UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-1201936-D1
Issued to: James Norman Elliott

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2331

James Norman Elliott

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

By order dated 1 June 1982, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia revoked Appellant's seaman's document upon finding him guilty of misconduct. The specification found proved alleges that while serving as Able Bodied Seaman on board the SS BUTTON GWINNETT under authority of the captioned document on or about 5 March 1982, Appellant did, aboard said vessel while at sea in the vicinity of Jeddah, Saudi Arabia, wrongfully assault and batter a fellow member of the crew, Dennis P. Carter, with a knife.

The hearing was held at Norfolk, Virginia on 12 May 1982.

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 three documents, a chair, a drawing and the testimony of two witnesses into evidence.

In defense, Appellant offered three earlier written statements of the victim, the testimony of three witnesses and his own testimony.

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

The entire decision was served on 1 June 1982. Appeal was timely filed on 26 May 1982 and perfected on 10 February 1983.

FINDINGS OF FACT

On 5 March 1982, Appellant was serving as Able Bodied Seaman on board the SS BUTTON GWINNETT and acting under authority of his

document while the vessel was at sea in the vicinity of the port of Jeddah, Saudi Arabia.

On 4 March, Appellant was resting in his bunk when he was disturbed by loud music coming from a nearby cabin. Dennis P. Carter, a messman aboard the vessel, was in the cabin with some other members of the crew. Happy hour was in progress and loud music was being played. Appellant complained to all present and after discussing the matter with one of the seamen present and Carter, the group moved the party to another cabin. The following morning, 5 March, Carter and Appellant met in the crew messroom. Appellant was seated at a table and no other members of the crew were present. Carter approached Appellant to apologize for the noise of the previous evenings, but both men exchanged verbal abuse and a heated argument began. The argument worsened and Carter knocked off Appellant's cap. After a brief struggle, Carter turned to move away. Appellant then stabbed Carter six times with a penknife. The victim was wounded twice on the back shoulder, twice on his chest under the left arm, and twice on his left arm. The shoulder wounds went to his bone. Carter then picked up a chair and after swinging it at Appellant a number of times succeeded in knocking the knife out of his hand. As a result the chair was broken and Appellant left the messroom. Carter, who was bleeding profusely, went to the Chief Mate. The Chief Mate, Dumford, assisted Carter to the ship's hospital, administered first aid and summoned the Master. At approximately 0900 on 5 March, Carter was examined by a Saudi Arabian physician and then removed from the ship on a stretcher to the local hospital. Appellant was arrested by the Saudi Arabian police and placed in jail. Several days later, Carter was released from the hospital and returned to the United States where he recuperated. Appellant was released from jail after Carter dropped all charges against him.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the charge was not supported by substantial evidence of a reliable and probative character, the conduct of the Coast Guard's Investigating Officers was fundamentally unfair and denied Appellant due process of law and the punishment was excessive.

APPEARANCE: Weisberg and Stein, Norfolk, Virginia by Richard J. Colgan, Esq.

OPINION

I

Appellant's contentions that the findings are then not supported by substantial evidence are without merit. The Investigating Officer must meet his burden of Proof by substantial evidence of a reliable and probative character which supports the required elements of the charge. The quality of the evidence necessary to support findings is found at 46 CFR 5.20-95(b): "Evidence of such probative value as a reasonably prudent and responsible person is accustomed to rely on when making decisions in important matters." The thrust of Appellant's attack here is on the Administrative Law Judge's determination as to the credibility of the witnesses who admittedly gave stories which conflicted to a certain degree, and to the ultimate weight to be given to the evidence. The Administrative Law Judge listened carefully to the testimony of Appellant and to the testimony of the victim. After reviewing the testimony, the Administrative Law Judge chose to believe the victim and disbelieve Appellant. It is the function of the Administrative Law Judge to determine the credibility of the witnesses and then to weigh the evidence admitted at the hearing. His decision in this matter is not subject to reversal on appeal unless it is demonstrated that the evidence upon which he relied is inherently incredible. Decisions on Appeal Nos. 2116 (BAGGETT), 1952 (AXEL).

On the facts alone, the test for review of an Administrative Law Judge's decision is not whether a reviewer may disagree with the Administrative Law Judge but whether there is substantial evidence of a reliable and probative character to support the findings. Decision on Appeal No. 1796 (GARCIA). In assault cases, when dealing with only the testimony of the aggressor and the victim, the versions of what happened often differ substantially. This is the case here. However, I have examined the record and found that the judge was not arbitrary or capricious in his evaluation of the testimony simply because he chose to believe one version of two sets of conflicting testimony.

