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

DECISION OF THE COMMANDANT

2068

Isiah REED

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 22 December 1975, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a messman on board the United States SS DEL SOL under authority of the document above captioned, Appellant on or about,

(1) 28 September 1975, did wrongfully fail to turn to while the SS DEL SOL was in the foreign port of Matadi, Zaire, Africa;

(2) 8,9,10,11,12 and 13 October 1975, did wrongfully fail to turn to while the SS DEL SOL was in the foreign port of Port Harcourt, Nigeria, Africa;

(3) 13 October 1975, did wrongfully fail to join the SS DEL SOL in the foreign port of Port Harcourt, Nigeria, Africa.

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

The Investigating Officer introduced in evidence certified

copies of the official log book, and an extract from the Shipping Articles.

In defense, Appellant offered in evidence copies of statements and other documentary material.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and three specifications had been proved. He then served a written order on Appellant revoking all documents, issued to Appellant.

FINDINGS OF FACT

On 28 September 1975, Appellant while serving as a messman on board the United States SS DEL SOL and acting under authority of his documents while the ship was in the port of Matadi, Zaire, Africa, went ashore without permission and failed to turn to for his scheduled duties.

On 30 September 1975, Appellant, after an evening of drinking at Boma, Africa, returned to the SS DEL SOL and was accosted by the 3rd Mate with a knife. This assault became the subject of a separate Coast Guard investigation.

Appellant, on 5 October 1975, requested repatriation from Port Harcourt, Nigeria, Africa, alleging fear for his life. The request was denied by the Master and on 8 October 1975, Appellant left and sought assistance from port authorities. The Maritime Superintendent accompanied Appellant back to the ship and discussed the situation with the Master, the 3rd Officer and the Purser. The Superintendent recommended that Appellant be repatriated to his home port because of poor relations between him, the Master and other crewmembers. The recommendation was not followed. Appellant subsequently left the ship and was logged for failure to turn to October 8 through 13, 1975, and for failure to join October 13, 1975.

Upon Appellant's arrival in the United States he was hospitalized from 28 October 1975 to 24 November 1975, for treatment of malaria at the USPHS Hospital in New Orleans, Louisianna.

BASES OF APPEAL

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

(1) The Administrative Law Judge did not provide assistance

as required by 46 CFR 5.30-1(g).

(2) The hearing was incomplete and denied Appellant due process as the Administrative Law Judge failed to call essential witnesses for the Appellant.

(3) The Administrative Law Judge abused his discretion by failing to order a medical examination for the Appellant on learning he had contacted malaria while in Africa.

(4) Appellant's prior record did not justify revocation.

(5) The first specification should not stand since Appellant in good faith believed that his membership in the Seaman's International Union permitted him a day's leave.

APPEARANCE: C. James Hicks, Ltd., A Professional Law Corporation, New Orleans, Louisiana, by C. James Hicks

OPINION

I

Appellant first argues that the Administrative Law Judge failed to sufficiently assist him in the preparation of his appeal as required by 46 CFR 5.30-1(g). The regulation is cited as providing for the Appellant to be assisted "beyond the point of informing him of the proper form to be used and the applicable regulations" of his appeal. This is an incomplete quotation of the regulation and misconstrues its meaning. The regulation reads in full, "[i]n the preparation of an appeal *neither* the Investigating Officer *nor* the Administrative Law Judge will assist the Appellant beyond the point of informing him of the proper form to be used and the applicable regulations." (Emphasis added) The Judge fully complied with this regulation. The Appellant was provided with copies of the written opinion, and of 46 CFR 5.30-1 and 5.30-3 to assist him in the preparation of his appeal. Due process was satisfied by this notification to Appellant of his right to appeal, his right to counsel, and the procedures to be followed in perfecting his appeal. No further assistance was appropriate or required by statute or regulation.

II

Appellant maintains that at the time of the hearing he did not know the whereabouts of witnesses for his defense and was not in a

position to know. Consequently he infers that the Judge should have located and called as witnesses persons who could testify to substantiate Appellant's version of the assault on him by 3rd Mate. This position is untenable. When Appellant was served with the charge he was fully informed of his right to have witnesses and relevant evidence subpoenaed for the hearing. (TR-6) Appellant could have ascertained the whereabouts of relevant witnesses using due diligence and have them subpoenaed. The fact that Appellant failed to avail himself of this opportunity did not impose an obligation upon the Judge to provide Appellant with his own witnesses.

