

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-284083
LICENSE NO. 427801
Issued to: MICHAEL KAY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2032

Michael Kay

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1, now 5.30-1.

By order dated 31 October 1974, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman documents for two months outright plus four months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Chief Mate on board the United States SS TRANSHURON under authority of the license and document above captioned, on or about 3 February 1974, Appellant wrongfully deserted the said vessel at the port of Honolulu, Hawaii.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence various documents including the vessel's log entry concerning the incident, and the testimony of one witness.

In defense, Appellant offered in evidence the deposition of the Captain of the vessel, overtime sheets from the voyage, a copy of his medical records, and his own testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents issued to Appellant, for a period of two months outright plus four months on 12 months' probation.

The entire decision and order was served on 4 November 1974. Appeal was timely filed on 15 November 1974.

FINDINGS OF FACT

On 3 February 1974, Appellant was serving as Chief Mate on board the United States SS TRANSHURON and acting under authority of his license and document while the ship was in the port of Honolulu, Hawaii.

Early that morning, the day the vessel was to sail on a foreign voyage, Appellant stated he was sick and was getting off the vessel. The Master warned Appellant that if he left the vessel it would constitute desertion. However, shortly before sailing time, on 3 February 1974, Appellant left the vessel with his gear and license.

On shore, Appellant was unable to gain admittance either to a U.S. Public Health Service Hospital (USPHSH) or a military service hospital for treatment of an asserted severe diabetic condition. Appellant did not seek private medical attention. On 4 February 1974, Appellant flew to San Francisco, but did not report to the hospital until the next day. Appellant was not admitted as an inpatient the hospital but was rather referred to the outpatient department to report on 14 February 1974 for treatment.

When the vessel departed Hawaii on 3 February 1974, Appellant was not on board and he was logged as a deserter.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

- (1) the union contract superseded and overshadowed the Shipping Article;
- (2) the testimony of the vessel's Master is not credible and should be disregarded; and
- (3) the Appellant was justified in quitting the vessel.

APPEARANCE: Jennings, Gartland and Tilly, San Francisco, California; John Gary Warner, Esq.

OPINION

I

Appellant's argument that the union contract superseded and overshadowed the Shipping Articles is without merit. While Commandant's Appeal Decision [1862 \(GOLDEN\)](#) recognized that a union agreement may be incorporated by reference into a shipping agreement, that decision continued:

"If it is to be incorporated, common sense dictates that a copy of the agreement must be attached in a timely fashion to each and every set of articles to which the agreement is to apply."

There is no evidence that the union agreement was ever made a part of the Shipping Articles, by reference, rider, or otherwise. To inquire whether a particular rider is valid first requires a finding that there was a rider in the Shipping Articles. See Norris, *The Law of Seamen*, 3rd Ed., 106. In the instant case, since the union agreement was not made a part of the Shipping Articles, any inquiry into the union agreement's validity, or the Appellant's alleged reliance upon it, is unnecessary and irrelevant.

II

Appellant's assertion that the Master's testimony is not credible and should be disregarded also fails. While I may review the credibility of a deposition witness' testimony, I have held that when the Administrative Law Judge's evaluation of deposition testimony's credibility is influenced by corroborative evidence, I would not arbitrarily reject the Judge's evaluation. Appeal Decision [1980 \(PADILLA\)](#). Since the Master's log entry makes out a prima facie case of desertion (*In Re Thomas W. Kellar*, 1967 A.M.C. 2368 (E.D.Va. 1967)), and since the testimony of the Third Mate substantially corroborates the Master's testimony and log entry, I conclude that the Administrative Law Judge's evaluation of the Master's credibility should not be disturbed. Further, allegations of the ship being an unhappy one, the Master being intoxicated, or the turnover of personnel do not go to the issue of credibility, but more properly concern the defense of justification.

III

Appellant's contention that he was justified in quitting the vessel is not supported by the evidence. Once the Appellant was entered in the ship's log as a deserter, he had the burden of showing he was wrongfully entered as such. *Kellar*, supra. Appellant has failed to sustain his burden. Prior to signing Articles of Engagement on 21 January 1974, Appellant was declared fit for duty. Before he quit the vessel, he never claimed he was ill, injured, or diabetic, nor did he ever inform the Master of same. Appellant did not attempt to convey his condition to a Coast Guard officer who was on board the vessel (albeit for an unrelated purpose) at the time he quit the vessel. He appeared to be physically fit, as evidenced by the amount of overtime he worked without complaint. Finally, when he quit the vessel he was able to forego medical attention for two days, and then was only scheduled for outpatient treatment for a week later. Also, even though being warned that his quitting the vessel would be entered as desertion, Appellant still did not convey his asserted illness to the Master, nor did he obtain a medical certificate.

Appellant's allegations that the ship was an "unhappy ship" in a bad state of maintenance and repair, that the Master was intoxicated, and that there was a tremendous turnover of personnel,

should have been communicated to the Coast Guard officer on board the vessel at port. Certainly, as Chief Mate Appellant should have been aware of his responsibilities in this regard. His failure to report these difficulties and attempt to have them corrected provides questionable support for justification for desertion.

CONCLUSION

I therefore conclude that all the circumstances surrounding Appellant's quitting the vessel militate against a finding that the desertion was justified. There is substantial evidence to support a finding that the Appellant deserted his vessel before the termination of his engagement, without justification.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 31 October 1974, is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 15th day of September 1975.

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