UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-714 745
Issued to Stephen J. MINTZ

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

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Stephen J. MINTZ

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

By order dated 21 July 1981, an administrative Law Judge of the United States Coast Guard at Long Beach, California suspended Appellant's seaman's documents for two months, plus three months on nine months' probation, upon finding him guilty of misconduct. The specification found proved alleges that, while serving as Officer's Bedroom Steward on board the SS PRESIDENT McKINLEY under authority of the above captioned document, on or about 4 May 1981, Appellant wrongfully failed to perform his assigned duties by absenting himself from his duty station without permission at 1300 hours.

The hearing was held at Long Beach, California on 2 and 30 June 1981.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced four documents into evidence.

In defense, Appellant offered no evidence.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and one specification had been proved.
He then entered an order suspending all documents issued to Appellant for a period of two months plus three months on twelve months' probation.

The entire decision was served on 24 July 1981. Appeal was timely filed on 30 July 1981 and perfected on 8 June 1982.

FINDINGS OF FACT

On 4 May 1981, Appellant, while serving as Officer's Bedroom Steward on board the SS PRESIDENT McKINLEY and acting under authority of his captioned merchant mariner's document while the vessel was in the port of Naha, Okinawa, requested the afternoon off from his immediate superior, the Chief Steward. The request was refused because the Master of the vessel had noted certain deficiencies in Appellant's station which he wanted corrected. At 1300 Appellant failed to turn to and perform his assigned duties as required.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant raises twenty-two points and matters on appeal. He cites neither authorities not portions of the record which support them as required by 46 CFR 5.30-1(e). Most are irrelevant, immaterial or beyond the scope of this administrative appeal *pro*cess and are not addres*se*d. The remaining contentions are as follows:

1. the Coast Guard has overweighed, abused and stretched the prima facie evidence doctrine out of proportion;

2. Appellant's reply to a log book entry should be treated as prima facie evidence;

3. there was a criminal conspiracy between the

Administrative Law Judge, the Investigating Officer and the Commandant;

4. signing the shipping articles was illegal because no shipping commissioner was present;

5. the union collective bargaining agreement rather than the shipping articles should govern Appellant's conduct while aboard ship;

6. Appellant was entitled to a free transcript at any time during a hearing that he chose and the Administrative Law Judge erred in denying him one during the hearing;

7. the Administrative Law Judge erred in not dismissing the charges because the Investigating Officer refused to subpoena certain witnesses.

APPEARANCE: Stephen J. Mintz, pro se

OPINION

I

Appellant's first contention is that the Coast Guard has overweighed, abused and stretched the prima facie evidence doctrine out of proportion. Appellant argues further that the Coast Guard's self promulgated and self serving prima facie evidence formula is not conclusive and incontrovertible. Whether Appellant is attacking the validity of the regulation or its application to the facts, his attack has no merit.

A regulation that was duly promulgated according to law is entitled to a presumption of validity. Decision on Appeal No. 1999 (ALT and JOSSY). Appellant has offered no evidence that the regulation, 46 CFR 5.20-107(b) was improperly promulgated. Even if he had offered such evidence, this administrative proceeding is not the proper forum to litigate the validity of a regulation. Decisions on Appeal No. 2202 (VAIL) and 2203 (WEST).

the regulation was correctly applied to the facts. The Administrative Law Judge, after ruling that the log entry admitted

into evidence during the government's cas-in-chief established a prima facie case in accordance with 46 U.S.C. 702, correctly explained to Appellant that the burden of going forward was shifted to him. While the burden of proof is always on the government, the establishment of a prima facie case by the government shifts the burden of going forward to the respondent. See Decisions on Appeal No. 2242 (DUNCAN) and 1651 (CROCKETT). a log book entry made in substantial compliance with 46 U.S.C. 702 constitutes prima facie evidence of its truth and imposes upon the seaman a burden of going forward with the evidence. 46 CFR 5.20-107(b). *Keller v. United States*, 273 F.Supp. 945 (D.Va. 1967). See also *Roeder v. Alcoa SS Co.* Inc., 422 F.2d 971 (3rd Cir. 1970). Even a logbook entry that establishes a prima facie case is not incontrovertible in that it may be rebutted. However, the Administrative Law Judge correctly applied his rule as set forth in the regulation. I find no error here.

II

Appellant also argues that his reply to the log book entry which was also set forth in the log book should be treated as prima facie evidence and require the Investigating Officer to come forward in rebuttal. I do not agree.

The rule is, although a log book entry made in substantial compliance with 46 U.S.C. 702 constitutes prima facie evidence of the facts recited therein, a seaman's reply thereto is not elevated to the level of prima facie evidence. Decision on Appeal 1861 (WASKASKI). Appellant's reply as set forth in the log book is "...the charges against me are pretextual and discriminatory if not completely erroneous and are to be considered under protest..."No facts were stated in the reply. Appellant's reply is not prima facie evidence except of the fact that it was made. It may, of course, be considered as evidence by the Administrative Law Judge and weighed as he deems appropriate. Decision on Appeal 2295 (AMOURY).

III

Appellant further argues that the log entry is untrustworthy and that there is a criminal conspiracy between the Administrative

Law Judge, the Investigating Officer and the Commandant. He does not cite to portions of the record or offer any other evidence to support the existence of such a conspiracy. Examination of the record reveals no evidence supporting Appellant contentions. Government officials such as the Administrative Law Judge and Coast Guard officials are presumed to perform their jobs properly unless the contrary is shown.

