IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO.Z-1208067 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Louis Richard KEATING

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1932

Louis Richard KEATING

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 26 October 1971, an Administrative Law Judge of the United States Coast Guard at New Orleans, La., revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved alleges that while serving as a Fireman/Watertender on board the United States SS OVERSEAS EXPLORER under authority of the document above described, on or about 15 July 1970, Appellant did:

(1) wrongfully fail to perform his assigned duties from 1600 to 2400 hours;

(2) wrongfully absent himself from the vessel without permission;

(3) wrongfully assault the Chief Officer, Norman Namenson; and

(4) wrongfully assault and batter with a deadly weapon, to wit; a piece of steel rod, Radio Officer Billy G. Crawford, and did injure said officer.

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

The Investigating Officer introduced in evidence voyage records from the OVERSEAS EXPLORER, a steel rod, and the testimony of several witnesses.

In defense, Appellant offered in evidence the testimony of a witness.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and each specification had been proved. The Administrative Law Judge then entered an order revoking all documents.

The entire decision and order was served on 15 November 1971. Appeal was timely filed on 23 November 1971. A brief in support of appeal was filed on 24 February 1972.

FINDINGS OF FACT

On 15 July 1970, Appellant was serving as a Fireman/Watertender on board the United States SS OVERSEAS EXPLORER and acting under authority of his document while the ship was in the port of Haifa, Israel.

Approximately at 1630 on the above date, it was reported to the Chief Officer by the gangway watchman that the Chief Steward was in need of medical attention. The Chief Officer along with the Third Mate and the Radio Officer proceeded to the dock where they found the steward in an unconscious condition lying on a stretcher near the gangway of the vessel. The Chief Officer and the mate attempted to render first-aid to the steward who appeared to be intoxicated and had swallowed his tongue. While the officer was

attending to the steward, Appellant interjected himself into the situation saying that the steward was only drunk and that he should be left alone. An altercation broke out between Appellant and the officer resulting in Appellant's being pushed aside by the officer and being told to leave them alone so that they could aid the steward.

At this time Appellant picked up a three foot piece of steel rod lying nearby and approached the officer with it. As he swung the rod at the officer's head, which was turned away from Appellant, the Radio Officer came from behind Appellant, placing himself between the latter and the Chief Officer. The force of the blow struck the Radio Officer on the right arm. The rod fell from Appellant's grasp behind the mate who was also bending over the steward.

The Radio Officer assisted by the mate subdued Appellant who had begun hollering that he would kill the Chief Officer. The Chief Steward was then assisted into a taxi and taken to the hospital, accompanied by the Chief Officer. Appellant was released and told to go aboard the vessel and behave himself. The piece of steel rod was retrieved by the mate and later turned over to the Master. The Israeli police were summoned to investigate the matter and the Appellant was turned over to them a few days later. He was signed off the vessel at that time. The Radio Officer was treated for the injury received from the blow.

Appellant was assigned the watch from 1600 to 2400 on that date and failed to perform such duties; although he was present on board the vessel following the incident and remained there until turned over to the custody of the Israeli police on 19 July 1970.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. The individual errors and exceptions alleged by Appellant are too numerous to be listed specifically, but will be taken up in the opinion. Generally, Appellant attacks the evidence as being incompetent and based on hearsay and asserts that such evidence as there is is insufficient to support the findings of the Administrative Law Judge.

APPEARANCE: Charles R. Maloney, Esq., of New Orleans, La.

OPINION

I

Although not raised by Appellant in his brief or elsewhere, it appears from a review of the evidence that the first and second specifications are multiplicious. The first alleges that Appellant wrongfully failed to perform his duties on 15 July 1970 and the second recites that he was wrongfully absent from the vessel on the same date. The evidence discloses that the duties which Appellant did not perform was the watch from 1600 until 2400. The reason that he did not appear for this watch was that he was absent from the vessel. Because both specifications arose from a single incident, the more specific offense of failure to perform duties is merged with the more general of absence from the vessel. See Decision on Appeal No. 1553. The first specification, is, therefore, dismissed.

