

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT No. Z-512 70 8762  
Issued to: Peter Anthony Amoury

DECISION OF THE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2295

Peter Anthony Amoury

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

By order dated 26 March 1981, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that, while serving as Engine Utilityman on board the SS TRAVELER under authority of the document above captioned, on or about 3 March 1981 Appellant wrongfully possessed hashish while the vessel was in the port of Navlakhi, India.

The hearing was held at Long Beach, California, on 17 March 1981.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence a certification of the shipping articles and a certified copy of the official log of the vessel.

In defense, Appellant offered the testimony of a shipmate and his own testimony.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant revoking all documents issued to Appellant.

The entire decision was served on Appellant on 30 March 1981. Appeal was timely filed on 6 April 1981 and perfected on 22 July 1981.

FINDINGS OF FACT

On 3 March 1981, Appellant was serving as Engine Utilityman on board the SS TRAVELER and acting under authority of his document

while the vessel was in the port of Navlakhi, India.

Appellant failed to perform his duties from 0800 to 1700 on 3 March 1981. He claimed that he was sick when called by the First Assistant Engineer regarding this. He was then reported to the Chief Officer for medical treatment.

At 1805 the Chief Officer entered Appellant's room to check on his health and while in the room found a small container of hashish. This was confiscated and turned over to U.S. Customs.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

(1)The Administrative Law Judge committed reversible error by attempting to persuade the Appellant to waive the submission of written proposed findings and conclusions and by telling Appellant that he would enter an order of revocation unless Appellant stated his possession was experimental;

(2)The Administrative Law Judge erred in failing to believe that Appellant's possession of hashish was experimental.

(3)The Coast Guard failed to present a prima facie case of possession of hashish and the Administrative Law Judge erred in the holding that the official log entry setting forth the above facts constituted a prima facie case;

#### OPINION

I and II

The first and second assignments of error are without merit.

The Administrative Law Judge is required by the Coast Guard's regulations, 46 CFR 5.20-150, to afford the person charged the opportunity to submit proposed findings and conclusions. The record shows that the Judge merely asked Appellant if he wished to do this. The Judge provided a brief explanation of what the question meant when Appellant indicated he did not understand it. There is no indication that the Judge attempted to influence Appellant's decision in this regard. This was not error.

After finding the charge and specification proved the Judge correctly informed Appellant that unless he presented evidence that the possession was only experimental he would enter an order of revocation. 46 CFR 5.03-4 requires revocation unless the

Administrative Law Judge is satisfied that the possession was the result of experimentation. The Judge did not err in so informing Appellant.

It is the Judge's duty to evaluate the evidence and decide which witnesses to believe. His failure to believe the Appellant's testimony that his possession was experimental is not error.

### III

The third assignment of error requires examination of the proper weight to be given to log book entries admitted under 46 CFR 5.20-107 and how that weight is affected if the entry is prepared in substantial compliance with 46 U.S.C. 702. This question was addressed in Commandant Decision on Appeal 2117 (AGUILAR) as follows:

"...The regulation at 46 CFR 5.20-107 is sometimes, and all too often, not appreciated. It declares first, in specific recognition of a legislative provision for evidence in civil proceedings, that an official log book entry of a vessel which carries one is an entry made in the regular course of business. It goes on to declare that such an entry made in substantial compliance with the relevant specific statute governing the mode and manner of official log book entries carries with it a greater weight than a mere "business entry." When so made, the entry constitutes "prima facie evidence" of the matters recited.

Note must be made that the term used is not the one so familiar in judicial review of administrative proceedings, "substantial evidence."

It should be clear that "prima facie evidence" is something more than "substantial evidence;" otherwise the regulation would be superfluous. Prima facie evidence is evidence which, if not rebutted, leads to only one reasonable conclusion; i.e., if such is the only evidence of record, in a proceeding like this, the allegations which it supports must be found proved; no other reasonable conclusion can be drawn from the evidence. The converse of this is not, as administrative law judges appear at times to believe, that an official log book entry which does not substantially comply with the requirements of 46 U.S.C. 702 cannot be substantial evidence of sufficiency on which to predicate findings. With the test that substantial evidence is evidence from which a reasonable man could infer the existence of a fact, there is little doubt that despite a technical deficiency in an official log book entry, which takes it out of substantial compliance with 46 U.S.C. 702, its force would easily still persuade a reasonable man that it was a reliable record of events."

