

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-524182
Issued to: Edwin R. Holder

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2099

Edwin R. Holder

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 30 July 1976, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for three months outright plus three months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved alleges that while serving as an "oiler" on board the United States SS MORMACPRIDE under authority of the document above captioned, on or about 17-18 October 1975, Appellant:

- (1) wrongfully failed to perform his duties from 2000 to 2400 hours due to intoxication while the vessel was in the port of New York,
- (2) wrongfully failed to properly perform his duties from 0800 to 0830 hours by making false entries in the engine room oiler's log sheet while the vessel was at sea, and
- (3) wrongfully assaulted and battered a licensed officer, to wit, the Third Assistant Engineer, C. Ferneza, with a

dangerous weapon, to wit, a clipboard, while the vessel was at sea.

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

The Investigating Officer introduced in evidence the testimony of three witnesses and the three documentary exhibits, including relevant extracts from the official log book, and the medical log book of the MORMACPRIDE.

In defense, Appellant testified in his own behalf.

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

The entire decision was served on 12 August 1976. Appeal was timely filed on 24 August 1976.

FINDINGS OF FACT

On 17-18 October 1975, Appellant was serving as an "oiler" on board the United States SS MORMACPRIDE and acting under authority of his document both while the ship was in the port of New York and at sea.

On 17 October 1975, Appellant was standing the 2000 to 2400 hours watch as "oiler", under the direction of the third assistant engineer, Mr. C. Ferneza, while the vessel was being made ready for departure from the port of New York. At approximately 2100 hours the Third Assistant Engineer observed the Appellant standing on the maneuvering platform and manipulating the main engine throttle. Operation of the throttle was beyond the scope of the duties of the Appellant, as he was not trained nor licensed as an engineer. The Appellant was verbally reprimanded by the Third Assistant Engineer for his conduct. During this encounter, the Third Assistant Engineer detected the smell of liquor on the Appellant's breath. He also noted that the Appellant spoke with a slurred speech

pattern and was unstable in his movements. The existence of these physical manifestations was substantiated by the observations of other crew members. Due to his condition of intoxication, the Third Assistant Engineer ordered the Appellant to leave the watch.

The Appellant returned to the engine room for the 0800 to 1200 hours watch on 18 October 1975. As part of his assigned duties, the Appellant was to make hourly checks of the over forty temperature gauges in the engine room and to record these temperatures on the "oiler's temperature log sheet". At approximately 0830, Mr. Ferneza, who was serving as engineer on the watch, observed Appellant making entries on the forms for temperature readings for the 0900 and 1000 hours "rounds". Appellant testified that advance entry of temperature readings was a customary practice for the oiler/firemen on the MORMACPRIDE, and that this practice in no way affected the observance of his duty of "making the rounds" at the appropriate times. He further testified that if he detected deviations in the actual readings from the recorded readings, then the proper changes were made in the oiler log upon completion of the round. The Third Assistant Engineer was aware that this practice of making advance entries was being followed by the Appellant, having observed him doing so on at least six different occasions. Mr. Ferneza had never previously attempted to correct Appellant's performance in this respect, his stated reason for restraint being that he was newly assigned to the ship and that the practice was accepted by the other engineers serving on board. (See transcript at p. 55). However, on this particular occasion the Third Assistant Engineer corrected the Appellant by directing him to make the entries in the log "on the hour," when actually observed, while making the rounds.

Shortly thereafter, the Appellant struck Mr. Ferneza with a clipboard which held the temperature log sheets. The blow caused a laceration on the Third Assistant Engineer's forehead which required subsequent medical treatment. The Appellant was not struck by Mr. Ferneza and did not sustain any injuries during this brief melee. The incident was not observed by two other crew members who were on duty in the engine room at that time. The Master of the MORMACPRIDE conducted a subsequent shipboard investigation regarding the incident and concluded that the altercation was initiated by the Appellant. This conclusion was entered in the ship's log.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the evidence presented at the hearing was insufficient to prove the three specifications of the charge of misconduct.

APPEARANCE: Phillips and Cappiello, New York, New York, by Sidney H. Kalban.

OPINION

I.

Appellant argues that in adjusting the engine throttle, he was following a practice which he had maintained since joining the ship and that, therefore, his action cannot be construed as misconduct. He further states that there was no factual showing that he was intoxicated on 17 October 1975. I disagree with both of these allegations. The frequency of occurrence of past undetected (and therefore uncorrected) hazardous procedures has no bearing on a finding of misconduct once these actions are discovered. The incidence of past errors does not license perpetuation of the errors in the future. Neither does it absolve a party of the consequence of present misconduct.

Appellant is not licensed as an engineer. Operation of the throttle is a procedure which requires the expertise of a person trained as a shipboard engineer. In adjusting the throttle in the absence of the engineer on watch, the Appellant was performing in a capacity for which he was not trained. Conditions of extremis or emergency, which would have justified his conduct, did not exist. The officer supervising the engine room watch stated that he was unaware that the Appellant had made throttle adjustments at previous times, and further testified that it was not a customary shipboard practice to allow the "oiler" to operate the throttle. The Administrative Law Judge accepted this testimony as fact, and I find no reason to overrule this factual determination.

