

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-1183 654-D1
Issued to: John E. Conen

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2309

John E. Conen

This appeal was taken in accordance with Title 46 United States Code 239(g) and 46 CFR 5.30-1.

By order dated 7 July 1981, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's document for three months, plus three months on twelve months' probation, upon finding him guilty of misconduct. The specifications found proved alleged that: (1) while serving as Electrician on board the SS MORMACSEA under authority of the document above captioned, Appellant did on or about 1700-1800, 10 December 1980, while the said vessel was in the port of East London, South Africa, wrongfully disobey a lawful order of the Chief Engineer by absenting himself from the vessel when instructed to remain on board; and (2) while serving as aforesaid did on or about 0900-1830, 14 December 1980, while the vessel was in Cape Town, South Africa, wrongfully fail to perform assigned duties.

The hearing was held at New York, New York on 3,10,20 and 27 February 1981.

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

The Investigating Officer introduced in evidence the testimony of two witnesses and four exhibits.

In defense, Appellant offered in evidence nine exhibits and the testimony of one witness.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and both specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of three months plus three months on twelve months' probation.

The entire decision was served on 21 July 1981. Appeal was timely filed on 22 July 1981 and perfected on 2 March 1982.

FINDINGS OF FACT

On 10 and 14 December 1980, Appellant was serving as Electrician on board SS MORMACSEA and acting under authority of his document while the vessel was in the ports of East London and Cape Town, South Africa, respectively.

Appellant joined SS MORMACSEA on 21 October 1980. In accordance with his usual practice, the Chief Engineer of the vessel, Daniel N. Fleming, advised Appellant shortly after his arrival of the company's policy that the Electrician was required to be aboard the vessel whenever the ship's cargo gear was being used to load or discharge cargo. Appellant clearly understood that this was to avoid delays in the event of electrical failures of the cargo equipment. The Chief Engineer conveyed this policy to Appellant. On November 3, 1980, Appellant signed foreign articles for the voyage in question.

During the course of its foreign voyage, SS MORMACSEA called at the ports of East London and Cape Town, South Africa. In each of those ports the vessel engaged in cargo operations utilizing its own cargo handling gear. At about 1700 on 10 December 1980, while the vessel was conducting cargo operations in the port of East London, Chief Officer Edward B. Higgins, Jr. initiated a search for Appellant. Appellant could not be found aboard the vessel and his absence had not been authorized. At 1735 the number three after cargo winch became inoperative. Appellant was observed returning to the vessel via gangway at about 1800. At 1805, the winch was back in service and shortly thereafter cargo operations were resumed.

On 14 December 1980, SS MORMACSEA docked in Cape Town, South Africa at 0510. Cargo operations commenced at 0800, utilizing the ship's gear and continued until 1830. Although the Chief Engineer had not authorized Appellant to be absent from the vessel during the operations, Appellant was not on board. During the period of cargo operations, two of the winch controls malfunctioned due to electrical problems. Cargo operations were delayed as a result. A floating crane was ordered to assist in handling cargo and a shoreside electrical contractor was employed to resolve the electrical problem.

Appellant was relieved as Electrician on 2 January 1981, in Charleston, South Carolina and left the vessel at 1535 that same day. While the Investigating Officer was aboard the vessel to conduct the investigation, Appellant asked him to interview 14 witnesses. Most of them had already been paid off and left the vessel. Those who had not left were given subpoenas.

The Administrative Law Judge convened a session of the hearing on 3 February 1981 because of a letter from Appellant complaining that the Investigating Officer would not subpoena requested witnesses. At that session of the hearing, Appellant stated that he wanted several witnesses: the Chief Engineer, Mr. Flemming; the Purser, Mr. Tunis Sounders; the First Assistant Engineer, Mr. Bertelson; a Third Assistant Engineer, Mr. Keith Smith; two of the wipers, Luis Cruz and Modesto Figueroa; two of the cadets; one of the cooks; a mess man; the Second Mate; and the Bosun. The Chief Engineer, Mr. Fleming was already under subpoena; the others were not. Appellant stated that these witnesses would show the incompetence of the Chief Mate and a pattern of events which would cause the Chief Mate to log Appellant for his own (the Chief Mate's) incompetence. Appellant did not further explain the relevance of the witnesses.

Inquiry by the Administrative Law Judge revealed that, at the time charges were issued, the Investigating Officer had subpoenaed the following at Appellant's request: the Chief Steward, Mr. Failes; the Chief Officer, Mr. Higgins; and Mr. Bartlett, a Third Assistant Engineer. The Administrative Law Judge refused to subpoena the additional witnesses because he did not believe their testimony would be relevant, but stated that he would do so later if it appeared there was valid reason for calling them. Appellant then requested that a letter be sent to the entire crew inviting them to the hearing and the Investigating Officer agreed to mail it. Appellant then withdrew his request for two of the witnesses the Investigating Officer had subpoenaed for him, Mr. Failes and Mr. Bartlett. During the hearing Appellant did not renew his request for witnesses.

