

U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

	:	
UNITED STATES OF AMERICA	:	
UNITED STATES COAST GUARD	:	DECISION OF THE
	:	
	:	COMMANDANT ON APPEAL
vs.	:	
	:	NO. 2551
LICENSE NO. 591358 and	:	
MERCHANT MARINER'S DOCUMENT	:	
113 38 7179	:	
	:	
Issued to: Frank K. LEVENE,	:	
Appellant	:	
_____	:	

This appeal has been taken in accordance with 46 U.S.C.
§ 7702 and 46 C.F.R. § 5.707.

BACKGROUND

By order dated September 25, 1992, an Administrative Law Judge of the United States Coast Guard at New York, New York
revoked Appellant's seaman's documents upon finding proved the
charges of misconduct and violation of law. The misconduct charge, supported by two
specifications, alleged that Appellant, while serving as Second Assistant Engineer
aboard the S/S RESOLUTE, Official Number D612715, on or about June 30, 1991, while
the vessel was at sea, wrongfully (1) assaulted and battered the Third Assistant
Engineer, William P. Jevvelis, by

strangling him with a strand of wire, and (2) assaulted another crewmember, Franklin Sesenton, by threatening him with a steel pipe. The violation of law charge, also supported by two specifications, alleged that Appellant wrongfully (1) operated the vessel while intoxicated, in violation of 33 C.F.R.

§ 95.045(b), and (2) refused to be tested for evidence of dangerous drugs and alcohol use, in violation of 33 C.F.R.

§ 95.040.

The Administrative Law Judge issued his decision and order on September 25, 1992. On October 22, 1992, Appellant filed a notice of appeal. On November 25, 1992, Commandant (G-MMI) extended the time for Appellant to file a completed appeal to December 21, 1992. Appellant timely submitted his completed appeal and, accordingly, this appeal is properly before the Commandant for review.

APPEARANCE: Jonathan C. Scott, Attorney-at-Law,
51 Normandy Drive, Northport, N.Y. 11768.

FINDINGS OF FACT

Appellant is the holder of Merchant Mariner's License No. 591358 which authorizes his service as Second Assistant Engineer of steam vessels, any horsepower. In addition, Appellant is the holder of Merchant Mariner's Document No. 113-38-7179. On June 30, 1991, Appellant was serving aboard the S/S RESOLUTE as a Second Assistant Engineer under the authority of those two documents.

At or about 2:00 p.m. on June 30, 1991, Third Assistant Engineer William P. Juevelis was lying on a beach chair, sunbathing on the flying bridge of the S/S RESOLUTE. Appellant, wearing gloves and holding a strand of copper wire in both hands, approached Juevelis stating that he was going to kill him. Appellant then placed the wire around Juevelis' neck and began to strangle him. Mr. Juevelis, unable to breathe, placed his hand between the wire and his throat, and struggled to break Appellant's hold on the wire. Eventually, Juevelis broke Appellant's hold, wrestled Appellant to the deck, and held him there until the Master arrived. While Juevelis held Appellant on the deck, Appellant kept repeating that he was going to kill Juevelis.

Upon his arrival at the scene, the Master noticed Appellant had slurred speech and smelled of alcohol. The Appellant was then taken to the Chief Mate's office where he refused to take a blood alcohol test but admitted that he had been drinking. The Master and Chief Mate then escorted the Appellant to his room where they found two empty gin bottles. The Master ordered Appellant to remain in his room, but Appellant disobeyed the order, obtained a length of pipe, went into the mess hall and assaulted the messman, Franklin Sesenton, by waving the pipe at him in a threatening manner. Appellant was later found sitting on the port side of the crew deck. He was subsequently handcuffed and returned to his room where the Master posted a guard outside Appellant's door.

