

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1092 656
Issued to: John I. RAMIREZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2040

John I. RAMIREZ

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

By order dated 9 January 1975, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman documents for six months outright upon finding him guilty of misconduct. The specifications found proved allege that while serving as an oiler on board the SS HAWAIIAN LEGISLATOR under authority of the document above captioned, on or about 28 October 1974, Appellant did.

FIRST, wrongfully Assault and Batter by beating a member of the crew, namely, 3rd Assistant Engineer Gilbert D. Quinn, and.

SECOND, wrongfully fail to perform his assigned duties by reason of intoxication.

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

The Investigating Officer introduced in evidence the testimony

of six witnesses and twelve exhibits. The substance of the testimony of two witnesses for the Coast Guard was stated for record and entered upon stipulation by the parties.

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

The substance of what would be the testimony of one witness for Appellant was reduced to writing and entered into evidence upon stipulation by the parties.

At the end of the hearing, the Judge rendered written decision in which he concluded that the charge and both specifications had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of six months outright.

The entire decision and order was served on 14 January 1975. Appeal was timely filed on 11 February 1975.

FINDINGS OF FACT

On 28 October 1975, Appellant was serving as an oiler on board the SS HAWAIIAN LEGISLATOR and acting under authority of his document while the ship was in the port of Honolulu, Hawaii. Appellant stood a watch which commenced at 1600 and was scheduled to end at 2400. Also on watch were a fireman and a Third Assistant Engineer, Darrell M. Gibson, who was in charge of the watch from 1600 until 2400.

During his watch Appellant left the engine room for periods of ten to fifteen minutes approximately every half hour until 1720 when he left for lunch. He remained away from the engine room for approximately one and one-half hours at his lunch break. Appellant admits that during this break he consumed the equivalent of a double shot of whiskey. Appellant obtained the whiskey from his locker in his room on board the vessel.

When Gibson admonished Appellant following the latter absence, Appellant responded, "Don't tell me what I can do." For emphasis,

Appellant "thumped" Gibson on the chest with his finger. Appellant was angry, unhappy, and in Gibson's words, "brewing for a fight."

Gibson phoned the Chief Engineer, Robert B. McDonald, and advised him that Appellant was using abusive language. The Chief Engineer came to the engine room and spoke to Gibson and then to Appellant. McDonald found that Appellant smelled of alcohol and was behaving in a boisterous and demanding manner. This behavior was contrary to Appellant's usual soft, polite demeanor. McDonald arranged for Appellant to be relieved of the watch because McDonald did not believe appellant could perform his duties. Appellant was relieved of his watch shortly after 1900.

At approximately 1930 Harry Eugene Edmunds, Appellant's relief as Oiler on watch was sent by Gibson to wake Gibson's relief, Gilbert D. Quinn. Edmunds observed that Quinn, who had been ashore on this date, was intoxicated. Edmunds was unsure that Quinn would get up. At approximately 2005, Edmunds returned to Quinn's quarters to wake him again. Quinn was not there, but Edmunds saw blood in the room.

While Quinn was dressing in preparation to relieve the watch, Appellant entered his quarters, cursing and kicking. Quinn did not know the cause for this commotion. Appellant struck Quinn in the face and mouth. While Quinn attempted to wash the blood from the injuries resulting from this striking. Appellant followed him, picked up a plastic bucket, and struck him above the left eyebrow and then on the left ear. The bucket, although plastic, was constructed with a sharp ridge where the side joined the bottom. The bucket, entered into evidence, was well covered with blood.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that the Judge erred in refusing to exclude a prospective witness from the hearing room and subsequently allowing that witness to appear on behalf of the Coast Guard, allowing a second witness to testify after he had sat through the presentation of the Coast Guard's case, conducting much of the examination in chief of the Coast Guard's witnesses, including substantial leading examination, and allowing the Coast

Guard to call four surprise witnesses. Appellant also urges that the findings of the Administrative Law Judge are contrary to the evidence.

APPEARANCE: David C. McClung, Esq., Honolulu, Hawaii.

OPINION

I

At the Commencement of the hearing Appellant requested that Mr. Robert Howard, an agent for the Marine Engineers Beneficial Association, be excluded from the hearing room. Upon assurance by the Investigating Officer that there was no possibility that any union agents would be called to testify, the Judge permitted Mr. Howard to remain in the hearing room. During the hearing Mr Howard was permitted to testify as a witness for the Coast Guard. His testimony was limited to the matter of the authenticity of photographs being entered into evidence. He was called to testify only after Appellant objected to the lack of proper foundation for admission of the photographs into evidence. Although 46 CFR 5.20-60 provides for the exclusion of all witnesses from the hearing room, absent a showing of specific prejudice failure to exclude a prospective witness is not ground for reversing a decision. Appeal Decision [1388 \(VINCENT\)](#). Mr. Howard was permitted to testify only to a very limited matter collateral to the main issue. The need for his appearance was not anticipated by the Investigating Officer, who did not recognize the need for establishing a proper foundation for the photographs. As clearly stated by Judge Wilkes at the hearing, it is necessary to permit latitude on the strict rules of evidence in these proceedings. 46 CFR 5.20-95(a). These hearings are to be regulated and conducted "in such a manner as to bring out all the relevant and material facts." 46 CFR 5.20-1 (a). Permitting the testimony of Mr. Howard was not prejudicial to Appellant and does not constitute reversible error.