At the session of the hearing on 3 February Appellant also complained that he had not been allowed to view the ship's log book in its entirety. The Investigating Officer objected to showing it to him. Before ruling on the request, the Administrative Law Judge ordered that it be produced for his examination to determine if any entries were relevant. At the final session of the hearing, and after examination of the log by the Judge, Appellant waived the production of all log entries except those regarding loggings of crewmembers and passengers. The Judge denied production of these entries because they were not relevant.

During the testimony of the Chief Engineer, Mr. Fleming, it became apparent that the events on 10 December had occurred in the Port of East London rather than Port Elizabeth as originally charged. The Administrative Law Judge proposed to amend the first specification to reflect this and asked Appellant if he had any objection. Appellant replied that he did not. The amendment was made to the specification.

BASES OF APPEAL

This appeal has been taken from the order by the Administrative Law Judge. In connection with the appeal Appellant submitted a 34 page brief in which he discusses at length the events of the voyage; the manner of conducting the investigation leading to the charges; the actions of various ship's officers and their testimony; and the Administrative Law Judge's manner of conducting the hearing and his findings. From Appellant's brief, I am able to identify the following as his basis of appeal:

1. The Investigating Officer was inexperienced and failed to investigate Appellant's complaints against the vessel.
2. Appellant was denied subpoenas for requested witnesses.
3. The Administrative Law Judge denied Appellant's request for the vessel's log book.
4. The charge sheet was amended during the course of the hearing.
5. The Administrative Law Judge did not conduct the hearing in a fair and impartial manner. In support of this basis he complains of the following:

The Judge refused to admit certain evidence.

The use of documents was not allowed until witnesses were excused.

Reporters were changed during the hearing.

Testimony regarding an uncharged offense was not allowed.

The Judge questioned witnesses.

The Judge refused to discuss Appellant's prior disciplinary record prior to findings.

6. The transcript does not accurately record the proceedings because there are breaks in the continuity of the record, testimony is omitted, and fictitious material inserted in its place. Appellant does not specifically describe the material he believes was omitted or is fictitious.
7. The legibility of some of the exhibits is poor.
8. The testimony of various witnesses is not true and the

findings of the Administrative Law Judge are not correct.

9. The log entries were not made in substantial compliance with 46 USC 702 because they were not made on the day the events occurred. Therefore, they should not have been considered as "prima facie" evidence under 46 CFR 5.20-107(b).

APPEARANCE: Pro se

OPINION

I

Appellant's complaints regarding the experience of the Investigating Officer and his unwillingness to investigate complaints do not set forth a reason for granting relief. An Investigating Officer is expected to conduct a thorough investigation and make inquiry into all reasonable reports of violations; however, he must also exercise his own judgment in determining what reports are sufficiently likely to lead to the discovery of a violation to require further inquiry. Although he must answer to his superiors for the manner in which he exercises this judgement, it is not a matter for review at Suspension and Revocation hearings.

II

The assertion that the Administrative Law Judge erred in refusing to subpoena the additional witnesses requested by Appellant is without merit.

It is clear from the record that the Investigating Officer had subpoenaed three witnesses on behalf of Appellant; however, Appellant desired the attendance of most of the crew. After inquiry the Administrative Law Judge determined that the testimony of the additional witnesses would not relate to the facts and circumstances surrounding the charges against Appellant. Subpoenas for witnesses may be limited to those whose testimony is shown to be, or is likely to be, relevant to the issues at hand. 46 CFR 5.15-10. Therefore, the Judge did not err in refusing to subpoena the additional witnesses.

III

Appellant next asserts that the Administrative Law Judge should have required production of the vessel's official log book. I do not agree.

Appellant, through the course of the proceedings, demanded

access to the vessel's official log book. However, both the Investigating Officer and the Master of the vessel objected to its release because much of the information in it related specifically to other individuals and company business and was not material to the charges against Appellant. The Administrative Law Judge conducted an in camera inspection of the official log book and provided Appellant a copy of those entries related to the charged offenses. They were admitted in evidence. At the final session of the hearing, Appellant was advised by the Administrative Law Judge of various categories into which the material in the log book had been classified. Appellant waived the production of material in most of the categories, requesting only that material related to the loggings of crew members and the medical care rendered to crew members and passengers be placed in evidence. The Administrative Law Judge denied this request because such material was not relevant to the issues before him. Since only relevant material need be produced in accordance with 46 CFR 5.15-10, there was no error in this ruling.

IV

Appellant next challenges the amendment to the charge sheet during the course of the proceedings. The amendment consisted of changing the first specification to allege misconduct in East London, South Africa, vice Elizabeth, South Africa. Appellant stated at the time of the amendment that he did not object to it. A specification is intended to provide notice to the charged party so that he has an adequate opportunity to prepare his defense. It is clear from the record that Appellant was well aware of the location of the vessel on the two dates in question and suffered no prejudice by virtue of the amendment allowed by the Administrative Law Judge. See Appeal Decision 2013 (BRITTON). Such amendments are authorized by 46 CFR 5.20-65. Where, as here, Appellant was not misled by the amendment and specifically declined to object to it, he will not be granted relief because of it on appeal.

