

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-556-50-7960
LICENSE NO. 467147
Issued to: Bruce WARREN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2084

Bruce WARREN

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

By order dated 9 February 1976 an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman documents for 8 months outright plus 4 months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Second Assistant Engineer on board the United States SS AMERICAN LEADER under authority of the documents above captioned, on or about 21 July 1975, Appellant wrongfully assaulted and battered a fellow crewmember.

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

The Investigating Officer introduced in evidence three exhibits and the testimony of three witnesses.

In defense, Appellant offered in evidence three exhibits and his own testimony.

At the end of the hearing, the Judge reserved decision. He subsequently entered an order suspending all documents issued to Appellant, for a period of 8 months outright plus 4 months on 12 months' probation.

The entire decision and order was served on 9 February 1976. Appeal was timely filed on March 24, 1976.

FINDINGS OF FACT

On 21 July 1975, Appellant was serving as a Second Assistant Engineer on board the United States SS AMERICAN LEADER and acting under authority of his documents while the ship was at sea. Prior to this date, the vessel had experienced a fire in the engine room

due to carbon buildup on the burners of the port boiler. As a result, it was understood among the engineers that each engine room watch would keep extra clean burners on hand to prevent a buildup or fire. The number of clean burners to be kept on hand at all times was not established by any general rule.

At approximately 0345 hours, 21 July 1975, the Appellant reported to the engine room to relieve the Third Assistant Engineer. Appellant asked the Third Assistant if there were clean burners on hand and he replied in the affirmative. The Third Assistant then left the engine room to go to his quarters. Upon entering his quarters the Third Assistant heard a buzzer which is activated from the engine room and utilized to summon the engineers. The Third Assistant returned to the engine room in response to the buzzer without changing his clothes. He was also still carrying in his left hand tools used in the engine room which consisted of a flashlight and channel lock pliers. The Third Assistant is right handed.

Upon entering the engine room the Third Assistant asked if anything was wrong. Appellant in turn asked him if the burners were clean. The Third Assistant again said that there was a clean burner. Appellant replied that this was not so and called the Third Assistant an obscenity to which the Third Assistant stated, "you are". Appellant then struck the Third Assistant in the left eye with his fist and followed this with a quick blow to the nose, knocking him down. The Third Assistant landed face down on the deck, striking his forehead hard on the floor plates. Appellant prevented him from getting up by stepping on one of his hands and his back and then rolled him over on his back to step on or kick him in the chest. Appellant thereupon walked away from the Third Assistant who got up and stumbled toward the inspection tanks where Appellant again assaulted him by slapping his face.

The Third Assistant, his face covered with blood, left the engine room and in a stunned condition knocked on the door of the First Assistant Engineer who directed him to the Chief Engineer's quarters. The Purser, a Marine Physician Assistant, was summoned to render medical aid. The Appellant was relieved of duty by the First Assistant Engineer. When questioned by the Chief Engineer about the injuries suffered by the Third Assistant, Appellant replied that he knew nothing about them.

The Purser remained with the Third Assistant at all times for the next two days, tending to the Third Assistant's injuries which included a bloody nose, a large red area on his forehead, a lacerated scalp, badly swollen left eye and a welt on the chest which appeared to give him difficulty breathing. The Third Assistant was also in a state of shock for approximately 12 hours following the assault. He was allowed to drink only four ounces of

water every four hours as the Purser was uncertain as to the extent of possible internal injuries. On 23 July 1975, the vessel was diverted to the port of Halifax so that the Third Assistant could receive better medical attention. X-rays taken there revealed that he suffered no fractures.

BASES OF APPEAL

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

- (1) Appellant reacted in self-defense
- (2) The Investigating Officer failed to prove his case against Appellant by a preponderance of the evidence or even by substantial evidence.
- (3) The evidence does not support the Third Assistant Engineer's testimony that he received a vicious beating from the Appellant.
- (4) In the alternative, the suspension is excessive in view of the facts and circumstances surrounding the altercation.

APPEARANCE: Bernard Rolnick, Esq.

