UNITED STATES OF AMERICA
UNITED STATES COAST GUARD v.
MERCHANT MARINER'S DOCUMENT NO. Z-295807
and LICENSE NO. 421837
Issued to: Martin FELDMAN

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2170

Martin FELDMAN

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 7 April 1977, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for six months, plus a further six months on twelve months' probation, upon finding him guilty of misconduct. The specifications found proved allege that while serving as third mate on board the United States SS MAYAGUEZ under authority of the document and license above captioned, on or about 21 March 1976, Appellant wrongfully failed to perform duties in connection with undocking the vessel because of intoxication and engaged in mutual combat with a member of the crew at Subic Bay, and, on 22 March 1976, wrongfully failed to stand a sea watch because of intoxication.

The hearing was held at Long Beach from 9 September 1976 to 25 March 1977.

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 witnesses, voyage records of MAYAGUEZ, and depositions.

In defense, Appellant offered in evidence his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of six months plus six moths on twelve months' probation.

The entire decision was served on 12 April 1977. Appeal was timely filed and perfected on 21 October 1977.

FINDINGS OF FACT

On 21 and 22 March 1976, Appellant was serving as third mate on board the United States SS MAYAGUEZ and acting under authority of his license and document while the vessel was proceeding to sea from the port of Subic Bay, Philippine Republic. While at station for unmooring the vessel Appellant wrongfully engaged in physical combat with an unlicensed crewmember.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that the evidence does not support the findings of fact.

APPEARANCE: Kessler and Drain, Los Angeles, California, by James G. Korsen, Esq.

OPINION

I

Certain puzzling features of this case must be noted before an ultimate disposition may be made.

The first involves the use of a deposition of a witness, George L. Zintz, Jr. When it was offered in evidence objection was raised on the grounds that it had been taken without proper notice to Appellant. the objection was overruled, the deposition was admitted into evidence, and it was so marked. It was never formally withdrawn nor was it excluded in any way until findings were announced. After oral findings and after Appellant's prior record had, as a consequence, been properly received, the Administrative Law Judge advised Appellant's counsel that the deposition of Zintz had not been admitted into evidence. When counsel suggested that this fact might have altered his stand on the entire record he was told that this should be reserved for an appeal. The initial decision states only that the deposition of the witness Zintz was not admitted into evidence.

The initial decision also makes a finding that "the words `assault and batter' alleged in the third specification are found not proved and the words `engage in mutual combat with' are substituted therefor." This too is misleading since it overlooks the fact that, when the Investigating Officer rested his case, the Administrative Law Judge on his own motion and without explanation amended the specification to that effect so that "assault and battery" had in fact disappeared as a subject of findings.

II

The use of official log book entries on this record also merits some attention. The rule has been made clear in these proceedings that an official log book entry made in substantial compliance with the statutes constitutes a *prima facie* case of the facts recited therein and that an entry which may not comport substantially with the statutory requirements may still meet the standards of substantial evidence, sufficient as a basis for findings in an administrative proceeding.

In this case Administrative Law Judge evaluated the official log book entry only as having "served as corroborating evidence of the testimony of the Master, the Chief Officer and the Ordinary Seaman Ferguson." With the value of the entry so reduced there is no need to inquire whether the evidence is "substantial" but one is alerted to looking closely at all the circumstances.

Corroboration is a form of external support for the credibility of other evidence. Generally speaking, a written record is useful in evidence in lieu of the direct testimony of a witness and, if the witness is available otherwise, hearsay may be corroborative of the eyewitness testimony if it is part, for example, of the *res gestae*; that is, the fact that the witness said or was seen to do something at the time of an event may tend to corroborate his direct evidence of what occurred. Under such consideration, the log entry provided here is far from corroborative.

The entry was not made until three days after the happening recorded and it is a product, naturally, of the same sources as testified on the record of hearing. The Administrative Law Judge specifically declared on the record that the "delay" in the making of the entry was because of a dispute over who would pay the chief mate's overtime, with the making of the entry having been conditioned upon Appellant's failure to make the payment, and therefore not for the ostensible reason of lack of time and opportunity that the master gave in the entry itself as the cause of the delay. So understood, the official log entry in this case was not in truth corroboration of the eyewitness testimony and adds nothing to it except the warning to scrutinize that testimony closely.

