UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT (Redacted)
Issued to: Thomas E. HOWELL

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2198

Thomas E. HOWELL

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

By order dated 1 August 1978, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, after a hearing at Seattle, on 22 May and 31 July 1978, suspended Appellant's document for a period of six months and further suspended it for a period of six months on twelve months' probation upon finding him guilty of misconduct. The three specifications of the charge of misconduct found proved allege (1) that Appellant while serving as able-bodied seaman aboard SS OVERSEAS JUNEAU, under authority of the captioned document, did, on or about 31 October 1977, while said vessel was at sea, wrongfully have intoxicating liquor in his possession; (2) that Appellant, while serving as aforesaid, did act in a disrespectful manner towards the Master and the Chief Mate, to wit: using foul and abusive language; and, (3) that Appellant, while serving as aforesaid, did wrongfully assault Frank Airey, a member of the crew, by brandishing his fist in a threatening manner and offering to inflict bodily harm.

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

The Investigating Officer introduced into evidence the testimony of two witnesses and four documents, including copies of

two pages of the official log book of SS OVERSEAS JUNEAU.

Appellant testified in his own defense.

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 six months and further suspension for a period of six months on probation for twelve months.

The decision was served on 7 August 1978. Appeal was timely filed on 27 September 1978, and perfected on 28 December 1978.

*FINDINGS OF FACT*

On 31 October 1977, Appellant was serving under authority of his merchant mariner's document as AB aboard SS OVERSEAS JUNEAU (hereinafter JUNEAU), which was underway enroute Bahrain. Upon receiving a complaint from Cook-Steward Airey that he suspected Appellant of having stolen a bottle of patent medicine, the Master of JUNEAU proceeded to Appellant's stateroom. At approximately 0830 that morning, the Master, accompanied by the Chief Mate and the Bosun, entered Appellant's stateroom where Appellant was sleeping. When they entered he awoke. As the Master and Chief Mate commenced a search of the stateroom, Appellant began to question what was occurring, directing remarks towards the Master and the Chief Mate in a disrespectful fashion. Appellant continued his remarks even after the Master ordered him to stop. The Master found a bottle identical to the one for which he was searching. The Master also found two bottles containing a clear liquid. Each contained a label printed in a foreign language, apparently Chinese. The Master smelled each bottle and determined that the liquid in each had a substantial alcoholic content. The Master recognized both bottles as a type used in the Orient in bottling alcoholic liquids. The Master confiscated both bottles and subsequently disposed of them over the side of JUNEAU. After the search, which lasted approximately fifteen minutes, had been completed, Appellant proceeded to the messhall. Upon arrival there, Appellant accosted Airey, and, while shaking his fist at Airey, angrily states to him, "I'm going to drop you." Thereafter, Appellant did not carry out this threat.

*BASES OF APPEAL*

This appeal has been taken from the decision and order of the

Administrative Law Judge. It is contended, (1) that the Coast Guard failed to proved satisfactorily that the liquid contained in the two bottles found in Appellant's stateroom was "intoxicating liquor;" (2) that Appellant's statements to the Master were not disrespectful; (3) that the proof that Appellant committed an assault was insufficient; (4) that the log entries should not have been admitted into evidence; (5) that Appellant was denied "a due process right of an `open public hearing;`" and (6) that Appellant improperly was denied "a fair opportunity to present evidence in mitigation."

APPEARANCE: Abbey & Fox, Seattle, Washington, by Martin D. Fox, Esq.

*OPINION*

I

Smell and appearance of the liquid, coupled with the Master's recognition of the type of bottles and their labels, sufficed to allow an inference that the two bottles he confiscated contained "intoxicating liquor." Appellant did not offer any evidence to rebut this inference, testifying only that he had "no idea" what was in them. R.87. In the absence of any proof that the liquid was not as alleged, the Administrative Law Judge properly was entitled to accept the inference and to find the first specification proved. Decisions on Appeal Nos. 1793, 2037, *aff'd,* 2 NTSB 2811 (1976).

II

It is clear that Appellant did not direct "foul" language, as that term commonly is understood, toward the Master and the Chief Mate. However, it equally is clear that the words Appellant directed toward them were uttered in a fashion which conveyed disrespect. By their use, Appellant apparently hoped to forestall completion of the search. Appellant's initial outbursts might be excused as the product of a sudden, unexpected awakening. But, his continued vocalizations, even after being ordered by the Master to "keep quiet until we were finished," [R.55], cannot be excused. It was for the disrespect conveyed, not the strict content of the language used, for which Appellant properly was held accountable. *See*, Decisions on Appeal Nos. 1388, 2042.

III

Appellant contends that the incident with Airey never occurred, or, in the alternative, that even if it did occur, and

"assault" was not committed.

