

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z 1 248 502
Issued to: Willie J. JONES

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2185

Willie J. JONES

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 May 1978, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, after a Hearing conducted at San Francisco, California, and New Orleans, Louisiana, on various dates between 17 January 1977 and 5 January 1978, suspended Appellant's document for a period of six months upon finding him guilty of misconduct. The four specifications of the charge of misconduct found proved allege that Appellant, while serving as QMED aboard SS DELTA MAR, under authority of the captioned document did, on or about 26 October 1976, while said vessel was at sea: (1) wrongfully assault and batter by beating a member of the crew, Eugene Kyzar; (2) wrongfully assault and batter with a portable radio the vessel's Master, Peter J. Bourgeois; (3) wrongfully use foul and abusive language against the vessel's Master, Peter J. Bourgeois; and (4) wrongfully disobey a lawful command of the vessel's Master, Peter J. Bourgeois, in that Appellant failed to stop using obscene and profane language against said vessel's Master.

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

The Investigating Officer introduced into evidence the testimony of three witnesses, ten documents, three photographs, one item of physical evidence, and four depositions.

In defense, Appellant introduced into evidence the testimony of two witnesses, his own included, and two documents.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specifications as alleged had been proved. He then entered an order of suspension for a period of six months.

The decision was served in open hearing on 11 May 1978.

Appeal was timely filed on 2 June 1978, and perfected on 4 December 1978.

FINDINGS OF FACT

Appellant was serving under authority of his duly issued Coast Guard document as qualified member of the engine department (QMED) aboard SS DELTA MAR on 26 October 1976. Appellant was standing the 0400-0800 watch in the engine room. DELTA MAR was underway off the coast of South America. At approximately 0630, Appellant, with proper authority, departed the engine room and walked to the crew's mess where he encountered an AB named Kyzar. Appellant accused Kyzar of being a "fink." After several moments of discussion, Kyzar suggested that they both speak to the Master to allow him to settle the matter. Without provocation, Appellant struck Kyzar in the stomach and upon the head, and then chased Kyzar from the mess. As both passed close to the Chief Engineer's stateroom, the Chief Engineer and the First Assistant Engineer heard shouting. Upon opening the door, the two officers observed Appellant apparently chasing Kyzar. Both the Chief Engineer and the First Assistant ordered Appellant to return to the engine room, which he did.

At the time the First Assistant observed a large folding knife in Appellant's watch pocket. After Appellant had departed, the First Assistant told Kyzar of his observation. Kyzar notified the Master of the incident, by telephone and then proceeded to the bridge where the Chief Mate overheard Kyzar telling the helmsman what had happened. The Chief Mate accompanied Kyzar to the Master's cabin. After speaking to both, the Master went alone to the crew's mess and spoke to several persons there. Immediately thereafter, he returned to his cabin, called the officer's lounge, and asked the First Assistant Engineer to report to his cabin. Upon his arrival, the First Assistant confirmed that he had observed Appellant in possession of a large folding knife. The Master decided to confiscate the knife. As a protective measure, from the ship's safe the Master withdrew the ship's pistol, a pair of handcuffs, and a can of "10-4 Chemical Billy," a disabling agent similar to chemical Mace. The Master placed the pistol in his belt, but did not disclose to anyone that he was carrying it. The Master handed the can and the handcuffs to the Chief Mate. He then proceeded to the engine room together with the First Assistant Engineer and the Chief Mate. Upon arrival he ordered Appellant to hand over his knife.

Initially Appellant refused and in an agitated fashion began to direct obscenities toward the Master. At the suggestion of the Second Assistant Engineer, who was also on watch in the engine room, Appellant handed the knife to the Master. As the Master was

about to leave the engine room, Appellant said something to him to the effect that he, Appellant, had something in his room to "take care of" the Master. The Master then ordered Appellant to accompany him to Appellant's stateroom where the Master intended to conduct a search. Appellant became further agitated and continued directing obscenities toward the Master. The Master had the Chief Mate, the Chief Engineer, and the Bosun present for the search. Appellant asked another QMED to be present.