Thus, although an official log book entry, not made in "substantial compliance" with 46 U.S.C. 702, is not automatically prima facie evidence under 46 CFR 5.20-107(b), it is admissible under 46 CFR 5.20-107(a) as a "business entry." Such an entry may be given such weight as the Administrative Law Judge deems proper and may, in some cases, constitute substantial evidence sufficient to support findings.

We must then consider whether log book entries made in compliance with the procedural requirements of 46 U.S.C. 702 but which do not concern offenses listed in 46 U.S.C. 701 can be said to be in "substantial compliance" with 46 U.S.C.702.

In Commandant Decision on Appeal 2133 (SANDLIN) the Administrative Law Judge advised the respondent, the master of a vessel which had grounded, that his log entries regarding the grounding (not an event listed in 46 U.S.C. 701) "are considered to be true" and are "prima facie evidence" of the facts they state. In holding this to be incorrect the Commandant stated:

"...The regulation [46 CFR 5.20-107(b)] has nothing to do with the type of log entry made by Appellant in this matter. It is clearly concerned only with actions of seamen recorded pursuant to statute and the "substantial compliances" provision of the regulation specially cites 46 U.S.C. 702. This Code Section is distinctively and exclusively tied to 46 U.S.C. 701 and has not direct bearing upon official log book entries made pursuant to any other provision of law or for any other purpose..."

Log book entries which do not concern offenses listed in 46 U.S.C. 701 are, therefore, not made in "substantial compliance" with 46 U.S.C. 702. Accordingly, they are neither required nor permitted to be considered prima facie evidence of the facts recited therein under 46 CFR 5.20-107(b). They are, however, admissible under 46 CFR 5.20-107(a) as business records. See also Commandant Decision on Appeal 2289 (ROGERS).

In the case at hand the Investigating Officer's case in-chief consisted of two documents, the certification of shipping articles and the certified copy of the ship's log concerning the events in question. The log indicated that when the Chief Mate entered Appellant's room on 3 March 1981 to check his alleged illness he discovered a quantity of hashish. This log entry was substantially in compliance with the procedures required by 46 U.S.C. 702 although the offense is not one enumerated in 46 U.S.C. 701.

The Administrative Law Judge determined that the log book entry constituted prima facie evidence of the facts recited therein

under 46 CFR 5.20-107(b) because it was made in "substantial compliance" with the procedural requirements of 46 U.S.C. 702. This determination was error and prejudiced the Appellant. The log book entry should have been evaluated on its own merits by the Judge and then given such weight as he deemed proper.

The entry was, however, properly admitted into evidence under 46 CFR 5.20-107(a) as a business entry. There was no objection to its admission or the ruling that it constituted prima facie evidence because made in "substantial compliance" with 46 U.S.C. 702. From an examination of the record, I am convinced that the evidence leading to findings would not have been presented differently had this ruling not been made. Therefore, I believe that the prejudice can be cured by returning the record to the Administrative Law Judge for new findings in accordance with this opinion.

In making new findings the Administrative Law Judge should determine the weight to be given to the log book entry; however, it must not be given weight as "prima facie" evidence of the offense under 46 CFR 5.20-107(b). Should the Judge find the charge and specification proved, he should set forth his reasoning in detail. In remanding this case to the Administrative Law Judge, no determination is made as to whether the evidence of record constitutes substantial evidence of a reliable and probative character sufficient to support findings.

#### CONCLUSION

The Administrative Law Judge erred in determining that an official log book entry not involving an offense listed in 46 U.S.C. 701 constituted prima facie evidence of the facts recited therein as a matter of law. This error did not affect the further presentation of evidence leading to findings. Therefore, prejudice resulting from this error can be cured by remanding this case to the Administrative Law Judge for new findings.

#### ORDER

The order of the Administrative Law Judge dated at Long Beach, California, on 26 March 1981, is VACATED. The case is REMANDED to the Administrative Law Judge for new findings and a new order consistent with this decision.

J.S. GRACEY  
Admiral, U.S. Coast Guard  
Commandant

Signed at Washington, D.C., this 30th day of March 1983.