IV

Appellant argues that the signing of the shipping articles for a foreign voyage is illegal since no shipping commissioner was present as required by 46 U.S.C. 565. I do not agree, 46 U.S.C. 546 authorizes the master of any vessel to perform the duties of shipping commissioner when engaging seaman in any district where no shipping commissioner is appointed. Since no district has an appointed shipping commissioner at this time, a Master may sign seamen on and off a vessel and generally perform the function of a shipping commissioner. See 44 Fed.Reg.70155 (1979).

V

Appellant argues that the collective bargaining agreement between the Seafarers International Union (SIU) and American President Lines takes precedence over the shipping articles. A seaman is bound by legally constituted articles of agreement and may not fail to obey or refuse lawful orders during the existence of the obligation. Decision on Appeal 2150 (THOMAS) and 46 CFR 5.03-20. Appellant cannot use the collective bargaining agreement as a shield to prevent remedial action against his document when he decides to violate his obligations under the law while in the service of a vessel under articles.

VI

Appellant's next argument is that he is entitled to a free transcript at any time during the hearing that he chooses. In support of this he cites U.S. v. *FULLER*, 330 F. Supp 303 (S.D.N.Y., 1970). This contention is without merit.

The question in *FULLER* differed from the case at hand.

FULLER concerned furnishing a free copy of the transcript to a respondent or his counsel whenever it is produced. At the time of Appellant's request there was neither a transcript nor a requirement that one be created. Therefore, the Administrative Law Judge did not err in denying Appellant's request to transcribe the record. The regulations do not provide for a record of hearing to be transcribed or for a transcript to be furnished unless an appeal is taken in accordance with the regulations. See 46 CFr 5.30-1(c) and 33 CFR 1.25-30(b)(4).

I note that the record indicates that Appellant was making his own tape recording of the proceeding. Therefore, even if Appellant had been entitled to a transcript, he was not prejudiced by the denial.

VII

Finally, Appellant contends that the refusal to issue subpoenas constituted a criminal obstruction of justice. There is, however, no evidence of a criminal obstruction of justice. Although, the subpoenas requested by Appellant should have been issued by the Investigating Officer the proper remedy was dismissal of the related specification. Since this was done it was not error for the Administrative Law Judge to proceed without these witnesses.

On 25 May 1981, the Investigating Officer visited Appellant's vessel, the SS PRESIDENT McKINLEY, to investigate a stabbing incident and view the vessel's official logbook. No charges were preferred against Appellant at that time. On 26 May 1981 Appellant visited the Eleventh Coast Guard District Office at Long Beach, California presented a letter requesting that subpoenas be issued to the Master and Chief Steward of the SS PRESIDENT McKINLEY. The letter was left with the secretary of the District Commander and Appellant was referred to the Marine Safety Office. At the Marine Safety Office, Appellant spoke with the Investigating Officer and asked that he issued subpoenas for the Master and Chief Steward before the ship sailed prior to the hearing. The Investigating Officer refused and then served the charges on the Appellant. In requesting the two witnesses Appellant stated that they were key witnesses and would testify about the discrepancies in his work station alleged in the first specification which was ultimately

dismissed. The Investigating Officer gave as his reasons for refusing: (1) his investigation was completed, and (2) he felt that it was an abuse of discretion to subpoena the Master of a vessel still underway for a hearing a weeks later when depositions would be sufficient. There is evidence that the Investigating Officer made no inquiry concerning the availability of the witnesses, but rejected Appellant's request out of hand.

Here the specification about which the two witnesses sought would have testified was dismissed. Appellant agreed to proceed without their testimony after this specification was dismissed but renewed his request after another specification was found proved. Appellant admitted that their testimony was not relevant to the specification found proved or the circumstances surrounding it. He also agreed that their testimony would be adverse to him but insisted on their presence to testify about the circumstances surrounding the specification which had been dismissed.

Among the rights accorded a person charged is that of having witnesses and other relevant evidence subpoenaed. denial of this right without adequate justification will require reversal. Decision on Appeal 2209 (SIEGELMAN). See also 5 U.S.C. 555 (d), 46 CFR 5.15-10(a) and 46 CFR 5.20-45(a)(2). A person charged must have the opportunity to present relevant evidence in his defense. Decision on Appeal No. 1309 (RAYMON). However, subpoenas for witnesses may be limited to those whose testimony is shown to be, or is likely to be relevant to the issues at hand. Decision on Appeal No. 2309 (CONEN); 46 CFR 5.15-10. The Investigating Officer's reasons for denying the witnesses were not sufficient since the record indicates that their testimony would have been relevant to the first specification. Nevertheless, the dismissal of the specification concerning which they would have testified eliminated any prejudice which would have resulted.

CONCLUSION

There was substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. Appellant received a hearing that was fair and conducted in accordance with the applicable regulations. He was not prejudiced by the absence of requested witnesses since the specification about

which they would have testified was dismissed.

ORDER

The order of the Administrative Law Judge dated 21 July 1981 at Long Beach, California is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast guard
Vice Commandant

Signed at Washington, D.C., this 4th day of October 1983.

***** END OF DECISION NO. 2328 *****

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