

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 525 288 and MERCHANT MARINER'S DOCUMENT  
Issued to: Hugh Michael Malanaphy Z-534 14 4967

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2257

Hugh Michael Malanaphy

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

By order dated 14 July 1980, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended Appellant's seaman's documents for two months on eight months' probation, upon finding him guilty of the charge of misconduct. The specification found proved alleges that while serving as Chief Mate on board the M/V WALLA WALLA, under authority of the license above captioned, on or about 10 May 1980, Appellant failed to respond promptly to a passenger's timely summons for help, thereby being unavailable to avert an assault which subsequently occurred, resulting in injury to a crew member.

The hearing was held at Seattle, Washington, on 30 June and 1 July 1980.

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 the testimony of four witnesses and nine documents.

In defense, Appellant offered in evidence the testimony of three person, including his own, and one document.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and single specification had been proved. He then entered an order suspending all valid licenses issued to Appellant for a period of two months on eight months' probation.

The entire decision was served on 15 July 1980. Appeal was timely filed on 7 August 1980.

FINDINGS OF FACT

On 10 May 1980, Appellant was serving as Chief Mate on board the M/V WALLA WALLA and acting under authority of his license while the vessel was on a voyage between Winslow and Seattle, Washington.

WALLA WALLA, a ferry departed from Winslow for Seattle, Washington, at 0630 on 10 May 1980 with Appellant on duty as Chief Mate.

Shortly before arrival of the WALLA WALLA at Seattle, a female passenger, Debbie Lyda, requested assistance from either Appellant or Second Mate, Diane Holt, at the Second Mate's office. Passenger Lyda reported that food was being thrown in the vessel's galley, stating "would one of you come; some girls are throwing food in the galley."

The Second Mate usually would have responded to such a request, but Appellant offered to respond to the reported incident for the Second Mate, whose duties on arrival required her on the car deck.

After a delay of two to five minutes, Appellant walked to the galley to investigate the food throwing incident.

After her return to the galley, but before Appellant's arrival, Debbie Lyda witnessed a passenger breaking up an assault by two Indian girls on her friend, Diane Pelland, a crew member.

Appellant did not accompany Miss Lyda to the galley to investigate the report of food throwing, and therefore, arrived in the galley after the assault was completed.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that: (1) certain findings of fact are unsupported by reliable, substantial evidence; (2) Appellant did not violate any formal rule, such as the common law, general maritime law, a ship's regulation, or shipping articles, and thus could not be guilty of misconduct; and (3) the sanction is too severe and should be modified to an admonition.

APPEARANCE: Jacob A. Mikkeltorg, Moriarty, Mikkeltorg, Broz, Wells & Fryer, 3300 Seattle-First National Bank Building, Seattle, Washington 98154.

#### OPINION

Appellant's contention that certain findings are unsupported by reliable evidence is not supported by the record. Substantial evidence is the test on appeal. Decision on Appeal No. 2059.

There is substantial, reliable and probative evidence to support the Administrative Law Judge's conclusion that Appellant had a duty to reposed immediately to passengers' request for help and he delayed in responding in this case.

Vessel Circular No. 17 of 1 March 1967, Exhibit No. 5, places all Masters and Mates on notice that their "utmost concern" should be over the safety of the passengers and crew. More importantly, numerous cases place the very highest standard of care on vessel officers for the personal safety of passengers and crew. Decision on Appeal No. 905; Weade v. Dichman, Wright and Pugh, Inc. 337 U.S. 801 (1949); Compagnie Generale Transatlantique v. Rivers, 211 F.294 (2nd Cir. 1914). Appellant, once he injected himself in place of the Second Mate, Diane Holt as the mate to respond to Ms. Lyda's summons for help, failed to meet this standard of care when he delayed two to five minutes in following Ms. Lyda to the galley.

The Administrative Law Judge accepted the credibility of Debbie Lyda and Diana Pelland regarding the delay of Appellant in responding to Ms. Lyda's request for assistance. The Judge's determination of credibility is to be upheld unless clearly arbitrary and capricious. Decision on Appeal No. 2115. In my opinion, the Judge's determination of credibility was reasonable.

Finally, Appellant's contention that the sanction is unduly harsh is without merit. The Administrative Law Judge considered the facts of the case and the exemplary prior record of Appellant in determining the sanction in this case. He further considered, and rejected, a "request for reconsideration," when the sole issue was appropriateness of the sanction imposed. Also, 46 CFR 5.20-165. the Scale of Average Orders, provides for an average sanction of six months suspension on twelve months' probation for neglect of duty, which is descriptive of Appellant's offense in this case. The order imposed, two months' suspension on eight months' probation, is well under this average sanction. Furthermore, in the absence of a showing that the order is obviously excessive or an abuse of discretion the order should not be modified. Decisions on Appeal Nos. 1751 and 1994.

Such is not the case here, where Appellant failed to meet the high standard required of him to promptly respond to passengers' request for help. In this case, a vicious assault might well have been prevented or ameliorated by his immediate response to Ms. Lyda's call for help. Under these circumstances, the order was not obviously excessive or an abuse of discretion.

#### CONCLUSION

The record as a whole establishes the charge of misconduct by

reliable, probative and substantial evidence.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington, on 14 July 1980, suspending all valid licenses to Appellant for a period of two months on eight months' probation is AFFIRMED.

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

Signed at Washington, D.C., this 10th day of June 1981.