UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. (REDACTED)
Issued to: Richard GIBBONS

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2422

Richard GIBBONS

This appeal has been taken *in* accordance with 46 U.S.C. 7702 and former 46 CFR 5.30-1 (currently 46 CFR Part 5, Subpart J.).

By order dated 4 March 1985, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's document for six months outright plus an additional six months' suspension on twelve months' probation upon finding proved the charge of misconduct. The notice of hearing, charge and specifications set forth two charges of misconduct, each supported by one specification. At the outset of the hearing, the Administrative Law Judge amended the charges by substituting in lieu thereof a single charge of misconduct supported by the two specifications. The specifications found proved allege that Appellant, while serving as Boatswain aboard the M/V COVE SAILOR, under authority of the captioned document, (1) did on or about 27 January 1985, the said vessel being at sea, wrongfully assault and batter an Able Bodied Seaman by striking him in the throat and kicking him in the stomach, head and back, and (2) did on or about 25 January 1985, wrongfully assault the Chief Pumpman by making threatening remarks.

The hearing was held at Houston, Texas, on 4 February 1985.

Appellant failed to appear at the hearing. The Administrative Law Judge entered a plea of not guilty on Appellant's behalf to the charge and each specification. The hearing was conducted in *absentia*.

The Investigating Officer offered in evidence the testimony of two witnesses and nine exhibits, eight of which were accepted.

The Administrative Law Judge rendered a written Decision and Order on 4 March 1985. He concluded that the charge and specifications of misconduct had been proved. He suspended Appellant's document for six months outright plus an additional six months' suspension on twelve months' probation.

The complete Decision and Order was served on 2 April 1985. Appeal was timely filed on 8 April 1985.

FINDINGS OF FACT

Dur*in*g all relevant times from 25 to 27 January 1985, Appellant was serving as Boatswain under the authority of his document aboard the tanker S.S. COVE SAILOR. The tanker was underway enroute from Providence, Rhode Island, to Houston, Texas.

On the morning of 25 January, the Chief Pumpman was conducting tank cleaning operations using butterworth machines. Appellant had turned off the butterworth machines without telling the Chief Pumpman. The Chief Pumpman advised Appellant that if Appellant shut off the machines without the Chief Pumpman's knowledge, it would cause a delay in the tank cleaning operations. Following their discussion on the matter, Appellant yelled to the Chief Pumpman that "when I get off [the vessel], heads are going to fly and yours is going to be the first." The Chief Pumpman felt threatened by the Appellant's statement and since that time he was nervous in the Appellant's presence.

On the afternoon of 27 January, an Able Seaman was in a passageway and was about to enter a ladder to go below when Appellant shoved him into the bulkhead as Appellant proceeded into the crew's mess. The Able Seaman followed Appellant into the mess and asked why the Appellant had shoved him. After an exchange of words, Appellant struck the Able Seaman in the throat with his hand, knocked him to the deck and then repeatedly kicked him in the stomach, head, and back. During this beating, Appellant went to the door of the mess at least two times to determine if anyone was watching. Satisfied that nobody was watching, Appellant would resume kicking the Able Seaman.

Appellant was a much larger man than both the Chief Pumpman

and the Able Seaman. Additionally, Appellant was often under the influence of alcohol when the S.S. COVE SAILOR was underway. During these periods, he would often make threatening remarks to other members of the crew. However, the Chief Pumpman and the Able Seaman could not determine whether Appellant was intoxicated during the incidents on 25 and 27 January.

The notice of hearing, charge and specifications was served on Appellant on 3 February 1985. The Investigating Officer advised Appellant of the nature of the proceedings and his associated rights, including the right to request a change in the time or place of the hearing. Appellant refused to sign the notice until he had spoken with an attorney on the matter. Appellant failed to appear at the hearing as directed, so a not guilty plea was entered on his behalf and the hearing was conducted in *absentia*.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends:

1. The hearing was improperly conducted without Appellant being present.

2. The charge in unjustified and based on fabrication.

3. The decision is against the weight of evidence.

4. In the alternative, the sanction imposed by the Administrative Law Judge is severe, harsh and excessive and without proper consideration of the mitigating circumstances.

OPINION

Appellant first alleges the hear*in*g was improperly conducted without Appellant being present. Appellant specifically asserts an unidentified accuser made threats against Appellant, preventing him form attending the hearing. Because of the threats and fears, Appellant claims he was deprived of due process, and that he was not accorded his right to cross examine witnesses. Appellant's contention is without merit.

The regulations in effect at the time of this proceeding provided:

> In any case in which the person charged after being duly served with the original of the notice of the time and place of the hearing and the charges and specifications,

> fails to appear at the time and place specified for the hearing, a notation to that effect shall be made in the record and the hearing may then be conducted "in *absentia*."