BASES OF APPEAL

Appellant asserts the following as error:

1. The evidence was insufficient to sustain the allegation of assault against Franklin Sesenton, the messman.

2. The evidence was insufficient to find proved that Appellant acted in violation of 33 CFR 95.045(b).

3. Appellant's Fifth Amendment right to Due Process was denied because he was "prevented from testifying at the hearing" due to an ongoing criminal investigation.

4. The sanction of revocation was harsh and extreme.

OPINION

I.

Appellant contends that because he made no threatening remarks, and merely waved the pipe at Mr. Sesenton, the messman, from a distance of eleven feet, he had neither the intent nor the desire to harm him. Therefore, he contends, there was insufficient evidence to sustain proof of assault. I disagree.

The law generally recognizes two types of assault. One type may be defined as an unlawful attempt, coupled with the present ability, to inflict injury on the person of another. In other words, an attempt to commit a battery constitutes an assault. Commandant v. Keating, 2 NTSB 2654 (1973) aff'g Appeal Decision 1932 (KEATING). In order to prove this assault, the state of mind of the actor (Appellant) is at issue. Id.

Assault also includes putting another in apprehension of harm when there is the "apparent present ability to inflict harm" whether or not the actor actually intends to inflict, or is capable of actually inflicting, such harm. Appeal Decision 1218 (NOMIKOS). In this latter type of assault, it is enough that the victim was placed in reasonable apprehension of immediate harm. Appeal Decision 2198 (HOWELL).

The Judge found the evidence sufficient to establish the latter type of assault (Finding No. 11). It is his duty to determine witness credibility and to weigh the evidence. Appeal Decision 2484 (VETTER); Appeal Decision 2424 (CAVANAGH). The sole testimony on this issue was that of the alleged victim. He testified that Appellant had confronted him in the galley and asked of the whereabouts of some other individual. Mr. Sesenton replied, in effect, that he was busy and did not have time for Appellant (Tr. at 136). Appellant then left and returned with a length of pipe and tried to hit Mr. Sesenton, who was scared and ran off to find the Captain (Tr. at 138). Under the above rule, the assault was completed when Appellant put Mr. Sesenton in reasonable apprehension of immediate harm. Appellant's desires or intent do not negate the assault. There is substantial evidence of a reliable and probative nature to establish proof of the assault against the messman, Franklin Sesenton.

II.

A.

Appellant next contends that the Administrative Law Judge erred in finding proved the first specification under the charge of violation of law or regulation. Specifically, Appellant asserts that since he was not "on duty or watch" at any time after he was alleged to have consumed alcoholic beverages, he could not have been "operating" the vessel while intoxicated. I disagree.

Section 95.045 plainly states, "[w]hile on board a vessel inspected . . . under Chapter 33 of Title 46 United States Code, a crewmember (including a licensed individual) . . . (b) Shall not be intoxicated at any time" Absent knowledge of the individual's blood alcohol content, intoxication for the purposes of 33 C.F.R. 95.045(b) is established only when it is proved that the individual was operating the vessel and the effect of the intoxicant was "apparent by observation." 33 C.F.R. § 95.020. For the purposes of these regulations, however, evidence of Appellant's status as crewmember of an inspected vessel, is also conclusive evidence that Appellant was "operating the vessel". 33 C.F.R. § 95.015. Thus, a violation of 33 C.F.R. § 95.045(b) is established by evidence that the individual was on board an inspected vessel, that he was a crewmember, and that the effect of intoxicant was "apparent by observation."

The record reveals that Appellant was serving as a licensed individual (Second Assistant Engineer) aboard the S/S RESOLUTE, and that the S/S RESOLUTE had a valid Certificate of Inspection

issued by the U.S. Coast Guard Marine Inspection Office, New York and that the Appellant was on board at the time of the alleged incident. This constituted substantial evidence that Appellant was a crewmember on board a vessel inspected under Chapter 33 of Title 46. Thus, it need only be further shown that the effect of the intoxicant was "apparent by observation" to find a violation of the regulation.

