

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-484437472-D1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: PEDREU C. LEWIS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1996

PEDREU C. LEWIS

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 20 February 1973, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for 7 months outright plus 6 months on 12 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a Fireman/Watertender on board the SS Elizabethport under authority of the document above captioned, on or about 21 May 1972, Appellant, while the vessel was in the port of Naha, Okinawa,

- (1) Wrongfully engaged in mutual combat with a fellow crewmember, to wit, Patrick G. Fox, Engine Utility; and
- (2) Wrongfully failed to obey an order given by the Master to cease fighting with said fellow crewmember.

At the hearing, Appellant elected to act as his own counsel. He entered a plea of not guilty to the charge and each specification. Upon his failure to attend subsequent sessions, the proceedings were properly continued in absentia.

The Investigating Officer introduced in evidence pertinent entries from the Official Log of the vessel, depositions of the Master and Third Mate, and the live testimony of Patrick G. Fox.

Appellant offered no defense.

The Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He entered an order suspending all documents issued to Appellant for a period of 7 months outright plus 6 months on 12 months' probation.

The entire decision and order was served on 30 May 1973.

Appeal was timely filed on 21 June 1973 and perfected on 15 January 1974.

FINDINGS OF FACT

On 21 May 1972, Appellant was serving as a Fireman/Watertender on board the SS Elizabethport and acting under authority of his documents while the ship was in port the of Naha, Okinawa.

Between 0300 and 0400, he and Fox exchanged words. Fox stepped towards Appellant, and a fight ensued in the presence of the Master. The Master three times ordered them to cease fighting and the orders were ignored.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) The finding of guilty is not supported by the evidence;
- (2) A prior probationary order, the basis for six months of the outright suspension, had expired prior to the date in question; and
- (3) The order of seven months' outright suspension is excessive.

APPEARANCE: Jennings, Gartland & Tilly, San Francisco.

OPINION

I

The opinion of the Administrative Law Judge states, "The evidence of the Coast Guard...stands uncontroverted except for the plea of 'Not Guilty'." This is not, however, to say that the Coast Guard evidence actually proved Appellant guilty of engaging in mutual combat. That evidence - the direct testimony of the Master, Third Mate and Fox - shows that Appellant accused Fox of assaulting him with a pipe, that further words were exchanged, that a fight occurred, and that the Master's order to cease was ignored by at least one of the combatants. The testimony of these witnesses on direct examination is silent as to the origin of the actual fisticuffs in terms of distinguishing between mutual combat on the one hand and assault and battery/defensive action on the other. The Investigating Officer never asked Fox who started the fight. He did, however, ascertain that Fox advanced on Appellant, not vice versa. (R.17). This might infer an assault on the part of the

former, rather than mutual combat. The Investigating Officer propounded a question to the Third Mate as to his opinion on who started the fight. The Mate's response placed the blame on a racial epithet directed at Appellant by Fox. (D.5). One might infer from this that Appellant then assaulted Fox, but this would be a shaky basis for such a conclusion in light of the other testimony to the effect that Appellant responded verbally to Fox and that Fox then advanced on Appellant. (R.17). The Master testified merely that a mutual combat took place. (D.5). This conclusion on his part, without further explanation, and his log entries to the same effect would appear to be legally insufficient basis for the findings of the Administrative Law Judge.

While Appellant never entered any evidence in his defense, he certainly communicated to the Judge his theory of defense, to wit assault and battery on the part of Fox. (R.21-23). Furthermore, Fox's responses on cross-examination, while less than perfectly clear, tend to shed more light on the genesis of the scuffle. At R.19, he said, "The first time I stepped towards you, and the second time I took a punch at you." Appellant accused Fox of assaulting and battering him and Fox, rather than denying it, justified it on the basis of an alleged earlier encounter in the mess hall. (R.19-21). These are statements against interest on Fox's part and entitled to substantial weight.

In order to prove mutual combat, it was incumbent upon the Investigating Officer to show that the fight was not the result of an assault upon Appellant or that his defense was excessive under the circumstances.

Inadequate treatment of these factors makes it impossible to determine whether Appellant intentionally ignored the Master's order to cease fighting or was prevented from obeying by the necessity of defending himself. Under the circumstances, it cannot be said that the Judge's findings are supported by substantial evidence of a reliable and probative character.

In light of the above, it is unnecessary to discuss Appellant's second and third bases for appeal.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California on 20 February 1973, is VACATED and the charge DISMISSED.

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

Signed at Washington, D.C., this 18th day of April 1974.

INDEX

Assault and battery

 mutual combat distinguished

Evidence

 insufficiency of

Mutual combat

 elements necessary to prove

Substantial evidence

 inferences not based on

 each of, basis for reversal