UNITED STATES OF AMERICA
UNITED STATES COAST GUARD VS.
MERCHANT MARINER'S DOCUMENT No. (Redacted)
Issued to: Gary Lee FAIRALL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2183

Gary Lee FAIRALL

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 17 April 1978, and administrative Law Judge of the United States Coast Guard at San Francisco, California, revoked Appellant's merchant mariner's document upon finding him guilty of two specification of the charge of misconduct. The two specifications of misconduct found proved allege that Appellant, while serving aboard the SS MAYAGUEZ under authority of the above captioned document, (1) did, on 6 February 1977, wrongfully use foul and abusive language towards a superior officer, the Chief Mate, and (2) did, on 18 February 1977, while said vessel was in the Port of Keelung, Taiwan, wrongfully assault and batter the Chief Mate, by kicking him repeatedly.

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

The Investigating Officer introduced into evidence eight document including the depositions of two witnesses.

In defense, Appellant offered the testimony of three witnesses, including his own.

Subsequent to the hearing the Administrative Law Judge rendered a decision in open hearing in which he concluded that the

charge and specification had been proved. He then entered an order of revocation.

A written decision was served on 8 May 1978. Appeal was timely filed on 16 May 1978 and perfected on 24 November 1978.

FINDINGS OF FACT

At all times relevant to the inquiry Appellant was serving under authority of his merchant mariner's document aboard SS MAYAGUEZ. On 6 February 1977, Appellant, in response to a request for his shore pass number, used foul and abusive language toward the Chief Mate. The conversation was overheard by the master. The incident was promptly logged and appellant was given the opportunity to respond.

On the evening of 17 February 1977, while the MAYAGUEZ was in Keelung, Taiwan, the chief mate went ashore to the Pacific Hotel. While at the hotel he drank several beers and engaged in conversation with people at the bar. During the late evening the chief mate left the bar and proceeded to the restroom. As he exited from the restroom into a dimly lit corridor he was struck on the head and lost consciousness. When he regained consciousness Appellant was standing over him kicking him in the body. While kicking, Appellant cursed the chief mate and used the words "I'm going to kill you." The Chief Mate screamed in response to the violent assault and Appellant left the scene.

Upon examination, the chief mate was found to have multiple contusions, abrasions, and lacerations about the left eye, back, abdomen, left leg and testicles. Blood was found in the urine and it was necessary to repatriate the chief mate to the United States for medical treatment.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. The appeal addresses only those issues relevant to the specification of assault and battery. Appellant advances the following argument on appeal:

1) The Investigating Officer failed to meet his burden of proof;

2) The Administrative Law Judge improperly admitted hearsay evidence;

3) The Administrative Law Judge improperly allowed non

responsive answers into evidence in spite of a motion to strike, and

4) The decision of the Administrative Law Judge was rendered despite substantial evidence to the contrary and was therefore arbitrary and capricious.

APPEARANCE: McCarthy & Perillat, San Francisco, California, by Malcolm N. McCarthy, Esq.

OPINION

I

Appellant contends that the Investigating Officer failed to meet his burden of proof. The Investigating Officer must meet the burden of proof by substantial evidence of a reliable and probative character which supports the required element of the charge. Regulations at 46 CFR 5.20-95(b) require the quality of evidence necessary to support findings to be:

> ...evidence of such probative value as a reasonably prudent and responsible person is accustomed to rely on when making decisions in important matter. It is not limited to evidence which is considered to be competent evidence for the purpose of admissibility under the jury-trial rules.

A review of the record in this case indicates that there was ample factual evidence to support the findings of the Administrative Law Judge. To disapprove of such findings on review it must be found that they are not based on substantial evidence or that the evidence is so inherently unreliable, incredible, or irrelevant that no reasonable man would find support for the findings. the specific evidence relied upon was supplied by sworn deposition in response to written interrogatories. The victim of the assault, the Chief Mate, identified Appellant as kicking him repeatedly when he regained consciousness. Captain Rowe, the Master of the MAYAGUEZ, was present during the police interrogation of a Miss Wong, a civilian witness to the assault. Captain Rowe testified that Miss Wong confirmed accusations of the Chief Mate against Appellant.

The evidence supplied by such testimony is not incredible nor inherently unreliable and it was certainly relevant to the elements of the charged offense. The evidence that was submitted in rebuttal was found by the Administrative Law Judge to be basically not worthy of belief and in some respects incredible. It is the

function of the Administrative Law Judge to assign weight to the evidence produced at the hearing and to resolve conflicting testimony. Since the evidence adduced to support the findings was substantial and of reliable and probative character, the finding of the Administrative Law Judge will not be disturbed on appeal.

II

Appellant contends that the Administrative Law Judge improperly admitted hearsay evidence, and once it was admitted, gave improper weight to such evidence. I disagree.

As discussed earlier, the evidence competent to support findings need not fulfil the prerequisites of admissibility necessary in jury trials. Hearsay evidence may be admitted and use to support an ultimate conclusion, the only *caveat* being that the findings must not be base upon hearsay alone. Decision on Appeal 1770. The victim of the assault testified to the fact that when he regained consciousness after being knocked to the floor he looked up and saw Appellant standing over him kicking him in the groin. This is direct evidence of such nature as to support the findings of the Administrative Law Judge.