With all of the witnesses to the search standing either in the area of the room behind the Master, or in the passageway outside, the Master commenced the search by ordering Appellant to open his locker and drawers. Appellant did so, all the while continuing to direct obscenities toward the Master. The Master ordered Appellant several times to stop cursing him and finally threatened to "put him in irons" if he did not comply with his orders. Appellant disregarded these orders. The Master obtained the handcuffs from the Chief Mate and attempted to place them about Appellant's wrists, but Appellant prevented him from doing so by raising his arms and taking a "fighting stance." The Master then obtained the can of disabling agent and sprayed it at Appellant's upper body. Appellant reacted by jumping upon his bunk, picking up a large portable radio from a shelf above the bunk, and then jumping back down to the deck. Appellant began to swing the radio at the Master, and succeeded in knocking the can of disabling agent from the Master's hand. The Master retreated toward the door of Appellant's stateroom, but Appellant followed and continued swinging the radio at the Master. Appellant struck the Master upon the left arm and upon the head. The Master then pulled the pistol from his belt, as he did so, Appellant dropped the radio and began to grapple with him. The pistol discharged, striking Appellant in the left thigh. Appellant was taken to the ship's hospital and eventually transferred to a hospital in Santa Marta, Colombia.

BASIS OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that (1) the evidence presented by the Coast Guard was not substantial, reliable, and probative, and (2) that, as to the second specification, Appellant acted in legitimate self-defense.

APPEARANCE: Law Offices of Sidney D. Torres III, Chalmette, Louisiana, by Glenn Ansardi, Esq.

OPINION

I

At the outset, I should address an evidentiary matter. During the hearing, a knife which purportedly resembled that carried by Appellant, was "marked for identification" by the Investigating Officer. R.18. The Investigating Officer thereafter never moved for its admittance into evidence. Nevertheless, the Administrative Law Judge, in his decision, states that "the Investigating Officer introduced in evidence a knife which appeared to resemble the knife which Jones allegedly had in his possession on 26 October 1976. (Investigating Officer exhibit No. 11)." The record contains only a sheet of paper with a "trace of double-bladed knife belonging to Jones kept locked in ship(sic) safe." This sheet of paper is labeled "Investigating Officer Exhibit No. 11 for ID." The sheet contains the notation, "substitution authorized," followed by a check mark apparently made with a ball point pen.

Although "[i]n these Administrative proceedings, strict adherence to the rules of evidence observed in courts is not required" (46 CFR 5.20-95(a)), it is still necessary for an item to be admitted into evidence before it properly may be considered by an Administrative Law Judge. Moreover, while occasionally it may be appropriate to substitute a sketch or photograph for an item properly admitted into evidence, merely placing a notation, "substitution authorized," upon the substituted sheet is unsatisfactory. The record should contain some appropriate indication that the Administrative Law Judge and the parties all concur in the substitution. Otherwise, upon appeal or review, the record will be deemed incomplete.

In this case, Appellant has not questioned the Administrative Law Judge's error in considering the knife as part of the properly admitted evidence. Moreover, it does not appear that this error has had any substantial impact upon the outcome of Appellant's case; i.e., the error can be considered a "harmless" one. Therefore, I perceive no reason to consider it further.

II

Appellant contends that the testimony of AB Kyzar, as corroborated in part by the First Assistant Engineer, "was not substantial, reliable, and probative to find that the Coast Guard carried it's[sic] burden of proving specification number 1 in light of ample indication that there were apparently independent eye-witnesses to this altercation which were never called to testify." To the contrary, if Kyzar's testimony were believed and Appellant's disbelieved, the first specification would be supported amply. The Administrative Law Judge, who was charged with the responsibility of determining credibility, believed Kyzar, the First Assistant Engineer, and the Chief Engineer and disbelieved Appellant. I am unable to perceive any reason to disagree with

this determination of the Administrative Law Judge. Therefore, I reject Appellant's contention that the evidence supporting the first specification is not "substantial, reliable, and probative."

In light of Appellant's right to have subpoenaed other witnesses (46 CFR 5.20-45(a)(2)), his argument that the Coast Guard Investigating Officer should have called "independent" eyewitnesses is rejected.