46 CFR 5.20-25. The Adm*in*istrative Law Judge, in the proper exercise of discretion, may conduct the hearing in *absentia*. Appeal Decisions 2263 (HESTER) AND 2234 (REIMANN). It is clear that the requirements of 46 CFR 5.20-25 were net *in* this case and the Administrative Law Judge's action in allowing the hearing to proceed in *absentia* was appropriate. The Adm*in*istrative Law Judge invoked his authority to conduct an in *absentia* hearing only after he had established that Appellant had notice of the time and place of the hearing and failed to appear.

Appellant does not contend he was never properly served with the notice of hearing. Rather, Appellant alleges that threats prevented him from attending the hearing. However, Appellant's assertion does not identify any particular individual, and there is nothing in the record to substantiate such threats.

Furthermore, the notice of hearing contains simple yet explicit instructions concerning "requests to change time and/or place of hearing," and it describes the results of a failure to appear at the time specified. The record demonstrates Appellant made no effort based on the alleged threats to effect a rescheduling or relocation of his hearing. Appellant's failure to make this request bars him from challenging the Administrative Law Judge's decision to conduct the hearing in absentia. Appeal Decision 2263 (HESTER).

II

Appellant alleges the charge is unjustified and based on fabrication. This argument is without merit.

The grounds asserted here on appeal are matters that should have been raised at the hearing in defense of the charge. When Appellant failed to appear for the scheduled hearing, he forfeited the right of presenting further evidence and he waived any defense that may have been available to him at the hearing. Appeal Decisions 2184 (BAYLESS), 1917 (RAY) AND 1723 (TOMPKINS). Appellant's claim that the charge is unjustified and fabricated should have been raised at the hearing. It will not be considered for the first time on appeal.

III

Appellant argues that the Administrative Law Judge's decision is against the weight of the evidence.

It is the duty of Administrative Law Judge to evaluate the evidence presented at the hearing:

> The question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings will not be set aside on appeal. *O'Kon v. Roland*, 247 F.Supp. 743 (S.D.N.Y. 1965).

Appeal Decision 2116 (BAGGETT), *cited with approval in* Appeal Decision 2333 (AYALA). See also Appeal Decision 2302 (FRAPPIER). The Administrative Law Judge correctly found that Appellant failed to meet the standard of conduct required of him. The record clearly shows that Appellant verbally threatened the Chief Pumpman on the morning of 25 January 1985 and that he committed an assault and battery upon the Able Seaman on the afternoon of 27 January 1985.

Appellant did not specifically refute in any way the charge and supporting specifications. He claims only that the Administrative Law Judge's decision is against the weight of the evidence without identifying particular errors in the record. Appellant's mere allegation fails to demonstrate that the record does not support the finding of misconduct.

Appellant argues the sanction of the Administrative Law Judge is severe, harsh and excessive and without proper consideration of the mitigating circumstances. This argument is also without merit.

It is well settled that the sanction imposed at the conclusion of a case is exclusively within the authority and discretion of the Administrative Law Judge unless there is a showing that an order is obviously excessive or an abuse of discretion. Appeal Decisions 2391 (STUMES), 2362 (ARNOLD) and 2313 (STAPLES); see also Appeal Decision 2173 (PIERCE). There was no such showing here.

The Administrative Law Judge ordered a suspension of Appellant's document for six months outright plus and additional six months' suspension on twelve months' probation upon finding proved the charge of misconduct. In view of the specifications found proved, the sanction imposed is not unduly harsh or unwarranted and is hereby affirmed on appeal.

V

An issue not raised by Appellant on appeal concerns the sufficiency of the second specification. The second specification is defective in that it charges Appellant with assault on 25 January "by making threatening remarks" to the Chief Pumpman. It is well settled that "mere language, without more, never constitutes an assault." Appeal Decision 1877 (BETANCOURT).

The defect in the second specification however does not require dismissal of the specification. Findings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as Appellant has actual notice and the questions are litigated. Kuhn v. Civil Aeronautics Board, 183 F2d 839 (D.C.Cir. 1950); Appeal Decision 1792 (PHILLIPS). A specifications need not meet the technical requirements of court pleading, provided it states facts which, if proved, constitute the elements of an offense. Appeal Decisions 2166 (REGISTER) and 1574 (STEPKINS); see also 46 CFR 5.05-17(b) (currently 46 CFR 5.25).

Appellant was on notice as to the nature of the misconduct attributed to him by the second specification and under consideration by the Administrative Law Judge. The specification fully alleged an offense of misconduct - that Appellant made threatening remarks to the Chief Pumpman. See Appeal Decisions 1473 (NASH) and 616 (SHUTTLEWORTH). There is no doubt from the record that this was the offense at issue.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations. The order is appropriate.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas on 4 March 1985 is AFFIRMED.

J. C. IRWIN
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this *2ND* day of *JUNE*, 1986.

***** END OF DECISION NO. 2422 *****

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