

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1071587-D3
Issued to: JOHN RICHARD CHRISTEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2115

JOHN RICHARD CHRISTEN

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 19 August 1976, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, revoked Appellant's seaman documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a messman on board the SS American Corsair under authority of the document above captioned, on or about 14 January 1971, Appellant:

- (1) wrongfully assaulted the saloon pantryman, Charles G. Pace, with intent to do harm by setting fire to his mattress while he was sleeping upon same;
- (2) wrongfully threatened to blow up the vessel, said vessel being the carrier of a cargo of military explosives; and
- (3) wrongfully lit matches on the main deck of said vessel with full knowledge that the vessel was carrying military explosives, and further, that said actions were deliberate. A fourth specification that Appellant wrongfully failed to perform his duties due to intoxication was found not proved.

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 numerous documents of the SS American Corsair and the deposition testimony of one witness. The Investigating Officer also introduced the testimony of three witnesses.

In defense, Appellant offered documentary evidence relating primarily to events which transpired subsequent to his removal from the SS American Corsair. Appellant also testified in his own behalf.

At the end of the hearing, the Judge reserved decision pending submission of proposed findings of fact and conclusions of law. On 19 August 1976 the Judge concluded that the charge and three of the four specifications had been proved. He then served a written order on Appellant revoking all documents issued to him.

The entire decision and order was served on 23 August 1976. Appeal was timely filed on 3 September 1976.

FINDINGS OF FACT

On 14 January 1971, Appellant was serving as a messman on board the SS American Corsair and acting under authority of his document while the ship was in Subic Bay, Manila, Republic of the Philippines. While serving in that capacity, Appellant did wrongfully assault the saloon pantryman, Charles G. Pace, by setting fire to Pace's mattress while he was sleeping on it. On the same day, Appellant did wrongfully threaten to blow up the SS American Corsair, and did wrongfully light matches on the main deck of the vessel with full knowledge that the vessel was carrying a cargo of military explosives and that the lighting of matches in that location was prohibited.

I find it not proved that Appellant did, on 14 January 1971, wrongfully fail to preform his duties due to intoxication.

CHRONOLOGY

I Believe a review of the chronology will be helpful for a better understanding of the events leading up to this appeal. The offenses with which Appellant has been charged occurred on board the SS American Corsair on 14 January 1971 when the vessel was in the port of Subic Bay, Republic of the Philippines. On 9 February 1971, Appellant was formally charged with misconduct and a hearing was opened in San Francisco, California. On 26 February 1971, at the request of Appellant's attorney, venue for the hearing was changed to Portsmouth, Virginia and Appellant was ordered to report to the hearing examiner there no later than 26 February 1971.

On 2 March 1971 a hearing was conducted at Wilmington, North Carolina, at which Appellant was not present. The hearing examiner found the charge and specifications proved and entered an order revoking Appellant's merchant mariner's document. This decision was affirmed on 9 August 1973 by the Commandant in Appeal No. 1985 (CHRISTEN), and by the National Transportation Safety Board in Order No. EM-41 on 13 March 1975.

Thereafter, Appellant filed suit in U.S. District Court for the Middle District of Louisiana. On 20 November 1975 that court ordered a new hearing which was commenced in Norfolk, Virginia on

19 January 1976 with a request for a change of venue to New Orleans, Louisiana. The request was granted, and a de novo hearing was held on 3 February, 20 February, 17 March and 11 June 1976. On 19 August 1976, the Administrative Law Judge found the charge and three of the four specifications proved and entered an order revoking Appellant's merchant mariner's document. It is from this order that Mr. Christen now appeals.

BASES OF APPEAL

Appellant has incorporated the proposed findings of fact and conclusions of law submitted by his attorney at the hearing into his brief on appeal. Appellant makes a number of contentions, all of which he alleges have violated his constitutional rights. Appellant contends that the deposition of Charles Sweet should not have been admitted into evidence because Sweet was not available for cross-examination, and that the certificate of discharge from the GULF ACE should not have been admitted because it has no bearing on the case in question and because it was improperly used to impeach Appellant's credibility as a witness. Appellant contends, further, that because the hearing was not completed within sixty days of the District Court's minute entry ordering a new hearing, he is entitled to the return of his merchant mariner's document. He also contends that his constitutional rights were violated when the Master of the SS American Corsair improperly discharged him from the vessel's service. Finally, Appellant alleges that there is not substantial evidence of a reliable and probative nature to support the charge and specifications against him.

