UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: John N. CREWS, Jr.

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2314

John N. CREWS, Jr.

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 April 1981, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, revoked Appellant's document, upon finding him guilty of misconduct. One specification found proved alleged that while serving as Bosun on board the SS SANTA LUCIA under authority of the document above captioned, on or about 2 November 1980, Appellant wrongfully assaulted and battered a fellow crewmember by striking him in the face with his fist. A second specification found proved alleged a simple assault on 3 November 1980 on another crewmember. Additionally found proved are four specifications of either wrongful absence or wrongful failure to perform duties, none of which exceeds one day in duration, between 23 October 1980 and 2 January 1981.

The hearing, in four sessions, was held at New York, New York on 12 January and 16 January 1981 and at Jacksonville, Florida on 30 January and 15 April 1981.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and to specifications one through five and of guilty to specification six alleging a wrongful failure to report for duty at 0800 and 1300, 2 January 1981 while the SS SANTA LUCIA was at anchor at Callao, Peru.

The Investigating Officer introduced in evidence eight exhibits and the deposition testimony of two witnesses.

In defense, the Appellant offered no documents or testimony although he did cross-examine the two deposition witnesses whose testimony was introduced by the Investigating Officer. He did not appear at the final session of the hearing. It was held in *absentia*.

At the close of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specifications one through five had been proved and that specification six had been proved by plea. He subsequently entered an order revoking all documents issued to Appellant.

The Decision and Order was served on 20 October 1981. Appeal was timely filed.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. No brief or memorandum containing authorities relied upon in support of the appeal has been received. In his letter of appeal, Appellant submits the following, set out of his own words, as assignments of error:

[1] "On page one (1), The Government admits confusion. Also, in the First Specification it was not noted that a launch service was available;

[2] Second Specification - That this was done in self - protection;

[3] Third Specification - Page two (2), Mr. Wiehl admits that he does not really know what happened;

[4] Fourth Specification - I was not wrongfully absent-Went ashore for Chief mate to buy brooms for longshoremen to clean holds;

[5] Fifth Specification - Chief Mate sent someone to my room to inform me that I did not have to return that afternoon;

[6] Sixth Specification - had day coming off as per agreement with Captain;

[7] Seventh Specification - Same day as the Sixth Specification - Clearly double jeopardy;

[8] Page three (3), Government combined Specifications 6 & 7. Although I pleaded guilty, it was because we were five (5) miles at anchor and I could not get back to inform the Chief mate that I was taking my day off;

[9] Page six (6) - A clear error on part of the Government;

[10] Page eight (8) - Any seafarer knows it takes 8 to 12 hours to transit the Panama Canal;

[11] Page nine (9) - The word *assuming* does not present proof;

[12] Page nine (9) - Mr. Penrose's statement is a lie under oath-I went to the mess hall first and was drinking water when he entered and walked up behind me. (See his own testimony that I slammed the door to his room prior to going to the mess hall). Mr Wiehl did not leave mess hall until after the incident;

[13] On page ten (10) - I was not intoxicated, (see Mr. Perez's statement). Mr. Wiehl said, *might* have touched his face. *Wasn't* assaulted by me;

[14] Page eleven (11) - *Pro*ves I was concerned about the hearing;

[15] Page twelve (12) - Clearly shows that the Investigating Officer was zealous and trying to put a feather in his cap."

APPEARANCE: Pro *se*

OPINION

I

The third, eleventh, fourteenth and fifteenth items constitute argument. They are Appellant's interpretation as to what the evidence shows. While it is proper to submit such argument to the Administrative Law Judge, it does not form the basis for relief on appeal. Unless the Judge's resolution of the facts is clearly unreasonable it will not disturbed on appeal. See Appeal Decisions Nos. 2097 (TODD), 2116 (BAGGETT), 2099 (HOLDER) and 2108

(ROYSE). Appellant had the opportunity to make argument at the hearing and chose not to. His failure is not reason for disturbing the findings of the Administrtative Law Judge.

II

The second, fourth, fifth, sixth, eighth, tenth, twelfth, and in part the first and thirteenth items are offers to give testimony. Appellant asks that this additional evidence, which was not presented at the hearing, be considered on appeal. He has failed to show why this evidence was not presented at the hearing, or why it should be considered now. The forum in which to present evidence is the hearing. When a person fails to do so after proper notice and later asserts he had evidence which would have helped his cause, he is too late. See Appeal Decision No. 1865 (RAZZI). My consideration of this case is limited to the evidence received at the hearing. See 46 U.S.C. 239(g), 46 CFR 5.30-1 and Appeal Decision No. 2289 (ROGERS).