OPINION

I

Appellant contends that he attacked the Third Assistant in the belief that the latter was about to assault him with the channel lock in his left hand. This argument fails to afford any justification for the assault and battery. First, contrary to Appellant's assertion, the Third Assistant did provide a reasonable explanation regarding his possession of the channel lock in that it was standard procedure to go to the engine room with tools in case of an emergency. This practice was never refuted by the Appellant. In addition, it is conceded that the channel lock was in the Third Assistant's left hand. Though not impossible for a right handed individual to use a weapon with his left hand, it is more reasonable to assume that the Third Assistant would have switched the channel lock to his right hand prior to an attempted attack. The record also indicates that Appellant did not raise the issue of self-defense when questioned immediately after the altercation by the Chief Engineer. This fact gives further cause to doubt

Appellant's contention.

Alternatively, even accepting Appellant's assertion of self-defense, Appellant is still guilty of assault and battery as he continued to attack the Third Assistant after he had been knocked down and disarmed. Appellant testified that he hit the Third Assistant as hard as he could, causing him to slam face down against the deck. At this point, the Third Assistant could not have been regarded as a threat to Appellant. However, the Appellant continued to assault the Third Assistant, stepping on his back and chest and slapping him with his open hand. It is well established that an individual who is attacked may himself become guilty of an assault by the use of excess force.

Appeal Decision No. 1852 (HALL) defined excess force as that which:

"clearly went beyond the bounds of necessity."

For example, Appeal Decision No. 1498 (PINDER) involved a situation similar to that at hand. In this case two crewmembers were engaged in a heated argument when one of them began swinging his fists. The other crewmember retaliated by knocking him down and kicking him. It was stated in the opinion that:

Regardless of the fact that the older man struck the first blow, it is clear that Appellant used excessive force to subdue his opponent and thereby was guilty of assault and battery. The record indicates that the point of reasonable force was probably passed by the time Appellant carried his attack so far as to knock DeSouza to the deck. But if excessive force had not been exercised up to then, it definitely was used when Appellant kicked DeSouza while he lay in a helpless condition.

It is concluded that the Appellant did not strike the Third Assistant in response to an aggressive act. Self-defense is an affirmative defense and the burden of proving its existence rests with the Appellant. As no evidence has been presented to substantiate Appellant's version of the altercation, the findings of the Judge will be upheld. In addition, even if this contention were conceded in Appellant's favor, his use of excessive force transformed him into the aggressor and therefore still culpable of assault and battery.

II

Appellant states that the Investigating Officer failed to prove his case against him by a preponderance of the evidence or

even by any substantial evidence. It is not necessary to prove a charge of misconduct by a preponderance of the evidence. Hearings held pursuant to R.S. 4450 (46 U.S.C. 239) are remedial and not penal. In these remedial administrative hearings the degree of proof required is that the findings be supported by substantial evidence of a reliable and probative nature. Additionally, it is the duty of the Judge to weigh the credibility of witnesses. His determinations of credibility will be upheld absent a demonstration that they are arbitrary and capricious. The Judge rejected the version of events given by the Appellant. The evidence which the Judge accepted meets the requirement of substantiality and supports the ultimate findings.

III

Appellant maintains that the evidence does not support the Third Assistant's testimony that he was the victim of a vicious beating. In contrast is the testimony of the Purser/Marine Physician Assistant which supports the Third Assistant's testimony. The Purser stated that immediately following the altercation the Third Assistant was in a state of shock, bleeding from his nose and forehead and complained of difficult in breathing. In addition, the Third Assistant's right eye was badly swollen. The most illustrative indication of the Third Assistant's condition, however, was that the Purser felt it necessary to remain with him constantly for two days until he was transferred to better medical facilities. I conclude that the evidence supports the Third Assistant's testimony as to the severity of the beating.

IV

Appellant asserts that the suspension is excessive in view of the circumstances surrounding the altercation. He states that the fact that fires had previously erupted from carbon buildup on the burners and that he had been on duty for 24 hours should serve to mitigate and explain his violent reaction to the lack of clean burners. This argument is without merit in view of the seriousness of the injuries received by the Third Assistant. Furthermore, the opinion of the Judge expressly and properly took into consideration the same arguments now presented by the Appellant.

CONCLUSION

It is concluded that substantial evidence of a reliable and probative nature has been presented to support the findings of the Judge that Appellant committed wrongful assault and battery upon another crewmember. I also find that the order and decision of the Judge is not excessive in view of the serious nature of the act of

misconduct.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 9 February 1976, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C. this 9th day of Nov. 1976.

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