

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z 209618-D1
Issued to: Hurmon Burnell Butts

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2327

Hurmon Burnell Butts

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

By order dated 7 January 1982, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman's document for six months with an additional six months suspension of twelve months' probation. The specifications found proved allege that Appellant, while serving as Boatswain aboard SS OGDEN WABASH under authority of the above captioned document between about 8 September 1981 and about 16 October 1981 did, on two occasions, wrongfully address a female member of the crew with improper and suggestive language; did, on two occasions, wrongfully order members of the crew to abuse a member of the crew; did solicit sexual favors from a female member of the crew in return for a favorable job retention and assignment; and did attempt to assign an unfavorable job unless sexual favors were rendered from a female member of the crew.

At the hearing on 17 November 1981 Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and all specifications.

The Investigating Officer introduced into evidence a certified copy of the Shipping Articles, a certified copy of Official Logbook entries, and an Affidavit of Service and Recitation of Rights to the Appellant. He called as witnesses Seaman Richardson who was the complainant, and three other witnesses.

In defense Appellant offered a certified copy of several pages of the Official Logbook, a business card of an attorney in Houston, and one witness. Appellant chose not to testify but made several unsworn statements.

At the end of the hearing on 25 November 1981 the Judge stated that he would render a written decision at a later date.

The Decision and Order was rendered on 7 January 1982 and served on 13 January 1982. Appeal was timely filed on 8 February

1982, and perfected on 2 December 1982.

FINDINGS OF FACT

From 4 September through 16 October 1981 Appellant served as Boatswain on board the SS OGDEN WABASH and as immediate supervisor of Richardson, an ordinary seaman. Richardson was the only female on board the vessel and was on her first voyage.

Two or three days after Richardson joined the vessel on 4 September 1981 Appellant approached her in her room and asked her to have sex with him. She refused and locked the door. At least once a day for several days Appellant asked Richardson to agree to an arrangement under which they would engage in sexual intercourse two or three times a week. Each time she refused.

Appellant threatened to assign her to "nasty, dirty jobs" if she did not agree; she continued to refuse. Appellant then assigned her unfavorable jobs that were not normally performed aboardship. These included cleaning winchbeds and cleaning up in the forepeak. During this time Appellant continued to approach Richardson about sex and threatened to have her removed from the ship if she did not satisfy his demands. She continued to refuse. On about 16 September 1981 she talked to Able Seaman Sustaire and Ordinary Seaman Hamilton about this problem. They advised her to go to the Deck Delegate, Chief Mate, and Master and report the problem. She could not find the Deck Delegate and reported the problem to Chief Mate Ryan, who took her to the Master. The Master asked her to prepare a statement and she wrote it out in his presence. He met with Richardson, Chief Mate Ryan, Appellant, the Deck Delegate, and Hamilton. After reading the statement, Appellant denied the allegations against him contained therein.

The next day the Deck Delegate asked Richardson if she would accept an apology from Appellant and drop the charges. He told her that if she pursued them she and Appellant would both be discharged from the vessel. She agreed; Appellant apologized "in a fashion" and she dropped the charges.

After about a week Appellant renewed his advances, again assigned her unusual, dirty jobs, and refused to give her overtime. Overtime was normally given to any of the crew who wanted it. He also told Hamilton to get his two watch partners and get the whole crew to "come down hard on her." He admitted to Hamilton and Third Mate Williams that he had asked Richardson for sex and she had refused. Appellant said that he was going to harass her and get rid of her because of her refusal. He also said that she was a lesbian and he was going to get her off the ship.

On about 16 October 1981 after giving notice to the First Mate and the Master Richardson packed her belongings and left the ship without collecting her pay.

BASES OF APPEAL

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

1. The Administrative proceedings were inadequate because Appellant's lack of education prevented him from adequately representing himself, and because the Administrative Law Judge failed to require that he be represented by counsel and did not advise him of what witnesses would be beneficial to his case.

2. The findings of the Administrative Law Judge are not supported by substantial evidence because the testimony of the two witnesses called by the Investigating Officer was tainted.

APPEARANCE: Jack C. Pickett, Attorney at Law, Pascagoula, MS.

OPINION

I

Appellant's contention that the proceedings were inadequate because of the Administrative Law Judge's failure to require him to have counsel and failure to advise him of what witnesses he needed is without merit.

With respect to the right to counsel Appeal Decision 2089 (STEWART) states:

The government's responsibility with regard to counsel in administrative proceedings is to inform the person of his right to be represented by counsel at his own expense and to allow him to be represented by counsel should he so choose. The government can not be held in error because Appellant, being aware of his right and of the serious consequences involved in his exercise of the right, chose not to be represented by counsel (as is also his right).

See also Appeal Decision 2119 (SMITH).

Appellant was advised of his rights by the Administrative Law Judge in accordance with 46 CFR 5.20-45. The record reflects that Appellant affirmatively waived his right to be represented by counsel at the hearing.

Appellant contends that he was "unlearned" and should have been required to have the assistance of counsel. The record does not support the contention that Appellant was unlearned to the extent that he could not represent himself. Appellant waived his right to counsel and there is no right to appointed counsel in an administrative proceeding. Appeal Decision 1826 (BOZEMAN).

The Administrative Law Judge extended reasonable latitude to Appellant in the presentation of his case in accordance with the provisions of 46 CFR 5.20-95(c). He also provided substantial assistance to Appellant by recessing the hearing to allow Appellant to obtain witnesses, and by directing the Investigating Officer to assist Appellant in subpoenaing witnesses. During the recess Appellant obtained two witnesses who testified at the second session of the hearing. There is nothing in the record to indicate that the Administrative Law Judge should have reasonably concluded that additional witnesses were necessary.

II

Appellant's allegation that the decision of the Administrative Law Judge is not supported by substantial evidence is without merit. He bases that allegation on a claim that the testimony of Third Mate Williams was tainted because he is "an ambulance chaser", and that the testimony of Seaman Hamilton is tainted because of a "more intimate" relationship between Hamilton and Richardson than that between ordinary crew members. He implies that these allegations reflect on the credibility of the witnesses. He cites no authorities which would require the Administrative Law Judge to disregard their testimony if his claims were true.

Credibility is a matter for the Administrative Law Judge.

[Q]uestions involving the credibility of a witness are best decided by the trier of fact who presides over the hearing. The Administrative Law Judge, being able to hear the testimony first hand and to observe the appearance and demeanor of the witness, is generally far better equipped to make determinations of credibility than is any appellate body.

Appeal Decision 2159 (MILICI). "The Judge's findings of fact will only be altered if determined to have been arbitrary and capricious as a matter of law." Appeal Decision 2018 (GOODWIN). "The test for upholding a decision on appeal is that it be supported by substantial evidence from the record as a whole." Appeal Decisions 1654 (DA CUNHA), 2253 (KIELY).

Third Mate Williams and Hamilton were not incompetent as a matter of law and the Judge at the hearing was aware of Appellant's

allegations regarding them. Since it is the Administrative Law Judge's function to decide on the credibility of witnesses, and since his determination of the credibility of these witnesses was not unreasonable, it will not be disturbed on appeal.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. There was substantial evidence of a reliable and probative character to support the findings of the Administrative Law Judge.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas on 7 January 1982 is AFFIRMED.

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

Signed at Washington, D.C., this 27th day of September 1983.