UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. (redacted)
Issued to: Harold H. MORGANDE

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2452

Harold H. MORGANDE

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 4 November 1986, as Administrative Law Judge of the United States Coast Guard at Alameda, California suspended Appellant's document for a period of 18 months, plus an additional twelve months suspension on 24 months' probation upon finding proved the charge of misconduct. The charge found proved was supported by six specifications.

The first specification alleged that Appellant, while serving as Able Bodied Seaman aboard S/S Mason LYKES, under authority of the captioned document, did, on or about 1650, 6 June 1983 while the vessel was in Apra Harbor, Guam, wrongfully disobey a lawful command of the Third Mate, in that he refused to go to the bow as directed. The second specification alleged that Appellant, while serving in the same capacity on or about 1230, 9 July 1983, while the vessel was at the Port of Oakland, California, wrongfully assaulted and battered the Chief Mate, by poking Appellant's finger into the Chief Mate's chest. The third specification alleged that Appellant, while serving in the same capacity, on or about 1230 9 July 1983, while the vessel was at the Port of Oakland, California, wrongfully assaulted and battered the Master by grabbing his arm. The fourth specification alleged that Appellant, while serving in the same capacity, on or about 9 July 1983, while the vessel was at the Port of Oakland, California, wrongfully interfered with the Master, in his official duty to protect a member of the crew, by

refusing to obey the Master's order to leave the ship. The fifth specification alleged that Appellant, while serving as Able Bodied Seaman aboard S/S SANTA JUANA, under authority of the captioned documents, on or about 1030, 17 August 1985 while the vessel was at sea, wrongfully assaulted and battered a member of the crew by striking him. (The specification found proved alleged mutual combat as a lesser included offense of assault.) The sixth specification alleged that Appellant, while serving as Able Bodied Seaman aboard S/S AMERICAN VETERAN, under authority of the captioned document, on or about 23 April 1984 while the vessel was in a foreign port, wrongfully failed to perform his duties as gangway watch on the 0000 to 0800 watch. A seventh specification was found not proved.

The hearing was held at Alameda, California, on 10 October 1986 and 4 November 1986.

At the hearing Appellant was represented by professional counsel and entered a denial of the charge and specifications.

The Investigating Officer introduced in evidence twelve exhibits and the testimony of five witnesses. In defense, Appellant introduced in evidence five exhibits, his own testimony, and the testimony of four additional witnesses.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and six specifications, had been proved, and entered a written order suspending Appellant's merchant mariner's document for a period of 18 months, with an additional twelve months suspension remitted on 24 months' probation.

The complete Decision and Order was served on 22 December 1986. Appeal was timely filed and a temporary document requested on 12 November 1986. On 18 November 1986, the Administrative Law Judge denied the request for a temporary document. Appellant perfected his appeal on the merits of the case on 9 December 1986, and, on 11 December 1986, filed an appeal from the denial of a temporary document.

FINDINGS OF FACT

At all times relevant to this appeal, Appellant was the holder of a Merchant Mariner's Document authorizing him to serve as "Able Bodied Seamen, Any-Waters-Unlimited, Wiper, Steward's Department (FH)".

On 6 June and 9 July 1983, Appellant was serving under the

authority of his document aboard the SS MASON LYKES, a U.S. flag freight vessel, as an Ale Bodied Seaman. At approximately 1650 on 6 June, the Chief Mate called the Third Mate on a walkie-talkie ratio and told him to send Appellant to the bow to assist in docking. The Third Mate addressed Appellant saying "Morgande, go on up to the bow." Appellant responded that he did not want to go to the bow." He did not go forward.

On 9 July 1983 SS MASON LYKES arrived in Oakland, California. In departing the vessel, Appellant dropped or threw a bottle of ginger brandy onto the deck while descending an inner ladder. The Chief Mate confronted Appellant and a dispute resulted. Appellant tapped the Chief Mate on the chest two or three times with his finger, as if making a point. The exchange became heated, and the Master heard their shouting and came to the scene. Fearing physical violence, he placed his arm between the two men trying to separate them. He told the Chief Mate that he would handle the situation, and told Appellant to leave the vessel. Appellant responded by berating the Captain, striking the Captain's right shoulder, and then grabbing the Captain's arm and pulling his watch off. The Captain gave instructions that the shore patrol be called to get Appellant off the vessel. The Union Patrolman arrived on the scene at this time, and managed to calm Appellant down and convince him to leave the vessel.