Acceptable evidence of intoxication includes "personal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior"

33 C.F.R. § 95.030. The Administrative Law Judge specifically found that immediately after the incident giving rise to the charges, Appellant's speech was slurred and he smelled of alcohol. Furthermore, Appellant admitted he had been drinking. The Administrative Law Judge's findings of fact will not be disturbed unless based on inherently incredible evidence. Appeal Decision 2333 (AYALA). Since these findings were based upon the uncontradicted testimony of the Chief Mate and Master, they will not be disturbed. This constituted substantial evidence that the effect of an intoxicant was "apparent by observation" and, therefore, substantial evidence that Appellant was intoxicated while a crewmember on board an inspected vessel, a violation of 33 C.F.R. § 95.045(b).

Appellant's contention that he was not "on duty or watch" while intoxicated is, thus, irrelevant and his assertion of error as to the first specification under the charge of violation of law or regulation is without merit.

B.

A different problem arises with the second specification under the charge of violation of law. Under that specification, Appellant was charged with "wrongfully refus[ing] to be chemically tested for evidence of dangerous drugs and/or alcohol use, in violation of 33 C.F.R. 95.040." However, the plain language of the regulation indicates that its provisions cannot be violated. The regulation is evidentiary in nature and not proscriptive. One cannot violate a regulation which merely prescribes a rule of evidence. See Appeal Decision 1574 (STEPKINS). Therefore, it was error to find this specification proved since it does not allege an offense.

III.

Appellant contends that it would have been appropriate for the Administrative Law Judge to continue the hearing until the U.S. Attorney in New Jersey decided whether to prosecute him criminally for the same offense. I disagree.

The decision to continue a hearing is within the sound discretion of the Administrative Law Judge. F.C.C. v. W.J.R., 337 U.S. 265 (1948). This may be done on the Administrative Law Judge's own motion, upon motion of the investigating officer, or upon motion of the respondent. 46 C.F.R. § 5.511. The Administrative Law Judge's decision is reviewable only for abuse of that discretion. American Power & Light Co. v. S.E.C.,

329 U.S. 90 (1946).

Under the circumstances here, the Administrative Law Judge did not abuse his discretion in not continuing the hearing beyond September 15, 1992. Appellant's first hearing date was November 4, 1991. At Appellant's request, that date was rescheduled to December 18, 1991. After another hearing on February 26, 1992, the Administrative Law Judge granted Appellant another continuance, this time until April 22, 1992. Shortly before that date, Appellant's counsel apprised the Administrative Law Judge that Appellant's activities aboard the S/S RESOLUTE on June 30, 1991 had become the subject of a criminal investigation by the U.S. Attorney in New Jersey. Appellant then requested another postponement of the hearing date. On April 17, 1992, the Administrative Law Judge granted Appellant's request, and issued another order rescheduling the hearing to May 15, 1992. The May 15th hearing took place as scheduled. On August 5, 1992, the Administrative Law Judge granted another continuance, again in accordance with Appellant's request, to September 15, 1992. Appellant did not request any further continuances.

In light of the above, Appellant and his professional counsel were fully aware of the procedure for requesting a continuance. If Appellant believed that the possibility of a criminal investigation affected his defense in this administrative proceeding, he could have requested a continuance. He did not. In short, there is no evidence that the Administrative Law Judge abused his discretion by proceeding with the hearing when no further requests for continuances were forthcoming. Cf. Appeal

Decision 1945 (PAPALIOS). Thus, the hearing was fair under the circumstances. Snyder v. Massachusetts, 291 U.S. 97 (1928)(Due Process requires the proceedings to be fair relative to particular conditions or results).

Appellant contends that these circumstances created a risk of self-incrimination which "prevented him from testifying at the hearing." I disagree.