Appellant disputes Airey's credibility, relying principally on the latter's testimony that the assault occurred at 0830, to discredit him. However, Airey actually testified that Appellant "came to the Messhall... at *approximately* 8:00 *or about*." (emphasis added) R.62. Moreover, as between the directly contradicting testimony of Appellant and airey, the Administrative Law Judge chose to believe the latter and to disbelieve Appellant. This properly was the responsibility of the Administrative Law Judge. Decision on Appeal No. 2160. Although I have some reservations, on this record I am unable to conclude that the Administrative Law Judge erred in making this determination of credibility. Hence, I shall not disturb it.

I previously have recognized that the term "assault" includes "putting another in apprehension of harm when there is the apparent present ability to inflict injury whether or not the actor actually intends to inflict or is capable of inflicting harm." Decision on Appeal No. 1218. In the circumstances found proved, Appellant's angry words, the gesture made with his fist, and Appellant's apparent ability to "drop" Airey as he threatened, sufficed to place Airey in reasonable apprehension of immediate harm. As he testified, Airey "actually was affeared" of Appellant's accomplishing the threat. R.64. In spite of his fear, Airey apparently was prepared to attempt to defend himself if attacked. Contrary to Appellant's separate contention, this does not serve to demonstrate that the element of apprehension was missing. Rather, Airey's apparent determination to defend himself lends credence to his testimony that he then believed Appellant's threat to have been made in earnest. Hence, I concur in the Administrative Law Judge's finding that an assault was committed by Appellant.

IV

Appellant objects to the admission of copies of two pages from the official log book of JUNEAU because the entries contained therein were not recorded in the log on the day of the occurrence of the incidents described, as required by 46 U.S.C. 702. Appellant misperceives the effect of the cited statute in these proceedings. Under the Federal business records exception to the hearsay rule, codified at 28 U.S.C. 1732, and 46 CFR 5.20-107, official log book entries are admissible into evidence. Failure to comply substantially with 46 U.S.C. 702 goes to the evidentiary weight to be accorded the entry, not to the question of its admissibility. *See*, *e.g.*, Decision on Appeal No. 2145. therefore, these entries properly were admitted and Appellant's

contention must be rejected.

V

As the last matter addressed prior to the close of the first session of Appellant's hearing, Appellant "note[d] that the two entrance ways to this hearing --one of them is posted, `Court in Session - Please Do Not Enter', and other entrance, a hallway, is locked, from the outside." R.121. Appellant then stated his belief that this had violated his due process right, under the Constitution and 46 CFR 5.20-5, "to an open, public, hearing, unless the Court at some time during the hearing indicates that it is not proper or that other circumstances exist which court decisions have held to warrant limitation and exception to the right of a public hearing." The Administrative Law Judge patiently explained that no one intentionally had been denied admission to the hearing room, and denied Appellant's request to "invalidate" the proceedings. Appellant again has raised this contention. I summarily reject it. Why Appellant never mentioned the subject before the end of the session he has not explained. It is obvious that Appellant must have been aware of the existence of the sign before the end of the day, but made his objection only after the substantive portion of the hearing had been completed. This smacks of "bad faith." In any event, it does not appear that anyone actually was prevented from attending the hearing, or that the hallway door intentionally had been locked. More importantly, Appellant has failed to distinguish an improper denial of access, from the implementation of reasonable measures to control access as a means of maintaining order during a hearing. Here, I simply find no indication that Appellant was denied an "open, public hearing."

VI

Upon the conclusion of the first session of the hearing, the Administrative Law Judge set Monday, 31 July 1978, as the date for final argument. To this Appellant agreed. At that time, the Administrative Law Judge also stated clearly to Appellant that the hearing would resume, even in Appellant's absence, on 31 July. In addition, the Administrative Law Judge forwarded a written notice of continuance to Appellant. On 31 July, the hearing was resumed, but neither Appellant nor his attorney appeared. After efforts to locate Appellant's attorney proved unsuccessful, the Administrative Law Judge proceeded to completion of the hearing. Subsequently, appellant sought to have the hearing reopened, but the Administrative Law Judge denied his request. Appellant now argues that he was denied a fair opportunity to present evidence in mitigation. To the contrary, I conclude that the Administrative Law Judge acted properly in proceeding in Appellant's absence on 31 July, and that Appellant has yet to offer reason sufficient to

require a reopening of the hearing. Review of an affidavit, dated 26 September 1978, filed by Appellant's attorney, discloses that, by the exercise of due diligence, Appellant could have been represented at the second session of the hearing. In such circumstances, I am unable to conclude that the Administrative Law Judge erred either in proceeding in Appellant's absence or in denying the request to reopen.

*ORDER*

The order of the Administrative Law Judge, dated at Seattle, Washington, on 1 August 1978, is AFFIRMED.

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

Signed at Washington, D.C., this 27th day of March 1980.

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