II.

Similarly, permitting the testimony of Mr. Walter Nomura, who had been present in the hearing room, for the sole purpose of laying a proper foundation for admitting a bucket into evidence is

not reversible error by the *Administrative* Law Judge. The Investigating Officer did not anticipate calling Mr. Nomura as a witness. The witness was called only after Appellant objected to the introduction of the bucket into evidence. The matter to which Mr. Nomura testified was collateral to the main issues before the judge. No specific prejudice to Appellant has been shown to have resulted from the witness' presence during the hearing.

III.

"At any time a witness is on the stand he may be questioned by an administrative law judge." 46 CFR 5.20-90 (a). This authority in the judge is necessary if he is to perform his duty, stated above, to bring out all the relevant and material facts. I find that in questioning the witness Judge Wilkes was merely carrying out the responsibilities placed upon him by the regulations governing these proceedings. The Judge acted properly in clarifying for the record that testimony which had been presented previously. The Appellant claims that the Judge used leading questions in the interrogation of the witness. The examples given in Appellant's brief fail to demonstrate error prejudicial to Appellant.

IV.

Appellant urges that the Administrative Law Judge committed grave prejudicial error in allowing four surprise witnesses to testify on behalf of the Coast Guard. The Investigating Officer had informed the Appellant that he only intended to call one witness, Mr. Quinn. Implicit in Appellant's argument is a claim of a right to discovery. "The APA contains no provision for pre-trial discovery in the administrative process and, of course, the provisions of the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings." Davis, *Administrative Law Treatise* 8.15. No right to discover the names of witnesses is contained in the statutory authority for these proceedings nor in the implementing regulations. The Investigating Officer had no legal obligation to inform appellant of the names of all witnesses to be called. Furthermore, Appellant was not left without recourse when the unexpected witnesses were called to testify. He could have requested a continuance to prepare for the unexpected evidence. If difficulties were anticipated due to the impending

departure of the witness' ship from Honolulu, a continuance until the vessel returned to that port could have been sought. Although Appellant objected to the Judge permitting the witnesses to take the stand, he sought no continuance. All the unexpected witnesses were cross-examined by Appellant. I find that Judge Wilkes properly permitted all witnesses to testify.

V.

Appellant attacks the evidence as insufficient to support a finding that he failed to perform due to intoxication. Appellant admits that he drank a glass of whiskey during his watch. Witnesses testified that he smelled of liquor and acted in a boisterous and demanding manner contrary to his usual soft, polite demeanor. That Appellant had a grievance concerning assignment of duties aboard the vessel does not detract from the above evidence of his condition. The finding of intoxication is supported by "substantial evidence of a reliable and probative character." 46 CFR 5.20-95 (b). Appellant's failure to stand watch under these circumstances was his own fault. Appeal Decision [1772](#) (McDERMOTT). The findings of the Judge on this issue are affirmed.

VI.

Appellant also attacks the sufficiency of the evidence supporting the assault and battery specification. There is no question that Quinn was intoxicated on the evening of 28 October 1974. However, although it is proper to consider his state of intoxication at the time the events at issue transpired, it is not necessary to totally discount the credibility of a witness due to that intoxication. Appellant's alternative theory of the cause of Quinn's injuries fails to take into account the presence of the blood stained bucket. Having been relieved of his watch, appellant had the opportunity to commit the alleged offense. His conduct and attitude displayed in the engine room toward the engineering officers on the vessel would logically extend to the officer scheduled to be in charge of the second half of Appellant's scheduled watch. I find that the Judge had "substantial evidence of a reliable and probative character" to support his findings.

CONCLUSION

The Administrative Law Judge committed no prejudicial error in his conduct of the hearing. The record contains sufficient evidence to support his findings.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 9 January 1975, is AFFIRMED.

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

Signed at Washington, D. C., this 17th day of October, 1975.

INDEX

Assault (including battery)

Failure to perform duties

Injuries attributable thereto

Intoxication, proof of as circumstantial evidence

Evidence

Admin. Proc. Act, does not require pretrial discovery

Fed. Rules of of Civil Proc., not applicable

Rules of, liberally construed

Examiner

Examination of witness by, permitted

Failure to bar witnesses from hearing during other testimony,
not grounds for reversal

Failure to Perform Duties

Intoxication as cause

Investigating Officer

Discovery, pretrial, Admin. Proc. Act does not require

Expected witnesses, no duty to divulge prior to hearing

Misconduct

Assault within definition

Failure to perform duties due to intoxication

Witnesses

Examiner's duty to insure full examination

Presence during other testimony, not grounds for reversal
absent showing of prejudice

Questioning of by Examiner

Surprise alleged, I.O. not required to reveal expected
witnesses prior to hearing

***** END OF DECISION NO. 2040 *****

[Top](#)