On the morning of 17 August 1985, while serving under the authority of his document as an ordinary seaman aboard the SS SANTA JUANA, a U.S. flag freight vessel, Appellant became involved in a physical conflict with another seaman. As the other seaman entered the recreation room he heard Appellant "yelling" at the Deck Delegate demanding that his room be changed because of the high level at which the other seaman, Appellant's roommate, played his radio. Blows were exchanged between Appellant and the other seaman, who was injured in the exchange. The two were eventually separated by the Second Engineer.

On 23 April 1984, Appellant was serving under the authority of his document aboard the SS AMERICAN VETERAN, a U.S. flag freight vessel, and failed to report for his watch from 0000 to 0800.

This appeal has been taken from the order of the Administrative Law Judge. Appellant contends that:

1. Certain specifications are barred by the regulation establishing time limitations for service of charges.

2. The Coast Guard's witnesses were not credible.

3. Touching the Chief Mate's chest with his finger did not constitute an assault and battery.

4. Appellant requested that a Coast Guard Investigating Officer be subpoenaed to testify at the hearing and this was not done.

5. The order of the Administrative Law Judge was excessive.

APPEARANCE: Appellant, Pro se.

OPINION

Appellant first appeals from the Administrative Law Judge's denial of his request for a temporary document.

A request for a temporary document is governed by the provisions of 46 CFR 5.707(c), which provides, in pertinent part:

> (c) A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws.

The Administrative Law Judge based his denial of a temporary document in part upon his finding that Appellant had interfered with the master in the performance of his official duties, and accordingly the applicable regulations (46 CFR 5.707(a) and (c), and 46 CFR 5.61(a)(10)) "preclude the issuance of a temporary [document] . . . based upon the presumption as set forth at 46 CFR 5.707(c) that such interference with a Master is 'not compatible with safety at sea.`" Decision and Order at 2.

The Administrative Law Judge also noted Appellant's history of physical confrontation and determined that his presence aboard a vessel "would not be compatible with the requirements for safety at sea." I found no reversible error in this determination.

In any case, disposition of the appeal on the merits renders the appeal from denial of the temporary document moot. Appeal Decisions 2406 (ZOFCHAK), 2354 (DITMARS).

II

Appellant argues that the statute of limitations has expired in regard to these specifications. This issue was originally raised by the Administrative Law Judge at the hearing, who noted that, with respect to the first four specifications, more than three years had elapsed from the occurrence of the alleged

incidents to the time Appellant was served with the charge sheet. The Administrative Law Judge determined that the charge and specifications had been served less than four months beyond this three-year period.

Concerning the fourth specification, the Administrative Law Judge found the alleged incident (interference with the master in his duty to protect a member of the crew) was the type of occurrence identified in 46 CFR 5.55(a)(2) which allows service for up to five years after the alleged incident. Service was thus timely.

Concerning the other three specifications, the controlling regulation, 46 CFR 5.55(b) provides a three-year time limit for filing charges after an alleged incident, except that "there shall be excluded any period or periods of time when the Respondent could not attend a hearing or be served charges by reason of being outside the United States . . . ." Appellant admitted at the hearing that he had been out of the country for five months during the applicable period of time. Record at 19-20. Excluding the period during which Appellant admittedly was outside the United States, I find no reason to disturb the Administrative Law Judge's determination that the service of these specifications was timely.

III

The primary issue in this case was one of credibility. There was conflicting testimony concerning the events which gave rise to the charge and specifications.

With respect to the first specification, disobedience of a lawful order, the Administrative Law Judge credited the testimony of the Master, Chief Mate and Third Mate, who all testified that Appellant had not gone forward as directed. Appellant admitted that he did not go forward.

Concerning the second, third and fourth specifications, Appellant urges that the Administrative Law Judge did not give sufficient credence to the testimony of the Union Patrolman, who arrived on the scene after the altercation between Appellant and the Master had been going on for some time, and who did not see any of the initial confrontation between Appellant and the Chief Mate, nor the occurrences when the Master first came on the scene. As the Administrative Law Judge stated:

> By the time [the Union Patrolman] arrived on the scene, Respondent had grabbed the Master's arm and torn his

> wrist watch off and the Master had already sent for the Security Police to have Respondent removed. Decision and Order at 25.

