UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: Gary Neal METCALFE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2038

Gary Neal METCALFE

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 25 April 1975, an Administrative Law Judge of the United States Coast Guard at Port Arthur, Texas, revoked Appellant's seaman documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as an Able Seaman on board the SS SAN ANTONIO under authority of the document above captioned, on or about 23 April 1975, Appellant did wrongfully commit assault and battery on a member of the crew, Joseph M. Kelly.

At the hearing, Appellant elected to act as his own counsel, with some assistance from the Beaumont-Port Arthur National Maritime Union Port Agent, Joseph Patton, and entered a plea of guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of four witnesses.

In defense, Appellant offered in evidence the testimony of one witness and his own testimony.

At the end of the hearing, the Judge entered an oral order revoking all documents issued to Appellant. He then served a written decision and order in which he concluded that the charge

and specification had been proved.

The entire written decision and order was served on 5 May 1975. Appeal was timely filed.

FINDINGS OF FACT

On 23 April 1975, Appellant was serving as Able Seaman aboard the SS SAN ANTONIO and acting under authority of his Merchant Mariner's Document while the ship was in the port of Port Arthur, Texas, at all times pertinent to this case.

On 23 April 1975, at approximately 6:45 P.M., Appellant and his roommate Joseph M. Kelley had an argument. Due to the intensity of the argument the Appellant invited Kelley to come down to the dock to settle the matter. The two men went out to the dock and continued to argue and agitate each other but no altercation took place.

Kelley returned to the ship. Appellant went to the mess hall followed shortly by Kelley. When Appellant saw Kelley, he used profanity and continued to agitate him. Appellant stated to Kelley, who is black, that, "I'm going to make a white man out of you." Kelley responded by saying "oh, forget about the whole thing."

Kelley went into the pantry to prepare coffee, which was part of his duty for the next watch. Present in the mess hall was Boatswain Phillip Pacettie, who noticed that Appellant was visibly upset and angry. The boatswain told Appellant to calm down and have a cup of coffee. Also present in the mess hall was deck maintenance man Robert H. Reed. Moments later Appellant followed Kelley into the pantry, which is a room about 5 feet in width with enough room for two men to walk by each other without touching. The coffee pots are located on a range where they are heated.

As Kelley faced the Appellant, the Appellant took a swing at Kelley,but missed hitting him. Kelley then grabbed Appellant and tussled with him. During this moment of wrestling, the Appellant deliberately grabbed a pot of hot coffee and hit Kelley on the left side of his head with the pot. Kelley then pushed the coffee pot back toward Appellant, causing the coffee pot's contents to fall on Kelley's left shoulder area, burning him. As the coffee pot was being pushed back at Appellant, Appellant was also burned around his upper chest and under his right arm pit.

During the struggle, Kelley wrestled Appellant to the deck and struck Appellant several times. The Maintenance man Reed pushed

Kelley aside and pushed Appellant into the mess hall. While Appellant was in the mess hall, he suddenly pulled a folding pocket knife from his pocket, opened it and threatened to kill Kelley. The Appellant also made the remark that he would kill Kelley in Kelley's sleep. The Boatswain then ran to report this incident to the Master. No further struggle ensued between Appellant and Kelley.

BASES OF APPEAL

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

(1) The Appellant was deprived of Due Process of Law in that he was not represented by counsel, given inadequate notice of the hearing thereby not given the opportunity to prepare and conduct an adequate defense, and unable to give conscious and informed waiver of right to counsel.

(2) Appellant did not commit assault and battery but was engaged in mutual combat with a crew member.

(3) The penalty imposed upon the Appellant was unduly severe and not warranted.

APPEARANCE: Paul D. Bekman, Esq., Law Officers Kaplan, Heyman, Engelman & Belgrad, Baltimore, Maryland 21201

OPINION

I

The first argument made by Appellant was that Appellant was deprived of due process of law in that he was not represented by counsel, is without merit. Appellant was fully advised of his rights to be represented by counsel of his choice by the Investigating Officer and again by the Administrative Law Judge. In addition, Appellant consulted his union representative. Nevertheless, Appellant's choice was to proceed without legal counsel.