V

Appellant next asserts that the Administrative Law Judge did not conduct the hearing in a fair and impartial manner because he refused to admit certain evidence, did not admit documents at the time desired by Appellant, changed reporters during the hearing, did not allow Appellant's references to a third logging which was not charged, questioned witnesses, and refused to consider Appellant's prior disciplinary record of explanations thereof until after a decision on the merits. I do not agree.

An Administrative Law Judge is required by 46 CFR 5.20-1(a) to conduct the hearing in a manner so as to bring out all relevant

facts. However, Appellant made constant references to irrelevant and immaterial matters not concerned with the charges. The Judge had a duty to reduce the confusion by excluding such material. Examination of the record shows that the hearing was properly conducted in this regard.

During the course of the proceedings, Appellant made reference to a third instance in which he was logged while aboard SS MORMACSEA. The Administrative Law Judge correctly recognized that it was not included in the charge and specifications and advised Appellant that the logging was not relevant. His refusal to allow it to be entered into evidence was proper.

Appellant claims to have been denied the opportunity to explain his own disciplinary record and states that this refusal resulted in a ten year old warning being considered as a matter in aggravation. He attempted to discuss his prior record before the decision on the merits. In refusing to allow this, the Judge explained why the prior record should not be revealed before a decision on the merits. There is no indication that Appellant would not have been allowed to explain his prior record had he wished to do so at the proper time. Later, Appellant specifically consented to the disclosure, without further notice, of his record to the Administrative Law Judge at the time specified in the regulations. This was not error.

VI

Appellant asserts that there were breaks and inaccuracies in the transcript of the hearing that operated to his prejudice. I do not agree.

Other than routine relief of court reporters, careful review of the record reveals no "breaks in continuity." The hearing sessions in this case were quite lengthy. The record of proceedings covers over three hundred pages. Relief of court reporters under such circumstances is a routine and accepted procedure. Included in the record is a certification by the three officially designated and qualified court reporters that the record is a true and verbatim transcript of the testimony and proceedings. A presumption of regularity accompanies the official functions of such persons. See Commandant's Appeal Decision 1793 (FARIA). Appellant has not indicated any basis for his contention that testimony was omitted or the verbatim transcript altered to reflect statements that were not made.

The only "omission" in the record, for which Appellant provides any support, relates to Administrative Law Judge Exhibit 1. That exhibit consists of a letter to the Commandant dated

January 19, 1981, written by Appellant. Appellant asserts that the letter contained an enclosure dated January 9, 1981, addressed to the Investigating Officer. He asserts that the enclosure was omitted from the record. While it is true that the January 9 letter does not appear with Exhibit 1, there is nothing in the record to indicate that the enclosure was appended to the January 19 letter which was provided to the Administrative Law Judge. The Administrative Law Judge designated the January 19 letter his own Exhibit I, with no reference whatsoever to enclosures or other letters. I can only conclude that the copy of the January 19 letter which was in the possession of the Administrative Law Judge did not include enclosures.

VII

Appellant next complains that the legibility of the exhibits is poor. This contention is without merit.

Examination of the exhibits attached to the record reveals all to be of excellent quality except for Exhibit 2. Exhibit 2 consists of photo copies of the official log entries related to Appellant's absences. The copies are of poor quality but are legible. There is no dispute regarding their content. There is no basis for relief here.

VIII

Appellant disputes the truth of the testimony of the witnesses and the correctness of the findings based on that testimony. This does not state grounds for relief.

It is for the Administrative Law Judge to determine the truthfulness of witnesses and the correct version of the facts. Commandant Appeal Decisions 2099 (HOLDER), 2108 (ROYCE), 2116 (BAGGETT). When, as here, the Judge's determinations are reasonable, they will not be disturbed on appeal.

IX

Appellant complains that the log entries were not made in substantial compliance with 46 USC 702 because not made on the day the event occurred and, therefore, should not have been found to be "prima facie" evidence. I find no error here.

I have previously affirmed findings that log book entries made a day or two following an offense were made in substantial compliance with 46 USC 702 when the delay was reasonable. See Commandant Appeal Decisions 1057 (WELTY), 1727 (ARNOLD), and 1748 (NICKERSON). In the case at hand, the log entries for each

specification were made 2 days after the event occurred. During this time the vessel was engaged in handling cargo, repairing cargo gear, and getting underway. Under these circumstances I believe the delay was reasonable. The Administrative Law Judge did not err in his determination that the log entries were made in substantial compliance with 46 USC 702.

CONCLUSION

There is substantial evidence of a reliable and probative character to support the Administrative Law Judge's finding that Appellant absented himself without authority from SS MORMACSEA in East London, and wrongfully failed to perform his assigned duties in Cape Town, South Africa on the dates and time alleged. The hearing was properly conducted in a fair and impartial manner.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 7 July 1981, is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C., this 12th day of May, 1983.