

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Otmar W. WIJNGAARDE Z-1-191-538-D2

DECISION OF THE VICE COMMANDANT ON REVIEW
UNITED STATES COAST GUARD

2269

Otmar W. WIJNGAARDE

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

By order dated 8 January 1981, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's seaman's document upon finding him guilty of the charge of misconduct. The two specifications found proved alleged that "while serving as electrician on board the AUSTRAL ENVOY, on 10 December 1979, while the vessel was in the port of Melbourne, Australia, he wrongfully failed to perform his assigned duties between the hours of 1045-1200, and 1300-1700."

The hearing was held at New York, New York, on 4 December 1980.

The Appellant was present at the hearing and was represented by professional counsel. He entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence two documents.

Appellant introduced in evidence his own testimony.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and two specifications had been proved. He then entered an order of suspension for one month and an additional five months on twelve months' probation.

The decision was served on 14 January 1981. Appeal was timely filed, and perfected on 25 March 1981.

FINDINGS OF FACT

On 8 January 1981, Appellant was serving as electrician on board the AUSTRAL ENVOY and acting under authority of his documents while the vessel was in the port of Melbourne, Australia.

The Appellant stated that on 8 January 1981 he capably performed his duties from 0800 to 1030, and that at 1030 he was told by the Chief Engineer to "knock off". He was not given a reason for the order. When he got to his room he discovered that it had been searched and a partially empty whisky bottle had been found. He denied having had anything to drink that day.

A photocopy of a 10 December 1979 entry in the official log book (Government Exhibit 3) was entered into evidence (R 19,20), and constituted the government's entire case. It stated that Appellant had been found under the influence of alcohol and was unable to perform his duties, that his working hours were from 0800-1200 and 1300-1700, that he was "knocked off", that a bottle 3/4 full of whisky was found in his room and confiscated, that Appellant was fined one day's pay of \$54.60, and the entry was signed by the Master. The entry further stated that it was read to Appellant and he entered "no comment" on 11 December 1979 signed by respondent, the master and by a third person.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that "the Administrative Law Judge erred in holding that the government's prima facie case, founded exclusively on the bare log book entry, was not rebutted by the live, unrebutted, unimpeached and credible testimony" of the Appellant. It is further contended that the Administrative Law Judge erred in drawing any inference from the Appellant's "no comment" to the log book entry read to him by the Master.

APPEARANCE: Phillips & Cappiello, P. C., New York, New York

OPINION

The log book entry was required by 46 U. S. C. 702 to be signed by the Master and by the mate or one of the crew as witness. As it was signed only by the Master, it was not made in substantial compliance with the statute. "A signature by a member of the crew on the record of reading the entry to the seaman the next day does not remedy the absence of that signature on the entry itself. Appeal Decision 1864. It is not reversible error to admit in evidence log entries not made in accordance with 46 U. S. C. 702. In such a case the log entries may be used as corroborative evidence, but they do not make out a prima facie case" Appeal Decision No. 2092.

Since the log entry was the only evidence submitted by the government which related the events under consideration and since the log entry had lost its character as a prima facie case there is

insufficient evidence in the record to sustain a finding of guilty against the Appellant.

CONCLUSION

The findings are not based on sufficient evidence to support the allegation that the Appellant wrongfully failed to perform his duties.

ORDER

Accordingly, the order of the Administrative Law Judge, dated at New York, New York, on 8 January 1980, is VACATED. The findings are SET ASIDE. The charge is DISMISSED without prejudice to the institution of further proceedings.

J. B. HAYES
Admiral, U. S. Coast Guard
Commandant

Signed in Washington, D. C. this 16th day of Dec. 1981