Appellant contends that the specification of failure to join was not provided at the hearing. To the contrary, entry into evidence of the log book page citing Appellant for failure to join established *prima facie* proof of the charge. Decision Numbers, 1079,1082,1083,1364 and 1727. Appellant's reliance upon National Transportation Safety Board EM-4, *1694 (KUNTZ)* is misplaced. That case involved questions on proof of desertion. Desertion however, is a distinct offense from failure to join and requires proof of intent. The log book entry plus Appellant's acknowledgement that he was not on the vessel when it left Port Harcourt, Nigeria, sufficiently established failure to join.

III

The Administrative Law Judge found the three specifications proved on the basis of the log book entries. This is in accord with the general rule that entries made in substantial compliance with 46 U.S.C. 702 are considered *prima facie* proof of the offense cited therein and may be used substantively as an exception to the hearsay rule. Decisions Numbers 1079, 1082, 1083, 1364, and 1727.

At the hearing Appellant did not deny the charges contained in the 2nd and 3rd specifications. However, he did raise an affirmative defense and it is pressed here on appeal. He alleges a fear for his life caused by the 3rd Mate cutting him with a knife and threatening to kill him. Appellant failed to fully testify to this incident at the hearing and the Judge concluded that an assault had not been proven. (D & O-11) However, I disagree and find the evidence was sufficient to show an assault. Written copies of oral statements made by Appellant to the Purser and to the United States Coast Guard investigator fully describing the incident were admitted into evidence by the Administrative Law Judge. This evidence was never questioned or contradicted by the Investigating Officer, who indicated during the hearing, that the

Coast Guard knew about the assault case and had documents concerning it. (TR-9) Therefore, while Appellant has shown by a quantum of the evidence that an assault did take place, I concur with the Judge's conclusion that this evidence was still insufficient to provide a legal justification for Appellant's failure to turn to and failure to join.

In 1265 (SCKOROHOD), a remarkably similar case, where the Appellant was threatened by a fellow crewmember, the general rule of law applicable to a defense of fear for life was stated as, "...there must not only be a genuine fear of at least grave bodily injury but also `reasonable cause' for such fear in order to leave the ship and it is not sufficient that this fear exists if there is not adequate justification for it." Even viewing the evidence in the light most favorably to the Appellant, it does not support a finding that the Appellant was reasonably justified in his fear.

Appellant has shown that on 30 September 1975, on board the SS DEL SOL he had one altercation with the 3rd Mate. During the quarrel the 3rd Mate threatened to kill Appellant if he did not pay a ten dollar debt and did, in fact cut Appellant's pant leg with a knife. After Appellant paid the debt, the 3rd Mate ceased his threats. Later that same evening when Appellant returned with the Chief Mate another brief quarrel ensued, with the 3rd Mate kicking and breaking Appellant's glasses. There were no further threats to kill the Appellant. Nor was the Appellant alleged that any other incidents took place from September 30 to October 8, over a week from the altercation. Even should there be persuasive proof that Appellant had a genuine fear for his safety, this fear was not based upon a reasonable cause. As in *SCKOROHOD, supra*, one threat made by a fellow crewmember to whom Appellant acknowledged he owed a debt was sufficient provocation for Appellant over a week later, to fail to turn to and to subsequently fail to join. Appellant is bound "to stand by the ship and obey the Master until the voyage be done, unless she come to such a pass as to be dangerous to human life." *The Condor* 196 Fed. (D. C. N. Y. 1912).

V

Appellant argues that the Judge abused his discretion by failing to order a medical examination when evidence was presented showing Appellant was treated for malaria upon his return to the United States. In support of this contention Appellant cites National Transportation Safety Board EM-8 and Appeal Number 1706 (OWENS). In this case Owens had consistently cited a mental condition to the Captain as the reason for his failure to perform. Subsequent to the original hearing additional medical evidence was

obtained tending to show Owens was schizophrenic and paranoid. On the production of this new evidence, illuminating an issue which had been previously been raised, the National Transportation Safety Board remanded the case for further review. The present case is clearly distinguishable since the log book shows that Appellant never mentioned his illness to the Master as excusing his failure to perform. Nor was illness invoked as a defense at the hearing to any of the specifications. Appellant's belated attempt to raise the issue is totally speculative and inappropriate on appeal. No evidence has previously been presented showing that Appellant's illness in any way contributed to his failure to perform his duties or his failure to join the ship. In 1977 HARMER when the Appellant tried to raise issues of mitigation on appeal it was stated, "[t]he decisions of the Commandant which recognize and reiterate the principle that matters in defense will not be considered when initially presented on appeal are too numerous to list."