III

Appellant's contention that he was acting in self-defense is rejected. At no time was Appellant the victim of unlawful aggression; hence, the right to act in his own self-defense never even came into being. Appellant cites Decision on Appeal No. 910 in support of the argument that the Master "failed to discharge his duty of care when he sprayed the mace upon the appellant in the close quarters of his cabin." This argument is not persuasive. In that decision, the Master of a vessel was found wrongfully to have slain a deranged member of the crew with a pistol, when the Master safely and reasonably could have undertaken actions with less severe consequence to subdue the crewmember. In Appellant's case, the Master only used the chemical disabling agent after an attempt to handcuff Appellant had failed; the Master drew his pistol only after the disabling agent also had failed. Even then, the Master never did deliberately fire at Appellant, as the Master in Decision No. 910 was found to have done. (Parenthetically, I should observe that I do not address the question of the appropriateness of the Master's use of a firearm. I take notice of the fact that this matter was the subject of a separate revocation and suspension proceeding. My consideration here is whether the actions taken by the Master, up to the point where Appellant struck him with the portable radio, were legally permissible under his authority as Master. I conclude that these actions were so permissible.)

Appellant's additional contention, that "the examiner did not find that the radio came in contact with Captain Bourgeois and accordingly a battery is unproved," is correct. Inexplicably, the Administrative Law Judge omitted as a finding of fact that Appellant actually struck the Master with the radio. Because the record clearly establishes that Appellant struck the Master's hand, knocking away the can of disabling agent, and then struck the Master upon the left arm and upon the head, my findings of fact reflect these occurrences.

IV

Appellant contends that the obscenities directed toward the Master did not constitute "verbal assaults against [the Master] or his position as master." If, in this fashion, appellant is arguing that the Master somehow was at fault for ignoring both the obscenities themselves and Appellant's continued failure to obey the Master's order to stop uttering them, then I summarily reject this contention. Appellant never was privileged to direct obscenities toward the Master or to disobey his lawful orders. The only fault lay with Appellant himself.

V

Appellant's contention as to the insubstantiality of the evidence is meritless. The record overwhelmingly supports the findings of the Administrative Law Judge. Appellant's version of the incident is so at odds with all the other evidence adduced, that to find his version truthful would require my rejecting substantially all the testimony of all eight witnesses, including even that of the one witness called by Appellant himself. This the Administrative Law Judge declined to do, as do I.

VI

I must comment upon one disturbing feature of the initial decision of the Administrative Law Judge. His "opinion" consist almost entirely of verbatim excerpts from the record (eighteen pages thereof). Worse yet, the Administrative Law Judge quotes extensively, without apparent reason, , from Decision on Appeal No. 425. In accordance with 5 U.S.C. 557(c), 46 CFR 5.20-155 provides that the decision of the Administrative Law Judge is to consist of inter alia, an `opinion' discussing the reasons, precedents, legal authorities, or other basis for the findings, conclusions and order of all material issues of fact, law, or discretion, with such specificity as to advise the parties of their record and legal basis." The issuance of an opinion which is little more than a "parroting" of page upon page of transcript, and which contains virtually no discussion of the "reasons, precedents, etc.," suggests that the Administrative Law Judge has spent scant time analyzing the case, resolving conflicts within the evidence, and applying the law to the facts found proved. Normally, I should feel compelled to return this case to the Administrative Law Judge, not for further hearing pursuant to 46 CFR 5.30-10, but for the entry of an opinion more reflective of those essentials I have just

addressed. However, because the evidence is so overwhelming, I am constrained to allow the opinion" of the Administrative Law Judge, although barely adequate, to stand without change.

CONCLUSION

The charge and each of the supporting specifications are found proved.

ORDER

The findings of the Administrative Law Judge are MODIFIED by the additional findings that Appellant struck the hand of the Master with the portable radio, knocking the can of disabling agent from it, and also struck the master on the left arm and upon the head with the portable radio. As MODIFIED, the findings of the Administrative Law Judge made, and the order of the Administrative Law Judge entered, at New Orleans, Louisiana, on 9 May 1978, are AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 22nd day of February 1980.

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