

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-533-18-2220
LICENSE NO. 492366
Issued to: Clarence R. NOWAK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2196

Clarence R. NOWAK

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 31 January 1978, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, after a hearing at San Francisco, California, on 13 January 1978, suspended the captioned documents for a period of three months on probation for twelve months upon finding him guilty of misconduct. The single specification of the charge of misconduct found proved alleges that Appellant, while serving as Third Assistant Engineer, aboard SS MARIPOSA, under authority of the captioned documents, did at or about 2030, 31 December 1977, engage in mutual combat with another crewman, to wit: Jimmy Prado, Third Assistant Engineer "(day)", while the vessel was at sea.

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

The Investigating Officer introduced into evidence five documents, including extracts of the official log of SS MARIPOSA and attachments thereto.

In defense, Appellant testified and introduced into evidence one document.

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

The decision was served on 2 February 1978 and appeal was timely filed on 1 March 1978.

FINDINGS OF FACT

On 31 December 1977, Appellant was serving under the authority of his license and Merchant Mariner's Document aboard SS MARIPOSA as Third Assistant Engineer. MARIPOSA was underway. At approximately 2030 that evening, several small balloons carried by Jimmy Prado, the Third Assistant Engineer (day), popped in the passageway outside Appellant's stateroom, awakening him. After Appellant had opened his door, he and Prado, who previously had been involved in disagreements, exchanged angry words. At Appellant's suggestion, both agreed to go to the ship's theater to engage in a fight. Before departing, Appellant picked up two or three of the remaining balloons and placed them upon the dresser in his stateroom. Upon reaching the elevator both agreed that it was foolish to fight at that time. Both returned to Appellant's stateroom where Prado stated that he wanted his balloons back. Appellant refused, and added that, if the level of noise did not improve, he would pop the balloons outside Prado's room in the morning to see how Prado liked it. Prado then reached for the balloons. Both men pushed each other and began to wrestle. Hearing noise from Appellant's stateroom, another member of the crew entered and separated the two. No one witnessed the initiation of the scuffle, although the crewmember who broke it up had been present in the passageway outside Appellant's room when he and Prado first exchanged words that evening. Prado suffered only bruises, while Appellant suffered more serious injuries, including a broken rib.

BASIS OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that the "verdict was against the weight of the evidence."

APPEARANCE: Pro se.

OPINION

I

At the outset, I need address an issue not raised by Appellant. The single specification of the charge of misconduct provides that Appellant, "while serving as Third Assistant Engineer, aboard SS MARIPOSA, under authority of the captioned documents, did on or about 2030, 31 December 1977, engage in mutual combat with another crewman, to wit, Jimmy Prado, Third Assistant Engineer (day)." Because the word "wrongfully" or its equivalent does not appear in this specification, it is at least arguable that no wrongdoing was charged, i.e., in some circumstances engaging in mutual combat properly may be permitted, as, for example, in a "smoker" on the fantail. However, inasmuch as (1) the issue has

not been raised previously, (2) it is clear that Appellant had sufficient notice of the "wrongfulness" of the alleged mutual combat because the charge of misconduct is supported by only the single specification, and (3) the specification is not missing any factual element necessary to state an offense, I find this specification not fatally defective. Cf., Decision on Appeal No. 2155 (addition of word "wrongfully" to specification missing necessary factual element held not sufficient to correct it).

II

Appellant's sole basis of appeal is that the decision of the Administrative Law Judge "was against the weight of the evidence." I previously have construed this contention as an argument that the decision is one not supported by substantial evidence. Decisions on Appeal Nos. 1796, 1893, 2156. "Findings must be supported by substantial evidence of a reliable and probative character." 46 CFR 5.20-95(b). At the hearing, Appellant and Prado each claimed that the other had assaulted him, and that each simply was defending himself from the attack. The Administrative Law Judge did not believe the testimony of either man on this point. Rather, he found that both "got into a shoving match which developed into a wrestling match between them, Mr. Nowak grabbing Mr. Prado's hair and Mr. Prado grabbing the hands and face of Mr. Nowak." The function of determining credibility properly is vested in the Administrative Law Judge. Decision on Appeal No. 2156. His opinion as to the veracity, or lack of it, of the combatants does not appear either arbitrary or capricious. The Administrative Law Judge's finding of ultimate facts, that Appellant and Prado wrongfully did engage in mutual combat, is supported by substantial evidence. There is no doubt that some type of altercation occurred in Appellant's stateroom. Having rejected the contradictory versions of self-defense advanced by each of the two combatants, the Administrative Law Judge was free to accept as controlling the inference that both had, either implicitly or explicitly, agreed to fight each other and did so. I can find nothing in the record which would lead me to disagree with this conclusion of the Administrative Law Judge. Appellant's contention, therefore, is rejected.

ORDER

The order of the Administrative Law Judge, dated at San Francisco, California, on 31 January 1978, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 27th day of March 1980.

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