

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1275028
Issued to: OSVALDO TROCHE

DECISION OF COMMANDANT
UNITED STATES COAST GUARD

2017

OSVALDO TROCHE

This appeal has been taken in accordance with Title 46 States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1, now 5.30-1.

By order dated 4 October 1973, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved allege that while serving as an oiler on board the United States SS ELIZABETHPORT under authority of the document above captioned, on or about 18 May 1973, Appellant did wrongfully assault and batter with a dangerous weapon, to wit, a knife, a member of the crew, Pedreu C. Lewis, while said vessel was at sea.

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

The Investigating Officer introduced in evidence shipping articles, entries from the official logbook, and the testimony of two witnesses.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision and order was served on 14 March 1974. Appeal was timely filed on 12 March 1974. A brief in support of the appeal was received on 21 November 1974.

FINDINGS OF FACT

On 18 May 1973, Appellant was serving as an oiler on board the United States SS ELIZABETHPORT and acting under authority of his document while the ship was at sea. At approximately 2345 hours on

that date, the Appellant, without warning or provocation, attacked his roommate, Mr. Lewis, with a knife and inflicted a deep facial wound on his left cheek, while in their living quarters. Mr. Lewis was unarmed at the time. Vocal threats arising from the ensuing struggle were overheard by Mr. Bennie Drumgoole, who entered the room shortly after incident took place and separated the two men. Mr. Lewis was taken to the ship's hospital. The Appellant, after appearing before the master of the ship, admitted having inflicted the wound with a knife in his possession, and was handcuffed to his bunk.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Essentially, the Appellant presents four bases of appeal, which are as follows:

- (1) "The evidence is not sufficient to justify the decision and order of the Administrative Law Judge", and therefore both are "insufficient as a matter of law".
- (2) The Administrative Law Judge erred in his evaluation of the credibility of the accusing witness.
- (3) The Administrative Law Judge committed reversible error in allowing testimony to be taken from a government witness before the Appellant had an opportunity to procure legal counsel, thereby effectively thwarting the exercise of the sixth amendment right of confrontation.
- (4) The order of outright revocation of the Appellant's merchant mariner's document was excessive.

APPEARANCE: Langer, Murray, and Burke of San Francisco, California by Raymond T. Burke, Esq.

OPINION

I

Appellant's first point of appeal must be rejected as there is sufficient evidence in the record to support a finding of assault and battery upon a fellow crewman despite his contentions to the contrary. The administrative hearing procedure created by 5 USC 551-559, and the regulations promulgated pursuant to R.S. 4450, 46 U.S.C. 239, as set forth in 46 CFR 5 are not designed to comply with the requisites of a criminal proceeding. These administrative hearings are civil matters which are directed not against any person but against his merchant mariner's document. The standard

of proof required for these hearings is set forth in 46 5.20-95(b) as being "substantial evidence of a reliable and probative character". This standard of "substantial evidence" is less demanding than that required to meet the test of "proof beyond a reasonable doubt" and was met in this case. Appellant admitted that he had a knife in his possession on the right of the incident and that the same knife was used to inflict a facial laceration upon Mr. Lewis. The Appellant's proposed defense of "accident" was refuted by the testimony of the complaining witness. The acceptance or rejection of this defense was a matter to be resolved by the trier of fact, and the findings on that issue will not be disturbed on appeal unless they are clearly arbitrary and capricious. It is my opinion that the finding of the Administrative Law Judge was neither arbitrary nor capricious and was supported by sufficient evidence in the record.

II

In his second point of appeal, Appellant argues that the testimony of the accusing witness was unreliable because of contradictions and prior inconsistencies in his statements and because of a record of previous disciplinary actions against such witness. Consequently, he contends that the Judge gave undue consideration to this testimony in reaching decision.

Questions involving the credibility of a witness must be decided by the trier of facts and logically so, as it is only at this level that the testimony of a witness may be elicited and his demeanor observed. The Administrative Law Judge is far better equipped to make these determinations than is any appellate body; consequently the appellate review of this type is limited in scope. Absent a clear showing of arbitrary and capricious action by the trier of fact concerning the issue, his determination will not be disturbed. The presence of evidence which conflicts with the testimony of a witness is not, in itself, enough to conclusively show a lack of credibility of that witness when there is substantial evidence that supports his account.

The trier of fact considered the prior inconsistent statements of Mr. Lewis when assessing the inherent truthfulness of his story at the hearing. He observed the demeanor of the witness and took into account his alleged reasons for making the prior statement. Further, he considered the prior disciplinary record of Mr. Lewis, which is merely another element concerning the issue of credibility. Ultimately he rejected the former story and accepted the latter testimony of the witness. His decision is supported by substantial evidence with regard to the circumstances surrounding the incident. It is not arbitrary or capricious and will not be rejected.

III

Appellant's third point of appeal is not meritorious. The taking of Mr. Drumgoole's testimony at the 31 May hearing was entirely proper in light of the conditions which necessitated such action. The absence of counsel for Appellant on this date did not create a situation, whereby he was denied the right of confrontation or cross examination as allege. On the contrary, the record reveals that the Administrative Law Judge carefully explained to the Appellant the necessity for taking the testimony at that date because of the probable absence of the witness from the vicinity in the future. He pointed out to the Appellant, and later explained to his counsel, that the record testimony of the witness would be available for review and that if so requested a continuance would be granted in order to recall the witness for further questioning. Appellant, with advice of counsel, did not avail himself of this opportunity before closing his case, and cannot now be heard to complain.

IV

In final point of argument Appellant complains that the order or revocation is excessive for the misconduct. This argument is not persuasive. Contrary to Appellant's assertions, personal hardship on an individual seaman is not a factor to be considered in assessing proper penalties for grave acts of misconduct. Likewise, while a previously unblemished history of sea duty may be an influencing factor for certain types of charges, it will not affect determinations concerning certain serious offenses of misconduct such as, "assault with a dangerous weapon which causes injury". 46 CFR 5.03-5 provides guidelines for penalty assessments for similar violations. Although this regulation is by no means controlling in every case, I feel that it may appropriately be given serious consideration here, considering the propensity for violence which such an act suggests.

The promotion of safety of life at sea and the welfare of individual seamen must always be of paramount concern to the Coast Guard in making these decisions. The lack of self restraint displayed by the Appellant and the grave nature of his action are definite challenges to this policy. The offense merits revocation and will not be modified.

ORDER

The order of the Administrative Law Judge, dated at San Francisco, California on 4 October 1973 is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 11th day of March 1975.

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