Appellant's right to invoke his Fifth Amendment privilege against self-incrimination in administrative proceedings is well settled. Kastigar v. U.S., 406 U.S. 441, rehearing denied, 408 U.S. 931 (1972). In this case, Appellant exercised his Fifth Amendment right by remaining silent. 46 C.F.R. § 5.519(a)(4). Cabral-Avila v. I.N.S., 589 F.2d 957 (1968)(petitioners' decision to remain silent at a deportation hearing was an appropriate exercise of their Fifth Amendment privilege against self-incrimination).

Nothing in the record of this case indicates that Appellant was prevented, by anyone except himself, from testifying if he so desired. By choosing to remain silent, however, Appellant deprived himself of an opportunity to present his own defense. Thus, if there was an error, it was committed by Appellant himself. Id. at 959 (petitioners' silence at deportation hearing did nothing to rebut the prima facie case that had been established against them).

Appellant erroneously asserts that the circumstances here are analogous to Gardner v. Broderick, 392 U.S. 273 (1968). In Gardner, the Court held that a policeman who did not waive the

privilege against self-incrimination after being subpoenaed before a grand jury, could not be dismissed from office "because of that refusal." Id. at 276. However, unlike Gardner, Appellant here is not being sanctioned for failing to testify, he merely waived contesting the government's prima facie case. Furthermore, Appellant was not subpoenaed to the hearing, nor even required to appear at the hearing. Thus, I find no reasonable analogy to the Gardner case.

Since the Administrative Law Judge complied with applicable regulations, he did not abuse his discretion in proceeding with the hearing, and Appellant has not been deprived of Due Process.

IV.

Appellant finally contends that the sanction of revocation was harsh and extreme. He lists a number of factors which I should consider in reassessing the order. After having considered them, I agree with the Administrative Law Judge that revocation is the appropriate remedial sanction based on the facts and circumstances of this case.

The offenses here constituted an assault with a dangerous weapon. See Appeal Decision 2549 (LEVENE). The assault and battery of Mr. Jevvelis, which is not contested on the appeal, was particularly vicious and nearly resulted in serious bodily harm. In fashioning an appropriate order, the Administrative Law Judge is to be guided by the Table of Average Orders set forth in 46 C.F.R. § 5.569. Revocation is within the range of average orders for a first offense of violent acts against other persons with injury resulting.

The entry of an appropriate order is peculiarly within the discretion of the Administrative Law Judge and will not be modified on appeal absent special circumstances. Appeal Decision 2423 (WESSELS); Appeal Decision 2331 (ELLIOT). Special circumstances generally require a showing that the order is obviously excessive, or an abuse of discretion. Appeal Decision 1994 (TOMPKINS); Appeal Decision 1751 (CASTRONUOVO).

In those cases cited by Appellant in which an order was modified on appeal, all of the elements of the instant case were not present. The evidence adduced in this case showed Appellant committed an unprovoked violent action, with the plainly expressed intent to do serious bodily harm, and committed a battery in furtherance of that intent. I have revoked the documents of seaman in similar cases. Appeal Decision Nos. 2331 (ELLIOT); 2313 (STAPLES); and 2017 (TROCHE). The promotion of safety of life at sea and the welfare of individual seamen continue to be of paramount concern to the Coast Guard in making these decisions. Appeal Decision 2017 (TROCHE). Appellant's lack of self restraint, and unprovoked violent actions, as revealed by the record, demonstrate that his potential for future violence is great. Appeal Decision 2289 (ROGERS). Therefore, I am not persuaded that the Administrative Law Judge's order was obviously excessive or an abuse of discretion.

CONCLUSION

The second specification under the charge of "violation of law" does not state an offense. With the exception of the second specification under the charge of "violation of law", the findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was fair and conducted in accordance with the requirements of applicable law and regulations. The order of revocation is not unduly severe.

ORDER

The finding of proved for the second specification under the charge of "violation of law" is SET ASIDE. The order of the Administrative Law Judge dated at New York, New York on September 25, 1992 is AFFIRMED.

Robert T. Nelson
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 27th day of August, 1993.