VI

In regard to the first specification, Appellant asserts his good faith belief that Section 70 of the Seaman's International Union Agreement permitted him a day's leave. Nonetheless it is well settled that a Master has absolute authority over his vessel and that the Shipping Articles supersede a Union agreement. See 2032 (KAY), 1862 (GOLDEN), 1674 (DOCKENDORF), 1095 (GARRETT et. al.), and 1008 (KLATTEMBErg).

Appellant concedes that he knew the Master's permission was required and contends that it was given. (TR-9) However, the log book entry for 28 September 1975, shows Appellant was absent without permission. (Investigating Officer's Exhibit 2) Appellant's good faith defense is without merit since it appears he did not rely solely on his Union membership for his days leave but first requested the Master's permission. The Judge chose to believe the report contained in the log book rather then the Appellant and determined permission had not been granted. Absent arbitrariness or capriciousness his decision must stand.

VII

Appellant asserts that revocation of his document is too harsh a penalty. The Judge conceded that had Appellant not had a prior record revocation would have been inappropriate. However, he found Appellant had demonstrated a continuing and unabated tendency to ignore shipboard rules of discipline and to reject the responsibilities of shipboard employment. Since 1946 Appellant has been disciplined twelve times. Contrary to Counsel's assertion

that Appellant has served "faithfully as a seaman since 1971" (Brief at 5), Appellant was admonished in 1973 for failure to perform,only two years before the present charge. Prior to that he had been admonished twice and suspended ten times with five periods of probation.

On appeal, Appellant attempts to distinguish the cases relied upon by the Judge in ordering revocation. In 1439 (COE) and National Transportation Safety Board Order No. EM-26, *Bender v. Winborne* both Respondents were on probation at the time of the final charge and revocation. However, since Appellant presently is not on probation from a prior offense he urges that revocation is inappropriate. This distinction is without substance. Revocation does not depend upon probation as a condition precedent. It is based instead upon a review of a seaman's cumulative record. As noted in *COE*, where the seaman had a prior record consisting of eight failures to perform, "[c]lemency will not be granted in view of the unusual number of offenses of the same nature now under consideration and Appellant's prior record shows a pattern of misbehavior which amply justifies revocation of his document. His irresponsibility is a continuing threat to the safety of life and property at sea which can no longer be tolerated.

Appellant relies on the Table of Average Orders to support his contention that revocation is too harsh a penalty for this offense. However, 46 CFR 5.20-165(a) specifically provides that "The Table...is for the information and guidance of Administrative Law Judges. The orders listed for the various offenses are average only and should not in any manner affect the fair and impartial adjudication of each case...." In addition it has consistently been held, as noted in 2002 (ADAMS), "[t]he degree of severity of the order is a matter of peculiarly within the discretion of the Administrative Law Judge and will be modified on appeal only upon a clear showing that it is arbitrary or capricious." Appellant's record clearly supports the Judge's order for revocation. His offenses since 1946 have included eleven instances of absence without leave, eleven cases of failure to perform, three offenses of failure to join, and one offense of failure to obey an order, creating a disturbance and possession of intoxicants. In the past Appellant has been treated with great leniency. He has been suspended where his record would have supported a revocation. Appellant has failed to heed the warnings and take advantage of the opportunities offered him for reform. The order for revocation will not be modified,

CONCLUSION

There is reliable evidence of a sufficient and probative nature to affirm the finding of the Administrative Law Judge that

Appellant failed to turn to for his duties on 28 September 1975 and on 8, 9, 10, 11, 12, 13 October 1975 and failed to join on 13 October 1975.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 22 December 1975, is AFFIRMED.

O. W. SILER
ADMIRAL, U. S. COAST GUARD
COMMANDANT

Signed at Washington, D.C., this 2nd day of August 1976.

INDEX

Not Binding

Union Agreement
Does not supersede shipping articles

Witnesses
Failure to request summons of

***** END OF DECISION NO. 2068 *****

Top