UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 446670 and
MERCHANT MARINER'S DOCUMENT (REDACTED)
Issued to: Michael W. WITTICH

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2163

Michael W. WITTICH

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 7 June 1978, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, after a hearing at Jacksonville, Florida, on 30 May 1978, suspended Appellant's license for a period of 6 months on probation for a period of 12 months upon finding him guilty of misconduct. The single specification of misconduct found proved alleges that Appellant, while serving as second assistant engineer aboard CAROLE G. INGRAM, under authority of the captioned documents, did, on or about 25 May 1978, while in the service of CAROLE G. INGRAM and while on board the INGRAM's tow, the barge IOS 3302, which was at anchor in the St. John's River, Jacksonville, Florida, wrongfully assault and batter by paushing down onto the sand locker of said barge, a member of the crew. to wit AB Armando RODRIGUEZ.

At the hearing, Appellant represented himself. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced into evidence the testimony of two witnesses and seven documents.

In defense, Appellant introduced into evidence his own testimony.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of suspension for a period of 6 months on probation for 12 months.

The decision was served on 12 June 1978. Appeal was timely filed on 30 June 1978, and perfected on 7 September 1978.

FINDINGS OF FACT

On 25 May 1978, Appellant was serving under the authority of his duly issued license and merchant mariner's document as second assistant engineer aboard the tug CAROLE G. INGRAM. While on board that vessel's tow, the Barge IOS 3302, which was anchored in the St. John's River, Jacksonville, Florida, Appellant overheard a discussion between the Chief Mate and an able bodied seaman named RODRIGUEZ. Without invitation, Appellant entered into this conversation which shortly developed into an argument between Appellant and RODRIGUEZ. Suddenly, and without warning, Appellant shoved RODRIGUEZ backwards. RODRIGUEZ's back or shoulder struck the sand locker, a storage structure located on the main deck of the barge. He then fell to the deck. RODRIGUEZ immediately stood up and dared Appellant to strike him again, but Appellant merely walked away. This terminated the incident. Shortly thereafter, RODRIGUEZ was hospitalized for two days with injuries diagnosed as "soft tissue trauma, right knee and back area."

BASIS OF APPEAL

This appeal has been taken from the Decision and Order of the Administrative Law Judge. In essence, Appellant urges one ground for appeal, that he was acting in self-defense when he shoved RODRIGUEZ.

APPEARANCE: *Pro se*.

OPINION

At the outset, I must agre with Appellant's objection to the following statement in the opinion of the Administrative Law Judge, "[f]rom the difference in size between RODRIGUEZ and WITTICH, (RODRIGUES, 5 foot, 10 inches, weight 170, as against WITTICH, 6 foot, 2 inches, 230 pounds), I find it rather difficult to imagine RODRIGUEZ initiating this altercation." Inferences as to who might have initiated an altercation are not properly based upon an observation as to differences in size. "What counts is not

necessarily the size of the dog in the fight it's the size of the fight in the dog." Dwight D. Eisenhower, Address to Republican National Committee, 31 January 1958. Although erroneous in nature, this opinion of the Administrative Law Judge does not require reversal of this decision.

It is undisputed that Appellant, with both hands, did push AB RODRIGUEZ into the sand locker causing injury to the latter. It is also undisputed that at no time did RODRIGUEZ *actual*ly touch Appellant. What Appellant argues is that the Administrative Law Judge erred by disregarding Appellant's testimony that he was put in reasonable fear of being struck by RODRIGUEZ and that the shove he administered constituted a gesture of self-defense only. The record contains sufficient evidence of a reliable and probative character to support a finding that Appellant's shove was unjustified, and legally unprovoked. It was not, in an objective sense, made in self-defense. Even if Appellant's argument that "RODRIGUEZ's words combined with his menacing, threatening, and irrational behavior led me to believe that he was going to *attack* me and cause me physical harm," were to be accepted, his position would be no better. "[T]he only real provocation which justifies the use of force is an actual attack leaving the victim with no other means of defense except the use of force." (emphasis added) Decision on Appeal No. 1975. There was no actual attack by RODRIGUEZ nor does it appear that Appellant could not have broken off the argument and safely walked away before pushing RODRIGUEZ, rather than afterwards. If even the "mere belief that another, no matter how well one knows the other or his type of person, may be reaching for a weapon, does not justify initiative action of battery," (Decision on Appeal No. 1803) then Appellant's action certainly was not justified. Despite Appellant's firm belief that he was acting only in self-defense, his action must be considered that of an aggressor, not that of one entitled reasonably to defend himself. Hence, the charge and specification are proved.

ORDER

The Order of the Administrative Law Judge, dated at Jacksonville, Florida, on 7 June 1978, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 6th day of Sep 1979.

INDEX

***** END OF DECISION NO. 2163 *****

Top