

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT  
Issued to: Jose Manuel FERNANDEZ 486916

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2410

Jose Manuel FERNANDEZ

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 15 November 1984, an Administrative Law Judge of the United States Coast Guard at Honolulu, Hawaii, suspended Appellant's license and document for three months outright plus an additional six months on twelve months' probation upon finding proved the charge of misconduct. The specification originally alleged that while serving as third officer aboard S.S. CONSTITUTION, under the authority of the captioned documents, on or about 29 September 1984. Appellant wrongfully assaulted and battered by beating with fists and kicking the Chief Engineer. At the conclusion of the evidence, and subsequent to closing arguments the Administrative Law Judge amended the specification to read that Appellant wrongfully entered into mutual combat with the Chief Engineer.

The hearing was held at Honolulu, Hawaii, on 15 November 1984.

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 in evidence five exhibits and the testimony of five witnesses.

In defense, Appellant introduced in evidence two exhibits and testified in his own behalf.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification, as amended, had been proved, and entered a written order suspending all licenses and documents issued to Appellant for a period of three months outright plus an additional six months on twelve months' probation.

The complete Decision and Order was served 14 January 1985. Appeal was timely filed on 11 December 1984 and perfected on 5 April 1985.

#### FINDINGS OF FACT

On 29 September 1984, Appellant was serving on board the S.S. CONSTITUTION, a passenger vessel of 20,220 gross tons, as Third Officer under the authority of his license and document. On that date, the vessel was scheduled to sail from Honolulu at approximately 2115. Appellant was assigned the 0800 to 1200 watch, after which he went ashore.

While ashore, Appellant had several drinks, and returned to the vessel in an intoxicated condition at approximately 2000. Shortly thereafter, Appellant relieved the Second Officer of the watch. Appellant then went to the office of the Pay Master, then to his room where he turned on his radio to a very high volume.

The Chief Engineer, who had also been drinking during the day, heard the loud radio noise coming from Appellant replied, "I'm not turning the goddam thing down." Words ensued and Appellant grabbed the Chief Engineer and the two of them entered into a mutual combat in the passageway, both striking blows at each other.

The Chief Officer, having heard the loud music, went to investigate and found the two struggling within each other in the passageway. The Chief Officer separated the two, and reported the incident to the Master. Both the Chief Engineer and Appellant were discharged from the vessel.

#### BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that the evidence shows that he was the party assaulted, that any fighting he did was in self defense and that defending oneself against unwarranted attack is not misconduct.

#### OPINION

The main thrust of Appellant's contentions on appeal is a challenge to the adequacy of the evidence supporting the findings of the Administrative Law Judge. This argument is without merit.

The Administrative Law Judge's finding that Appellant and the Chief Engineer entered into a mutual combat has ample support in the evidence. Although there is conflicting testimony concerning how the fight started,

the Chief Officer testified that when he arrived on the scene, he found the two "pushing each other around in the passageway." (TR-58). Both the Chief Engineer and Appellant testified as to the altercation in the passageway.

I have consistently refused to reweigh conflicting evidence if the findings of the Administrative Law Judge can reasonably be supported.

When ... an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, that determination will not be disturbed unless it is inherently incredible

Appeal Decisions 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), and 2302 (FRAPPIER).

It is well established that the opportunity of the Administrative Law Judge to observe the demeanor of the witnesses affords him a significant advantage when it becomes necessary to choose between conflicting versions of an event.

Appeal Decision 2353 (EDGELL). See also Appeal Decision 2159 (MILICI).  
II

Although he has not raised the issue on appeal, Appellant at the hearing objected to the amendment of the specification by the Administrative Law Judge. The Administrative Law Judge determined that mutual combat was a lesser included offense under the alleged assault and battery. I perceive no error in this determination.

The regulations for suspension and revocation proceedings permit "the amendment of charges and specifications to correct harmless errors by deletion or substitution of words or figures." 46 CFR 5.20-65(b). "(T)here may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841 (D.C. Cir. 1950). This doctrine has been accepted in Suspension and Revocation proceedings. See Appeal Decisions 2358 (buisset), 2166 (register), and 1792 (PHILLIPS). lesser included offense under a specification alleging assault and battery. Appeal Decisions 1878 (BAILEY), 1435 (FINE) and 1398 (DANZEY). As stated in BAILEY, "(I)t is misconduct for two seamen to agree to fight, and then to fight..."

## CONCLUSION

The findings of the Administrative Law Judge are supported by

substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Honolulu, Hawaii 15 November 1984 is AFFIRMED.

B. L. STABILE  
Vice Admiral, U.S. Coast Guard  
Vice Commandant

Signed at Washington, D.C. this 3rd day of October, 1985.

\*\*\*\*\* END OF DECISION NO. 2410 \*\*\*\*\*