I have recently discussed the self-defense issue peripherally raised by Appellant in his attack on the evidence. Decision on Appeal No. 2291 (MARGIOTTA). There I said it was well settled that although an act of aggression might authorize the use of sufficient force to cause an aggressor to desist, it does not justify the use of force which goes clearly beyond the bounds of necessity. See also Decisions on Appeals Nos 1852 (HALL) and 1803 (PABON). The evidence established that Appellant overstepped the bounds of legitimate self-defense when he used a dangerous weapon, a pocket knife, to stab Carter six times after Carter knocked Appellant's cap off. It is apparent that the response greatly exceeded the provocation. Appellant's self-defense argument is therefore without merit.

II

Appellant argues that he was denied due process by improper conduct by the Investigating Officers when they withheld two statements previously made by Appellant. He also suggests that their conduct was so unfair that the entire proceedings was unfair. I agree with neither argument.

The first of the two statements was obtained by Appellant through counsel from his union patrolman, Mr. Jones. The Investigating Officers stated that they were not aware of it and Appellant offered no evidence to refute that. The other statement was one by Appellant made to the Third Mate and written on the letterhead of the SS BUTTON GWINNETT. This statement was not introduced into evidence but used by the Investigating Officer during cross-examination of Appellant. Exhibit F is the two paragraph request for subpoena to the Administrative Law Judge. The statement to the Third Mate is fairly included in either paragraph of Exhibit F. Apparently all paragraph 1 and 2 material was provided except this letter. The Investigating Officer stated that he thought it had been provided but apparently due to an oversight it was not. The written request had not been renewed at the hearing although Appellant was aware of his statement to the Third Mate and that it had not been provided. Appellant was given a copy of the statements shortly after it was used and granted a recess to study it. In Decision On Appeal No 2043 (FISH) I held that failure to provide evidentiary statements to Appellant at or before a hearing was reversible error. In Decision on Appeal No. 2040 (RAMIREZ), I discussed the right to discovery in these proceedings. RAMIREZ, supra involved the use by the Investigating Officers of four surprise witnesses. I held that there was no prejudicial error since Appellant did not request a continuance but did cross examine the surprise witnesses.

Here Appellant was given the statement at the hearing, examined it and had the opportunity to use it before redirect examination. He did not request any continuance more than a "few" minutes recess, and did not object to the ten minutes allowed by the Administrative Law Judge. Appellant was not unfairly prejudiced by the use of the statement. Even if it was not provided before its use by the government, it was not prejudicial error since the statement was provided at the hearing, a continuance to examine it was granted and Appellant did examine it prior to redirect examination. FISH, supra and RAMIREZ, supra. The record reveals no intentional misconduct by the Investigating Officers and Appellant was not denied due process. The conduct of the Investigating Officers did not render the proceeding unfair.

Appellant finally contends that the punishment was excessive,

listing a number of factors which I should consider in reassessing the order. I have considered them, but agree with the Administrative Law Judge that revocation is the remedial sanction appropriate to this merchant mariner based on these facts and circumstances. I discussed the argument that an order of revocation for a first offense of assault and battery with a dangerous weapon is too severe in Decision on Appeal No. 2313 (STAPLES). There I held that the Administrative Law Judge must be guided by the Table of Average Orders (46 CFR 5.20-165) and fashion a remedial order appropriate to the person, his prior record and the circumstances surrounding the offense. I note that revocation is the average order for a first offense of assault and battery with a dangerous weapon. (46 CFR 5.20-165).

I have also said that the order in a particular case is peculiarly within the discretion of the Administrative Law Judge and, absent some special circumstances, will not be disturbed on appeal. See Decisions on Appeal Nos. 2236 (CLUFF), 1980 (PADILLA), 1936 VARGAS and 1585 (WALLIS). Generally there must be showing that an order is obviously excessive or an abuse of discretion before it will be modified on appeal. Decisions on Appeal Nos. 1994 (TOMPKINS) and 1751 (CASTRONUOVO). See also Decision on Appeal No. 2267 (ERVAST). I have affirmed revocations of the Merchant Mariner's Documents in similar assault and battery cases involving seamen with unblemished previous records. STAPLES, supra and Decisions on Appeal Nos. 2017 (TROCHE) and 1892 (SMITH). Appellant's violent and vindictive response with a knife to essentially the knocking off of his cap greatly exceeded the scope of response allowable as self defense. It also convinces me that Appellant's potential for future violence is great. Decision on Appeal No. 2289 (ROGERS). Therefore, I am not persuaded that the order here is excessive or an abuse of discretion by the Administrative Law Judge.

CONCLUSION

There was substantial evidence, reliable and probative in nature to support the findings of the Administrative Law Judge. The hearing was fair and conducted in accordance with the requirements of applicable regulations. The order of revocation is not unduly severe.

ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia on 1 June 1982 is AFFIRMED.

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

Commandant

Signed at Washington, D.C., this 25th day of November 1983.