APPEARANCE: At the hearing: Jerry W. Lindig, Esq., Baton Rouge, La.; On appeal: pro se.

OPINION

I.

Appellant's first contention is that the deposition of Charles Sweet should not have been admitted into evidence because Mr. Sweet was not available for cross-examination at the hearing. It is Appellant's position that the lack of opportunity to cross-examine Mr. Sweet face-to-face was a denial of Appellant's rights under the Sixth Amendment of the Constitution.

The Sixth Amendment provides, in part, for the right of confrontation in all criminal prosecutions. This right has been applied in a modified way to administrative proceedings, (see Greene v. McElroy, 360 U.S. 474 (1959); Willner v. Committee on Character and Fitness, 373 U.S. 96(1963); and Davis, Administrative

Law Treatise, Section 7.05), so that the Government may not take detrimental action in administrative proceedings unless the individual is given an opportunity to rebut the evidence presented against him, including the right to cross-examine witnesses. There is no constitutional requirement that the right to cross-examine witnesses in administrative proceedings must be face-to-face in the hearing room. It is sufficient that the individual charged is given the opportunity to personally interrogate the witness or have a representative do so in his behalf at the place where the deposition is taken, or submit cross-interrogatories for the witness to answer under oath. With respect to the proceedings for suspension and revocation of merchant mariner documents in particular, 46 USC 239(d) provides that any person whose conduct is under investigation shall be allowed to cross-examine witnesses. Appellant interprets this provision as requiring a face-to-face confrontation, but there is no indication that this statement imposes an additional duty higher than the constitutional requirement. The Commandant so held in Decision on Appeal 1534 (BERRIOS). In the present case, Appellant submitted thirty-two cross-interrogatories to Mr. Sweet, which he was required to answer under oath. It is my opinion that the taking of Mr. Sweet's deposition was in full compliance with 46 CFR 5.20-140, 46 USC 239(d), and the case law interpreting Appellant's rights under the Sixth Amendment to the Constitution, and therefore, that the deposition was properly admitted into evidence.

II.

Appellant's second contention is that the certificate of discharge from the GULF ACE should not have been admitted because it was irrelevant to the case in question, it was not a prior inconsistent statement, and, in any event, it was improperly used to impeach Appellant's credibility as a witness. On direct examination Appellant testified that he had not been able to obtain employment in the maritime industry since 1971 because his document had been revoked. On cross-examination, the Investigating Officer introduced into evidence a Certificate of Discharge from the SS GULF ACE showing that Appellant had been employed aboard vessel in 1973. Introduction of the document was not immaterial nor irrelevant because it related directly to a subject Appellant voluntarily brought up on direct examination. With respect to Appellant's contention that a witness may only be impeached by a prior inconsistent statement, 46 CFR 5.20-130 states that a witness may be impeached in this way, but it does not state that this is the only permissible method of impeachment. A witness may be impeached by evidence of conviction, prior bad acts or any of the other acceptable techniques. Therefore, the fact that the Certificate of Discharge from GULF ACE was not a prior inconsistent statement made by Appellant is not grounds for excluding it from

the record for the limited purpose of impeaching Appellant's credibility. With respect to Appellant's contention that the Certificate of Discharge should not have been admitted without the Investigating Officer first laying a proper foundation, it is my opinion that such a foundation should have been laid. However, this error is not sufficient to merit a reversal of the Administrative Law Judge's decision. Even if the testimony concerning the SS GULF ACE were totally stricken from the record, substantial evidence would still remain to support the Judge's decision. (See Decision on Appeal 2083 SYBIAK). It is therefore my opinion that admission of the Certificate of Discharge without first laying a proper foundation did not constitute reversible error.