The argument concerning inadequate notice of the hearing given to Appellant thereby not giving him an opportunity to prepare and conduct an adequate defense must also fail. Appellant states on the record that he was ready to proceed with the hearing and would represent himself. He further stated that he had no preliminary motions or objections. The purpose of convening the hearing within

a very short time (one day) after the incident is, *inter alia*, in order to preserve the testimony of the witnesses while the incident is still clear in their minds. This, plus the fact that four of the witnesses were from the SS SAN ANTONIO and the ship was due to sail the afternoon of 25 April 1975, was significant. In *APPEAL DECISION* 1525 (BRENNAN)& the Commandant, citing previous decisions, said: It has been determined that it is sufficient notice for Appellant to appear and request a continuance to prepare his defense if he is given notice the day before (Commandant's Appeal Decisions Nos. 1423 and 1453), or even an hour before (Commandant's Appeal Decision No. 1468), the hearing begins. Hence, it would have been proper to proceed with the hearing in this case on (the day after service of notice)."

Appellant argues further that he was unable to give conscious and informed waiver of right to counsel. This is also without merit. Appellant relates his inability to give conscious and informed waiver of right to counsel in connection with the the injuries sustained by Appellant, that this, serious first degree burns and head injuries. Appellant's physical condition was such, as the record indicates, that his comprehension and mental ability were not impaired so as not to comprehend the gravamen of the hearing or to "give conscious and informed waiver of right to counsel." The comment that Appellant makes, ". . . my brain is going around in circles, your honor," is one from being nervous, as Appellant indicates, from ". . .a Coast Guard hearing, . . ." The record does not support the Appellant's contention that his election to proceed without counsel was not "conscious and informed".

II

In the Appellant's second point of appeal, Appellant argues that he did not commit assault and battery, but instead was engaged in "mutual combat" with a crew member. The record clearly indicates the testimony of the Boatswain who testified that Appellant followed the crew member into the pantry despite the crew member's request to be left alone.

The "mutual combat" argument is one of semantics. However, it can be ascertained from the testimony of the witnesses, even though somewhat conflicting, that substantial evidence was given to indicate the altercation was not an agreed struggle. The simple fact of the location of the altercation, i.e. the pantry, in and of itself prevents reaching a conclusion as presented by Appellant. There was a finding of a clear-cut case of assault and battery with

injury, wherein Appellant was found to be the aggressor.

III

Appellant's third and final point of argument, that the penalty imposed upon the Appellant was unduly severe and not warranted, has some merit. Grave acts of misconduct such as assault and battery are taken very seriously, which in this case led to the revocation of Appellant's document. Furthermore, the promotion of safety of life at sea and the welfare of individual seamen must always be of paramount concern to the Coast Guard in making these decisions. The lack of self restraint can and frequently does lead to serious consequences especially when the offense is assault and battery.

46 CFR 5.20-165 and Table 5.20-165 provide guidelines for penalty assessments for violations. This regulation is by no means controlling in all cases, but should be given every consideration in rendering a decision.

Many of the suggestions made by Appellant why the order of revocation should be vacated are without merit, and if Appellant's document is to be returned it must be based on reasons which justify this conclusion.

Table 5.20-165 lists Assault and Battery as a Group E offense. It further indicates that the time between offenses is not to have any bearing when considering whether the man is a repeater. The average order listed for a first offense is six (6) months suspension with no period of probation, and for a second offense, revocation.

Appellant was issued his original document in October 1966. Reviewing his record, we find that in San Diego, California, on 29 July 1969, he was given a warning for attacking a crew member on board the SS THUNDERBIRD. On 10 August 1970, in Los Angeles, California, he was warned again for using undue force in defending himself against an attack by a crew member on the SS GREEN MOUNTAIN STATE. On 2 June 1971, his document was suspended in San Francisco for two months outright and three months on 24 months probation for failure to perform and directing threatening language to the Master on the SS LEADER.

Nothing is known from the record concerning Appellant's prior offenses involving personal combat except that in each a warning was given and charges were not served. The order issued in the present case is by no means an abuse of discretion by the Administrative Law Judge, particularly since this was not

Appellant's first assault and battery offense. However, upon comparison of the facts in this case with those in prior Appeals Decisions, it is my opinion that a suspension of Appellant's document for twelve months outright and twelve months on twelve months probation is a more appropriate order.

CONCLUSION

I conclude that the charge and specification in this case have been proved by substantial evidence, and that the findings of the Administrative Law Judge should be supported. Appellant was not denied his right to Due Process of Law in the conduct of these proceedings. However, the order should be modified in view of prior decisions.

ORDER

The findings of the Administrative Law Judge made at Houston, Texas, dated 5 May 1975, are Affirmed. The order, made at Port Arthur, Texas on 25 April 1975, is MODIFIED to provide for a suspension of twelve months outright, plus twelve months on twelve months probation, and, as MODIFIED, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 30th day of September 1975

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