Operation of the engine throttle by untrained personnel is an

inadvisable procedure which could jeopardize the safety of the ship. The Administrative Law Judge did not make a factual finding as to whether the Appellant had the practical experience necessary to operate the throttle. But, without specific instruction by the engineer of the watch to adjust the throttle, I must presume that he did not. However, I need not decide whether this conduct will support a finding of failure to perform due to intoxication. There is no dispute that the Appellant was ordered out of the engine room by the Third Assistant Engineer after this encounter, and that he therefore did not complete his assigned watch. Of the essence then is why was this order given? If the Appellant were intoxicated, then he was the cause of his failure to stand the watch, and this in itself would constitute failure to perform a duty. There is sufficient evidence to support the factual finding that Appellant was intoxicated while on watch. Appellant does not argue any other reason for his dismissal. Two witnesses testified at the hearing to the effect that the Appellant displayed physical manifestations of inebriation. The Appellant testified himself that he had a few drinks earlier in the day. The Administrative Law Judge found the Third Assistant Engineer's dismissal of the Appellant from the watch to be justified. There is sufficient evidence upon which to base this finding.

While the Appellant may suffer from a speech impediment which causes him to "slur" his words, as is argued, the fact that he was under the influence of alcohol at the time of his dismissal is substantiated by other evidence. The absence of an entry in the ship's log regarding this incident is not determinative of whether or not it, in fact, occurred. Commandant Appeal Decision [1646](#) (Williams). The first specification was proved.

II.

There is no dispute regarding the fact that the Appellant made advance entries in the oiler's temperature log before actually observing the various temperature gauges on his hourly rounds. These gauges are safety devices which provide advance warning of engine room conditions which threaten the security of the ship. Proper monitoring of these devices is a necessary safety precaution which must be strictly observed. Hourly observation of the gauges is not enough. There must be a means whereby current temperatures can be compared to past readings in order that major fluctuations

from the norm will be noticed. Despite Appellant's experience, it is doubtful that he can make an accurate recollection of the readings of over forty different gauges after completion of a round, as he testified. The readings should be recorded when they are made. Advance entry of the temperature readings is a procedure which should be discouraged by the ship's officers. In this case it was not.

The Third Assistant Engineer testified that he was aware that the Appellant often made "oil log" temperature entries before the rounds had been made. Yet before the incident at hand, he never corrected the Appellant for following this practice. By remaining silent, this officer gave acquiescence to a potentially hazardous shipboard practice followed by one of his subordinates, and in doing so was as culpable as was the oiler, perhaps even more so. The supervisory officer of the engine room watch has a responsibility to instruct the seamen in proper safety precautions. Since this was not done, Appellant's actions in making advance entries in the oiler's temperature log cannot be construed to be a failure to properly perform his duties.

The specification in question alleges that the Appellant made "false" entries in the oiler's log book. However, no evidence was presented to show that the advance entries differed from the actual temperature readings at the specified time. Without this evidence, there is no showing that the entries were false. Therefore, the second specification was not proved, and the findings of the Administrative Law Judge are reversed to this extent.

III.

Appellant argues that he was defending himself from an attack initiated by the Third Assistant Engineer when he struck this officer. The Third Assistant Engineer testified that after he gave the Appellant a verbal admonishment regarding the oiler book notations, the Appellant committed an unprovoked battery on him. The Third Assistant Engineer was injured. The Appellant was not. There were no other witnesses to the altercation. Essentially, the factual dispute was decided by the rejection of the testimony of one witness and the acceptance of the testimony of another. Questions of credibility of witnesses are within the sole province

of the fact finder. Resolution of issues of credibility by acceptance of the testimony of a witness will not be disturbed on appeal absent overwhelming evidence that the testimony of the witness was inherently incredible. Commandant Appeal Decision [1831](#) (Creer). I find no such evidence on review. The Appellant has offered no theory as to why the Third Assistant Engineer would make an assault upon him. Appellant's argument of self defense is therefore rejected. The Third specification was proved.

CONCLUSION

The test for review of an Administrative Law Judge's decision is whether there is substantial evidence to support the Judge's findings. Commandant Appeal Decision [1796](#) (Garcia). There is substantial evidence that the Appellant was unable to perform his duties due to intoxication and that he committed a battery upon an officer of the MORMACPRIDE. Both of these offenses were serious acts of misconduct by the Appellant, but the latter is the most reprehensible. A deliberate attack on a ship's officer is a grave offense, which was aggravated in this case by the fact that the officer was performing his duties while on watch at the time.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 30 July 1976, is AFFIRMED as modified.

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

Signed at Washington, D. C. this 26th day of April, 1977.

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