III

Appellant's third contention is that he is entitled to the return of his merchant mariner's document because the hearing was not completed within sixty days of the District Court's minute entry ordering a new hearing to be held. The pertinent parts of the minute entry, dated 20 November 1975, read as follows:

"IT IS ORDERED that this matter be, and is hereby remanded to the Hearing Examiner for the Department of Transportation, United States Coast Guard, at Portsmouth, Virginia, for further proceedings not inconsistent herewith.

IT IS FURTHER ORDERED that in the event the plaintiff herein, John Richard Christen, is not given a new hearing, after proper notice, within sixty (60) days from the date of this order, his merchant mariner's document, previously revoked, shall be returned to him."

In accord with this order, Administrative Law Judge Ray C. Cowan at Norfolk, Virginia, the successor to the hearing examiner at Portsmouth, signed an order on 9 January 1976 setting a new hearing for 1000, 19 January 1976. The hearing opened on that date in Norfolk, Virginia, within the sixty day requirement set forth by the District Court. Although Appellant was not present at the hearing, a motion for change of venue to New Orleans, Louisiana was filed on his behalf. The motion was granted, and the hearing was reconvened on 3 February 1976 in New Orleans. I do not interpret the District Court's minute entry as requiring the hearing and the rendering of a new decision and order to have been made within sixty days, only that the hearing be reconvened within that time. Because the hearing reconvened on 19 January 1976, it is my opinion that the Coast Guard was in full compliance with the court's order.

IV.

Appellant's fourth contention is that his constitutional rights were violated when the Master SS American Corsair improperly discharged him from the vessel's service, and when he had to obtain the aid of the Government of the Republic of the Philippines to effect his repatriation to the United States. The merit of Appellant's allegations is beyond the scope of these proceedings. Neither a ship's master nor its owner is considered a public official, and their actions are not constitutional or unconstitutional. See, for example, U.S. v. Watson, 391 F.2d 927 (C.A. La. 1968) in which the court held that the master of a vessel cannot violate the Fourth Amendment of the Constitution by conducting a warrantless search, because he conducts the search in his capacity as a private citizen.

V.

Appellant's fifth and final contention is that there is not substantial evidence of a reliable and probative nature to support the charge and specifications against him. Appellant bases this contention on two theories (1) that the log entry describing the incident is relevant to this proceeding was not prepared in substantial compliance with 46 USC 702, and (2) that there are discrepancies among the stories related by the witnesses who testified against him. With respect to the log entry, it is true that certain requirements must be met for a log entry to constitute prima facie evidence of an act of misconduct, and that some of these requirements were not met in the instant case. No copy of the log extract was furnished to Appellant; it was not read to him, nor was he given an opportunity to make a reply. However, the Administrative Law Judge did not use the log extract as prima facie evidence. Standing alone, the log extract might have been sufficient to support the charge and specifications against Appellant, but the log was supported by the live testimony of three witnesses and the deposition of a fourth. The cumulative weight of the log plus the testimony and deposition of the witnesses constitutes, in my opinion, substantial evidence of a reliable and probative nature. The discrepancies in the testimony of the witnesses are minor and can be attributed both to the length of time between the date of the offenses and the date of the hearing, and normal "human error in recalling observations made at a disorderly scene, or while the witness was excited." See Decisions on Appeal 1516 (ALFONSO) and 1569 (BUNN). However, except for these minor discrepancies, each of the witnesses corroborates the other. For the Administrative Law Judge to have accepted

Appellant's version of the incidents, he would have had to find that all four of the witnesses and perjured themselves and that the Master had lied in preparing the extract. The Judge's determination of credibility is to be upheld unless clearly arbitrary and capricious. See Decision on Appeal 1836 (CASTILLO). In my opinion, the Judge's determination of credibility was reasonable, and his findings and order should not be disturbed.

CONCLUSION

Substantial evidence of a reliable and probative nature exists to support the findings of proved. Furthermore, no reversible error was committed by the Administrative Law Judge in admitting into evidence the documents complained of by Appellant. It is therefore my opinion that the Judge's order should be affirmed.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana on 19 August 1976, revoking Appellant's merchant mariner's document is AFFIRMED.

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

Signed at Washington, D. C., this 24th day of March 1978.

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