The ship's Captain testified that he was present during the questioning by Keelung Foreign Affairs Police of a cashier from the hotel where the incident occurred. The Captain testified that the cashier verified the incident as reported by the victim. This is hearsay and *pro*perly admissible. The Administrative Law Judge has broad discretion as to the weight to be given evidence. The regulation which requires *con*si*de*ration of opposing evidence (48 CFR 5.20-95(a)) does not require hearsay evidence to be dismissed or given no weight merely because it is opposed by conflicting testimony. The aforementioned regulation only requires that the trier of fact accord hearsay such weight as the circumstances warrant. The declarant was a neutral third party discussing with police during interrogation the circumstances of an event just recently occurred. Under these circumstances the veracity and accuracy of perception and recollection of the declarant would be appropriately tested and would not be imbued with any inherent reason for unreliability. The evidence objected to by Appellant merely corroborated the direct evidence offered by the testimony of the victim. Under the circumstances it was appropriately admitted and could be relied upon to support the findings.

III

Appellant contends that the Administrative Law Judge erred by admitting nonresponsive answers to interrogatories over a motion to

strike. A witness is expected to give responsive answers to questions or interrogatories and, of course, the response must be relevant and material to issues in question. A nonresponsive answer may be stricken upon the motion of either party with the exception that the Administrative Law Judge in his discretion may refuse to strike a nonresponsive answer or voluntary testimony that is relevant to an issue and is not otherwise barred by some exclusionary rule. If the nonresponsive testimony is relevant to some issue and is otherwise admissible it is meaningless to delay proceedings until counsel later asks the appropriate question to obtain the stricken testimony. This rule is simple to apply and voices the regulatory responsibility of the Administrative Law Judge. In an administrative proceedings of a remedial nature, rather than criminal, there is a relaxed standard of evidence. All relevant and material evidence is to be available for consideration. It is required that the Administrative Law Judge support his findings with substantial evidence of a reliable and probative nature, that evidence which a reasonably prudent man would rely upon in the conduct of serious affairs. See Decision on Appeal 2097.

Appellant contends that many of the responses to the written interrogatory received from Mr. Nowlan were irrelevant to the question posed and thus were the appropriate object of a motion to strike. In response to a question to Mr. Nowlan as to whether he was struck on the head and the time it happened, Mr. Nowlan replied with a detailed description of the location, the assault, and the injury incurred. Also included within the response was an identification of his assailant as Appellant. The fact that this was not responsive to the question posed is not determinative of the issue. The testimony was directly related to a material issue before the hearing and therefore the Administrative Law Judge appropriately exercised his discretion in refusing the motion to strike.

In response to questions relating to Appellant's length of employment aboard MAYAGUEZ and the working relationship of the witness to Appellant, the Chief Mate testified as to "problems" created by Appellant and a belligerent attitude Appellant held towards him. While the response was again beyond the scope of the question the response would be relevant to establish a motive for the later alleged acts of Appellant toward the Chief Mate; and therefore the Administrative Law Judge did not abuse his discretion in overruling the motion to strike. A review of the record indicates that the responses of the Chief Mate that could be considered as nonresponsive to the question were relevant to the alleged specifications.

IV

As a final argument for error Appellant contends that the decision of the Administrative Law Judge was rendered despite substantial evidence to the contrary which thereby rendered the decision arbitrary and capricious. The argument of Appellant is not persuasive.

The thrust of Appellant's contention is basically an attack on the Administrative Law Judge's determination as to the credibility of witnesses and the ultimate weight to be given the evidence. It is clear that the Administrative Law Judge listened to the testimony of Appellant and his witnesses. After reviewing their respective testimony the Administrative Law Judge chose to disbelieve their testimony as incredible and not worthy of belief.

It is the function of the Administrative Law Judge to determine the credibility of witnesses and then to weigh the evidence admitted at the hearing. His decision in this matter is not subject to being reserved on appeal unless it is shown that the evidence upon which he relied is inherently incredible. Decisions on Appeal Nos. 2116, 1952. On the facts alone, the test for review of an Administrative Law Judge's decision is not whether a reviewer may disagree with the examiner but whether there is substantial evidence of a reliable and probative character to support the findings. Decision on Appeal No. 1796.

While Appellant urges that there is testimony to support his position, he chooses to disregard those matters in evidence which balance against him. The responsibilities of review do not require a counting of all conflicts within evidence both pro and con Appellant's cause in order to reach a decision. Appellant herein seeks a de *novo* hearing by so suggesting. There is no such entitlement on appeal. The decision of the Administrative Law Judge is fully supported by the record. As the victim of a brutal assault, the Chief Mate testified that Appellant was his assailant. The Captain then confirmed that a third party witnessed the assault and confirmed the accusation against Appellant. Since the record supports the findings with substantial evidence the only issue on appeal is whether the evidence accepted by the Judge was so inherently unreliable that a reasonable man could not accept it. Decision on Appeal No. 1806. I find the evidence relied upon to support the findings was reliable and amply supports the decision.

ORDER

The order of the Administrative Law Judge, dated at San

Francisco, California, on 2 May 1978, is AFFIRMED.

J.B. HAYES
Admiral, U. S. Coast Guard
COMMANDANT

Signed at Washington, D.C., this 21st day of February 1980.

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***** END OF DECISION NO. 2183 *****

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