II

Before discussing the general arguments raised by Appellant, I wish to dispose of several specific points raised in connection with several of the specifications. These are that (1) the charges must be dismissed because of the failure of the "complaining witness" to appear and testify at the hearing; (2) that certain of the specifications are not identical in form to those found at 46 CFR 137.03-5; and (3) that the log entries offered as evidence are inadmissible or at least incompetent as evidence because of hearsay.

On the first point, Appellant has confused these proceedings with a criminal trial. There is no "complaining witness" here in the sense that term would be used in criminal proceedings. The action to be taken, if any, is only against Appellant's seaman's documents and not against his person. The proceedings are administrative requiring only substantial evidence to support a finding of proved. If this evidence can be provided without the presence of the person who logged Appellant or who was the victim

of the alleged assault, then the charge will be affirmed regardless of the source of the evidence, so long as it is not based solely upon hearsay.

The specifications found at the cited regulation do not provide a required format for a valid specification nor are they exhaustive of possible specifications which can be the subject of a hearing. The list is only that of acts for which the Coast Guard will initiate administrative action seeking the revocation of documents. If revocation is otherwise warranted by the seriousness of an offense or by the prior record of misconduct, such an order may be affirmed whether or not the offense is found among those listed.

The answer to the third point is so well settled by prior decisions and indeed by regulation that I need only cite Appellant to 46 CFR 137.20-107. An official entry made in substantial compliance with the requirements of 46 USC 702 is prima facie evidence of the facts recited therein. Statements attached to and made an official part of official log entries are likewise admissible as exceptions to the hearsay rule and are competent evidence to be considered along with other evidence received at the hearing.

III

Appellant's principal contention with respect to the third specification is that there could be no assault upon the Chief Officer because at the time of the alleged assault the officer had his back to Appellant and being unaware of his activities could not have been in reasonable apprehension of being struck by Appellant. It is also urged that such threats as were made by Appellant were made only while Appellant was restrained and that he could not have carried out such threats.

This argument fails to recognize that common law assault can involve two distinct concepts, namely, an actual attempt to commit a battery or the appearance of an attempt to commit a battery. The arguments raised by Appellant concern only the latter concept. Where there has been a clear attempt to commit a battery, there has been an assault whatever the condition of the intended victim. The fact that Appellant had not previously threatened the Chief Officer

is irrelevant. See Decision on Appeal Nos. 1776 and 1845.

Appellant also argues that the findings of the Administrative Law Judge ignore certain testimony given at the hearing and are unsupported by the evidence. Suffice it to say that the Administrative Law Judge, as the finder of fact, determines the credibility of witnesses and the weight to be accorded the evidence. His findings will be upheld when, as here, there is substantial evidence of a reliable and probative character to support them.

IV

Essentially, Appellant's argument as to the specification alleging an assault and battery upon the Radio Officer is that the Appellant had not threatened him and did not intend to injure him; therefore, did not assault him. Appellant contends that absent an assault the resultant injury to the Radio Officer cannot be a battery. The argument is clever, but without merit as a specific intent to injure the actual victim is not an essential element of an assault and battery where the injury occurs while the defendant is unlawfully attempting to batter another.

In this situation, the Appellant was engaged in an act wrongful in itself, namely attempting to batter the Chief Officer. Appellant is chargeable with the natural and probable consequences of his act and the intent necessary for assault and battery is imputed from the doing of the wrongful act. *Medley v. State*, 345 SW2nd. 899, 208 Tenn. 347 (1961) and *6 C.J.S.* Assault 71. A finding of an actual battery necessarily includes an assault.

For the purposes of these proceedings, I hold that a steel rod is a dangerous or deadly weapon as alleged. See *Tatum v. United States*, 71 App D.C. 393, 110 F.2nd 555 (1940) and *Medlin v. United States*, 93 App. D. C. 64, 207 F.2nd 33 (1953).

CONCLUSION

Although this act of misconduct is the first such charge against Appellant, I concur with the Administrative Law Judge that the act presents a sufficient threat to the safety of life and

property at sea to warrant the revocation of Appellant's seaman's documents. The dismissal of the first specification does not alter this conclusion.

ORDER

The findings as to the first specification are SET ASIDE, and the first specification is DISMISSED.

The order of the Administrative Law Judge dated at New Orleans, La., on 26 October 1971, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 23rd day of May 1973.

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