law Judge entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence nine documents including certified copies of official log entries of the USNS MAUMEE.

There was no defense.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and the specifications had been proved. Based on the seriousness of the assault charge, the table of average orders in 46 CFR 5.20-165 and the unanswered question of Appellant's mental instability, the Administrative Law Judge then entered an order to revoke the document issued to Appellant. The entire decision was served on 28 September 1981. Appeal was timely filed *pro se* on 30 September 1981 and perfected on 15 December 1981.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a Steward/Utility on board USNS MAUMEE, an American merchant vessel owned or operated by the U.S. Navy and acting under authority of her document.

The Appellant had been regularly, duly and personally served with notice of hearing and advised of her rights under 46 CFR 5.05-25(e) on 25 July 1981. Appellant was not present at the hearing scheduled on 25 August 1981 at 10:00 a.m. The hearing was held "in absentia," and the Judge entered a plea of not guilty on Appellant's behalf to the charge and specifications. In addition to the several documents introduced, two official log entries dated 15 January 1981 and 19 January 1981 were produced. They were accepted as prima facie evidence pursuant to 46 CFR 5.20-107(b). Pertinent parts of the 15 January 1981 official log entry state as follows:

> Fannie Rogers Stewards Utility reported to Chief Mate January 11th, 1981 at 0700 that at 1915 January 9th 1981, Friday, she had fell out of a chair while ship was rolling. Fannie Rogers worked the 10th Saturday, also the 11th Sunday. Monday morning 12th she didn't do her regular job serving the crew, didn't set up table properly or serve. Other persons had to do her job. She wouldn't do as directed by Steward and was wandering around doing strange things.

Tuesday 13th was a repeat of the 12th. I as master asked her how she felt. She said alright. I asked her why she didn't work then. Her reply was that she didn't feel like it. I told her that if she didn't turn to tomorrow the 14th that she would be logged. She said she didn't care. Wednesday 14 Fannie Rogers turned to in the morning with her regular duties. Things didn't go to bad until the evening meal. When I came back to eat the steward sent word he wanted to see me. Fannie set in the crew mess room eating her supper, not serving the crew. They were helping themselves and being served by others in the Steward department. I asked her why she wasn't working and she said I have to go get my jacket. She left but didn't return to her duties.

January 15th, today, Fannie didn't turn to for her morning meal. I went to her room and she is not going to work. I have been told by the Steward, Chief Cook and Galleyman she has been around all night pounding on their doors. Also she had her portholes open throwing things out. Fannie doesn't act seaworthy. She will be sent to doctor on arrival McMurdo, January 19th, for observation. For the above days not working there will be no monetary value. Placed Fannie L. M. Rogers' case to be turned over to U.S. Coast Guard for their judgement what to do about her seamans papers."

Pertinent parts of the 19 January 1981 official log entry state as follows:

"At 2000LT January 18th, 1981 latitude 70-10S longitude 175-28W I was called on the phone to come and get Fannie Rogers out of the chief engineer shower. I got my coat on and proceeded aft to get Fannie back to her room. When I got to the chief engineer's room Fannie was out in the passageway arguing with the chief engineer. After some discussion with Fannie I got her to go with me back down to her room. As I was coming out her door, Galley Utility, John M. Wilson [REDACTED], came up to me and handed me a paper. It was a formal complaint against Fannie for violence. [It stated:] At 1:15 p.m. January 18th; 1981 I was walking by Fannie's room and she called to me. I ignored her and went straight to my door. As I was unlocking it turned around and she was coming at me with a pair of scissors saying she was going to kill me.

I turned and ran. The wiper, Ruben Trevino [REDACTED] saw me coming with Fannie after me.

Master, after I read this complaint I took Fannie up to the ship's hospital and posted a 24 hour guard at the door. She is to be fed and kept there until we get to McMurdo in approximately two days. then she is to be sent to the doctor. Fannie doesn't want to do what she is told without an argument and she has been very successful at destroying government property.

The above violent act by Fannie Rogers against the Galley Man to be turned over to U.S. Coast Guard for their final decision on Fannie's papers which gives her the right to work on a ship not cause trouble and not do her job."

[The ship's log entries are quoted without grammatical changes.]

Both official logbook entries were signed by the maker and a witness. Appellant's responses were noted; however, Appellant refused to sign them.

Based on the official log entries, the Administrative Law Judge found that there was prima facie evidence to show that Appellant was guilty of misconduct and the specifications thereunder.

BASES OF APPEAL

This appeal *pro se* has been taken from the order imposed by the Administrative Law Judge. From Appellant's various letters, I have construed the following to be considered on appeal:

(1) Can additional evidence and an affirmative defense proffered after the hearing be considered part of the official record on appeal;

(2) Were the entries in the official logbook properly determined to be prima facie evidence; and

(3) Was the revocation order too severe?