III

In connection with the process of unmooring the vessel, when Appellant was at his station aft, in communication with the bridge by radio telephone, the gravamen of the offense is seen to be the alleged intoxication. As a matter of fact, there is actually no evidence that a duty in connection with the unmooring was not performed. There was testimony that an order was given to "single up" and that it was reported that the after station had done so. The Administrative Law Judge made a finding under which it seems that two lines, one wire, were still in place as a "doubling up" after the report was made but there is no evidence directly to support this.

There was evidence that a "rumble" aft was reported to the master by a shore worker and that the chief mate was dispatched

aft. When he arrived, however, the mooring lines had all been taken in.

As to the intoxication, the predicate for the finding made in the initial decision is a statement given by the chief mate after the occurrence to the master that Appellant was "half and half." A lay opinion of intoxication may be the basis for a finding properly made, but the lay opinion here is deprived of probative value by the testimony of the witness himself. The lay opinion, first, was not given at the hearing itself; it was introduced as admissible hearsay of a statement previously made. As a general rule, the conclusion of a witness on this subject must be based on recited fact observations. There was, of course, no established predicate for the report made by the chief mate before he made it. (Reports or statements of this sort are not, of their nature, prepared for under the "rules of evidence.") When the chief mate testified at the hearing, however, he did not provide the necessary support even for the earlier conclusion he had uttered. He stated that when he aroused Appellant for the purpose of getting underway Appellant got up and "lurched." He testified that he could not attribute this movement either to intoxication or to the disturbance of being wakened and roused. He stated that he detected no characteristic odor of intoxicants on Appellant's breath. He declared that had he believed Appellant to be intoxicated he would not have permitted him to take charge of his station. In direct confrontation with a question as to his opinion of Appellant's intoxication he said, "I can't say whether he was or not."

Thus, at this hearing, the witness did not give a lay opinion of intoxication, and the details testified to cannot support an earlier opinion, if it was such, introduced into this record as hearsay, such as to constitute a basis for a finding that Appellant was in fact intoxicated.

The only evidence of the master touching on this is the report made to him by the chief mate and is of no more probative value than the testimony of the chief mate itself. Since the non-standing of the underway watch was brought about by the same report that second alleged failure to perform duties cannot be attributed to intoxication either.

IV

The evidence is sufficient on the matter of voluntarily engaging in physical combat with the unlicensed crewmember; in fact, Appellant admitted this in his testimony.

A cautionary word must be added on this matter. As noted above, the Administrative Law Judge amended the original "assault and battery" specification on his own motion. The words substituted did not include an element of wrongfulness. Since boxing exhibitions have been known to be presented aboard ships, "mutual combat" is not necessarily in and of itself misconduct. The failure to have included a qualifying word in the amendment I do not take to have been a fatal error in the context of the record since what had been alleged was clearly misconduct and since the amendment was accepted as continuing a statement of misconduct.

CONCLUSION

It is concluded that the specification alleging failure to perform duties by reason of intoxication were not established by substantial evidence and must be dismissed, but the finding of wrongful engagement in mutual combat is sustainable.

Since the prior record of Appellant, though lengthy, had been clear for several years and since the findings are being modified, it is appropriate to reduce the severity of the order imposed by the initial decision.

ORDER

The findings of the Administrative Law Judge relative to alleged failures to perform duties by reason of intoxication aboard MAYAGUEZ on 21 and 22 March 1976 are SET ASIDE and the specifications relative thereto are DISMISSED. As MODIFIED, the findings of the Administrative Law Judge entered on 7 April 1977 are AFFIRMED. The order is MODIFIED to provide for a suspension of all licenses and certificates issued to Appellant for a period of three months, and as MODIFIED is AFFIRMED.

R.H.SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD

Vice Commandant

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

INDEX

***** END OF DECISION NO. 2170 *****

Top