III

The "confusion" which the Appellant refers to in his first assignment of error is the use of that word by the Administrative Law Judge in the preliminary statement of his Decision and Order. The statement reads:

> "In this case some confusion arises due to the fact that a total of three (3) charge sheets were served; the first on 25 November 1980, the second on 8 December 1980, the third on 19 January 1981. However, it has been removed that we are concerned with one charge of misconduct supported by seven (7) specifications which relate to Respondent's service as Bosun on board the SS SANTA LUCIA."

Any initial confusion was adequately resolved by the Judge and this assignment of error is without merit.

In Appellant's seventh item he asserts that his 5th Amendment guarantees against being twice put in jeopardy for the same offense were violated because the sixth and seventh specifications involved offenses of absence without authority occurring on the same day. The fact that two offense occurred the same day does not prevent charging both of them. At the arraignment, the Investigating Officer moved to combine the sixth and seventh specifications into a new amended specification six. Appellant objected to neither the amendment of the original specifications into a new specification six, nor the dismissal of specification seven. When arraigned on the amended specification Appellant's plea of not guilty was

accepted by the Administrative Law Judge after proper inquiry. Appellant's claim of error is without merit.

Concerning Appellant's ninth item, the record shows that the Investigating Officer offered into evidence Exhibit 9, a map of that portion of South America containing the city of Valparaiso. This exhibit was admitted without objection before the Administrative Law Judge realized that it was irrelevant to the issued in the case. In offering this exhibit the Investigating Officer apparently confused the city of Valparaiso with the city of Cristobal. The lack of relevance was almost immediately recognized by the Administrative Law Judge as demonstrated by his statement on the record. Exhibit 9 never became the basis of any of the findings in this case. Appellant suffered no prejudice because of its inadvertent admission into evidence.

IV

The Appellant's thirteenth item raises the issue of the sufficiency of the evidence to support the finding that he wrongfully assaulted a fellow crewmember, Thomas Wiehl, on 3 November 1980.

The test is whether the finding by Administrative Law Judge was based upon substantial evidence of a reliable and probative character supporting the required elements of the charge. Appeal Decision 2183 (FAIRALL). Additionally, the regulations at 46 CFR 5.20-95(b) require the quality of evidence necessary to support findings to be:

> "...evidence of such probative value as a reasonably prudent and responsible person is accustomed to rely on when making decisions in important matters. It is not limited to evidence which is considered to be competent evidence for the purpose of admissibility under the jury-trial rules."

A review of the records shows that the specific evidence relied upon was supplied by the sworn deposition testimony of the victim, Thomas Wiehl. Wiehl had an argument with the Chief Steward, Mr. Payne, after which he entered the mess hall and began muttering curse words about Mr. Payne. Appellant then came over and took Wiehl's plate of food from him. Wiehl left the mess hall and returned about fifteen minutes later. Appellant, who Wiehl believed to be intoxicated, again approached Wiehl, who was seated. Wiehl testified that Appellant said he could "whip my butt." At that instant, according to Wiehl, Appellant put his hand up to Wiehl's face, took off Wiehl's glasses with one hand, and "crunched them a little, sort of bent them up." In further testimony he

stated that the Appellant might have touched his face with his hand when he took off his glasses. In cross-examination of the witness by the Appellant it was established that the Appellant had approached him in an angry manner, took the glasses off his face and that Wiehl felt that he was going to be harmed. The testimony was uncontroverted.

Any unlawful touching of another or placing of another in apprehension of immediate harm constitutes an assault. The touching can be done with an object that touches the victim. In the instant case the touching of the victim's glasses which, in-turn, were touching the victim's face and head is sufficient. Additionally, there is unrebutted evidence that the victim was placed in apprehension by Appellant's remarks and simultaneous touching of his glasses. The record substantial evidence of a reliable and probative character that supports the finding of assault. It will not be disturbed.

V

Upon review of the entire record, including the Appellant's prior disciplinary record, and upon recognition of the fact that neither the offense of assault or assault and battery was aggravated, and that no injury was shown to have resulted therefrom, I am of the opinion that the sanction of revocation is too harsh in this case. Hence, I shall modify the order of revocation to one of suspension.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative character; however, the sanction is too severe under the circumstances.

ORDER

The findings of the Administrative Law Judge entered at Jacksonville, Florida on 23 April 1981 are AFFIRMED. The order of revocation of the Appellant's document is MODIFIED to seven months suspension plus five months of suspension on five months probation. The order of the Administrative Law Judge, as modified, is AFFIRMED.

J.S. GRACEY
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 23rd day of May 1983.

***** END OF DECISION NO. 2314 *****

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