OPINION

I

Appellant contends that additional evidence and an affirmative defense submitted after the hearing should be considered part of the record on appeal. Appellant's contention is without merit. Where Appellant had adequate hearing notice and did not appear to present evidence relative to the merits of the charge, Appellant waives her right to do so on appeal. See 46 U.S.C. 239(g); 46 CFR 5.30-1 and Appeal Decision No. 1752 (HELLER). In the instant case, the Administrative Law Judge notified Appellant on 25 July 1981 of the hearing to be held on 25 August 1981. Appellant neither appeared at the hearing nor perfected a request for a continuance at anytime prior to the hearing. Consequently, Appellant has waived her right to proffer additional evidence or an affirmative defense, and such additional matters will not now be made part of the record on appeal.

II

Appellant next contends that the entries in the official logbook were defective; therefore, the official log entries cannot be considered prima facie evidence.

Appellant's contention as to the inattention to duty specification is unfounded. According to 46 CFR 5.20-107(b), official logbook entries of a vessel are prima facie evidence of the facts related therein when they are in substantial compliance with the requirements of 46 U.S.C. 702. Pertinent parts of 46 U.S.C. 702 state as follows:

> "Upon commission of any of the offenses enumerated in 46 U.S.C. 701 an entry thereof shall be made in the official logbook on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any pot, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as

he thinks fit; and a statement that a copy of the entry has been furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner . . . ."

Because the offense is one enumerated in 46 U.S.C. 701 and the log entry was in substantial compliance with the procedural requirements of 46 U.S.C. 702, this official log entry is prima facie evidence of the offense recited therein. The official log entry is in substantial compliance with the requirements in 46 U.S.C. 702, because it was signed by the Master and ship's steward on 15 January 1981 and Appellant responded to the log entry by saying; "I don't have no reply to that . . . What can I say about that." See Appeal Decision No. 922 (WILSON). The fact that Appellant was not given a copy of the log entry or refused to sign the log entry after her response is not enough to make the entry defective. See Appeal Decision No. 1719 (EVANS). Because prima facie evidence exists to prove the inattention to duty specification, the finding of the Administrative Law Judge in regard to this specification will be affirmed.

The analysis with respect to the assault specification is different; however, I find that there is sufficient evidence of record to affirm the findings of the Administrative Law Judge.

On 18 January 1981, Appellant assaulted Galley/Utility John M. Wilson. The facts of this offense were entered in the official log and the entry was signed by the Master and a member of the crew on 19 January 1981. While this log entry is not automatically prima facie evidence because the offense is not one enumerated in 46 USC 701, IT IS, NEVERTHELESS, ADMISSIBLE EVIDENCE UNDER 46 CFR 5.20-107(A)as a business entry. The evidentiary weight to be given to such entries is determined separately in each case; however, they may constitute substantial evidence sufficient to support findings. See Appeal Decisions No. 2117 (AGUILAR) and 2133 (SANDLIN).

It is not necessary to remand the record to the Administrative Law Judge in every case where findings must be corrected. The law provides authority for the Commandant to alter or modify findings based on the record. See 46 U.S.C. 239(g), 46 CFR 5.30-10, and 46 CFR 5.35-15. Because the evidence in this case is all documentary, I am able to evaluate it. Consequently, and for the sake of administrative economy, the case will not be remanded and I will

alter findings as needed.

Upon examination of the record, I find that the 15 January 1981 log entry is consistent with the 19 January 1981 log entry. The incident on 18 January was an apparent continuation of Appellant's earlier strange behavior. Further, I note that Appellant did not dispute the entry when it was shown to her. Her response as recorded by the master was merely: "My reply is I said what you said. Let me say it my way."
Consequently, I find that the evidence in the record proves with substantial evidence of a reliable and probative character that Appellant assaulted Galley/Utility John M. Wilson on the date noted above.

III

Last, Appellant contends that the revocation order is too severe. On this point I concur.

Appellant's document was ordered revoked because the Administrative Law Judge considered this assault incident a very serious matter. While assault is a very serious matter, it does not always result in revocation. In order to substantiate a revocation sanction, the record must show that Appellant would be a continuing threat to safety of life or property at sea. See Appeal decision No. 2082 (JOHNSON) and 46 CFR 5.03-5.
There is not enough evidence to establish Appellant to be such a continuing threat. The bare assertions of the Investigating Officer that"...she was mentally incompetent," and the vague statements of the Master that "Fannie doesn't act seaworthy" are not sufficient evidence to establish continuing mental instability. Therefore, the revocation order is too severe.

CONCLUSION

I find that there is substantial evidence of a reliable and probative character to support the findings of the Judge regarding the charge and specifications. The offenses are of a very serious nature; however, a remedial order, other than revocation, is appropriate.

ORDER

The order of the Administrative Law Judge dated at Port Arthur, Texas on 23 September 1981, is modified to provide for an outright suspension of eighteen months instead of revocation. As modified the order is affirmed.

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

Signed at Washington, D.C., this 27th day of February 1983.

***** END OF DECISION NO. 2289 *****

Top