The Administrative Law Judge went on to find the testimony of the Master and Chief Mate "far more credible" than that of Appellant.

Concerning the fifth specification, which alleges an assault, Appellant admits that an altercation occurred, but asserts that the other seaman was the aggressor. The Administrative Law Judge determined that the two had engaged in mutual combat. An Administrative Law Judge may find mutual combat a lesser included offense under a specification alleging assault and battery. Appeal Decisions 2410 (FERNANDEZ), 1878 (BAILEY). As stated in *BAILEY*, "(I)t is misconduct for two seamen to agree to fight, and then to fight. . . ."

Concerning the sixth specification, it was established both by testimony at the hearing and by an entry in the vessel's official logbook that the offense had occurred. Appellant admitted at the hearing that it occurred (Record at 2518 252), but contended that he had made a mistake. I find the Administrative Law Judge's determination that the specification was "clearly proven" (Decision and Order at 27) to be supported by substantial evidence, and I will not disturb it.

It is well settled that it is the Administrative Law Judge's duty to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. Appeal Decisions 2424 CAVANAUGH. *Accord*, Appeal Decisions 2340 (JAFFEE), 2386 (LOUVIERE), 2333 (AYALA), 2302 (FRAPPIER).

The decision of the Administrative Law Judge will not be overturned unless it is clearly erroneous. Appeal Decision 2332 (LORENZ). There has been no such showing here.

IV

Appellant alleges that his touching of the Chief Mate's chest with his finger did not constitute an assault and battery because it did not create an unusually high risk of harm and he lacked the intent to harm the Chief Mate. This issue was resolved in Appeal Decision 2273 (SILVERMAN):

> An intent to injure is not an element of assault. See Appeal Decision 1447. It is also not an element of

> battery. The National Transportation Safety Board has said in Order EM-19, 1 NTSB 2279: "A battery may encompass any unauthorized touching of another."

Appellant's conduct in tapping the Chief Mate on the chest is sufficient to support the Administrative Law Judge's determination that the specification was proved.

V

Appellant argues that he requested a Coast Guard Investigating Officer to be subpoenaed to testify at the hearing, and that this request was not complied with. The record, however, reveals that the Investigating Officer was available to testify by telephone and that Appellant chose not to call him. Record at 309-11. Therefore, the argument is without merit.

VI

I note that the offenses alleged in specifications 1, 5 and 6 were the subject of entries in the vessel logbooks. The Administrative Law Judge stated that the log entries regarding these specifications constituted prima facie evidence that the incidents described by those entries had occurred as recorded. Decision and Order at 11, 15, 17. Title 46 CFR 5.545 provides that an entry made in the official log book "concerning an offense enumerated in 46 USC 11501, made in substantial compliance with the procedural requirements of 46 USC 11502, is admissible as evidence and constitutes prima facie evidence of the facts recited." Because the offenses embodied in specifications five and six are not ones enumerated in 46 USC 11501, the log entries do not constitute prima facie evidence. They are, however, admissible as evidence under 46 CFR 5.545(b) as a record of regularly conducted activity. Appeal Decisions 2417 (YOUNG), 2289 (ROGERS). While the evidentiary weight accorded such entries is determined separately in each case, they may constitute substantial evidence sufficient to support the Administrative Law Judge's findings. Appeal Decisions 2289 (ROGERS), 2133 (SANDLIN). It is clear that the Administrative Law Judge did not rely exclusively on the log entries in making his findings with regard to these specifications, which are well supported by the record.

VI

Appellant finally contends that the order imposed by the Administrative Law Judge was harsh and excessive. It is well settled, however, that the sanction imposed at the conclusion of a

case is exclusively within the authority and discretion of the Administrative Law Judge. Appeal Decisions 2362 (ARNOLD) and 2173 (PIERCE). Generally there must be a showing that an order is obviously excessive or an abuse of discretion before it will be modified on appeal. Appeal Decisions 2423 (WESSELS), 2391 (STUMES), 2313 (STAPLES). There was no such showing here.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated 4 November 1986 at Alameda, California, is AFFIRMED.

J. C. IRWIN
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 24th day of June, 1987.

***** END OF DECISION NO. 2452 *****

Top