

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA :
UNITED STATES COAST GUARD :
 : DECISION OF THE
vs. :
 : COMMANDANT
MERCHANT MARINER'S DOCUMENT :
NO. 335-30-5882-D2 : ON APPEAL
Issued to: Ronald H. CARTER, : NO.2561
Appellant. :

This appeal has been take in accordance with 46 U.S.C. # 7702 and 46 C.F.R. # 5.701.

By an order dated February 4, 1994, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's document for two months outright. Appellant's document was further suspended for an additional four months on six months probation. The order was rendered after finding the single charge of misconduct proved. The single specification supporting the misconduct charge, which was amended without objection by Appellant, alleged that, Appellant, while serving under the authority of his U.S. Coast Guard, U.S. Merchant Mariner's Document, on or about 1550, November 27, 1991, while serving as Unlimited Able Seaman on M/V CAPE EDMONT, Official Number 901128, when said vessel was moored in port at Guam, U.S.A., did wrongfully assault the master, Virgil Elkinton, by threatening to strike him with his [Appellant's] fist.

A hearing on the matter was held at Corpus Christi, Texas, on January 20, 1994. At the hearing, the Appellant appeared without counsel and denied the charge and supporting specification.

The Investigating Officer introduced into evidence the testimony of two witnesses and five documentary exhibits, including copies of seven pages of the official log book of M/V CAPE EDMONT.

Appellant testified in his own defense and introduced into evidence eight documentary exhibits, seven of which are medical reports or portions of medical records documenting various injuries, medical complaints, diagnoses, and treatments regarding Appellant.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proven. The complete decision and order were served on Appellant on February 8, 1994. Appellant filed a Notice of Appeal, which also purports to be an Appeal Brief, on February 24, 1994, pursuant to 46 C.F.R. # 5.703.

FINDINGS OF FACT

On November 27, 1991, Appellant was serving as an Unlimited Able Seaman on board M/V CAPE EDMONT and was acting under the authority of his Merchant Mariner's Document. On November 27,

1991, the Appellant destroyed his merchant mariners document by cutting it up. Appellant then delivered his document to the master, Virgil Elkinton, in an envelope in hopes of being dismissed from the ship in Guam. In the afternoon of November 27, 1991, upon discovering what Appellant had done, the master called Appellant to his office to question him about cutting up the merchant mariner's document. During the conversation with the master, in order to get a medical examination or to be discharged early from the vessel, Appellant told the master that he would "punch him upside the head if that is what it would take to leave the ship." The master felt that the threat was sincere and feared that appellant would strike him. The master logged the incident in the ship's official log on November 29, 1994, while moored in the port of Apra Harbor, Guam.

The initial supporting specification of the charge alleged that the Appellant was serving as an "Unlimited Seaman" and committed the assault "on or about November 29, 1991." This specification was amended at the hearing, without objection by Appellant, to allege that Appellant was serving as an "Unlimited Able Seaman" and that the assault occurred on "November 27, 1991." No other amendments were made to the charge or specification.

Appellant served in Vietnam with the U.S. Army and also was deployed with the U.S. Merchant Marine to the Persian Gulf during

Operation Desert Storm. Several months prior to the voyage on M/V CAPE EDMONT, Appellant received treatment for a puncture 1 wound to his back that was incurred while deployed to the Persian Gulf during Operation Desert Storm. After his deployment to the Persian Gulf, Appellant reported symptoms of fatigue, dizziness, and memory loss. Appellant attributes these symptoms to being sprayed with Agent Orange during Vietnam and with some type of "acid" during Operation Desert Storm.

Appellant was served the "Notice of Hearing and Charge Sheet" on November 29, 1993, by the Investigating Officer. The Notice contained an explanation of the rights of a person charged, including the right to be represented by professional counsel and to have relevant witnesses and evidence subpoenaed in accordance with 46 C.F.R. # 5.107. The Investigating Officer also verbally explained these rights to Appellant. Appellant signed the "Notice of Hearing and Charge Sheet," acknowledging service of the notice, charge, and his rights.

By letter and attached instructions dated December 3, 1993, the Administrative Law Judge notified Appellant by certified mail of the date, time, and place of hearing, the nature of the charge and specification, and the rights of a respondent, including the right to be represented by professional counsel and the right to have relevant witnesses and evidence subpoenaed. Appellant signed the Administrative Law Judge's instructions and returned

it to him at the commencement of the hearing, acknowledging receipt of the Judge's notice, the charge, and rights of a respondent.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. The Appellant's bases for appeal are unclear; however, the thrust of his appeal is that:

1. Appellant was denied due process because he could not afford an attorney and because he was not given the opportunity to obtain affordable counsel.
2. Appellant was provoked by the master to destroy his merchant mariner's document because the master denied him adequate medical care.
3. Appellant was denied a fair hearing because all relevant witnesses were not called to testify.

OPINION

I.

Before addressing Appellant's bases of appeal, I find it necessary to raise sua sponte the error in the Administrative Law Judge's finding that the assault took place while the M/V CAPE

EDMONT was moored in the port of Apra Harbor, Guam, as charged in the supporting specification. [Decision and Order pp. 4, 5]. I find that the evidence adduced at the hearing, through exhibits and testimony, does not support such a finding.

Appellant, although denying he threatened to hit the master, testified that the incident involving the destruction of the document took place while the vessel was underway, a "day or two" before the vessel arrived in Guam, around the time the vessel was in a storm. [Tr. pp. 95, 103]. This testimony is uncontroverted in the record and, moreover, is supported by the master's testimony. Although the ship's log book entry regarding the incident [I.O. Ex. 4] shows that the master made the entry on November 29, 1991, while the vessel was in port at Guam, the entry further indicates that the incident occurred two days before on November 27, 1991. When asked by the Investigating Officer why the entry in the ship's log regarding the incident was dated November 29, 1991, and not the date of the alleged assault, the master stated that there was no time to make the entry on November 27, 1991, because the ship was "completing" a storm on that date and because the ship was approaching the harbor. [Tr. p. 42].

Therefore, the Administrative Law Judge's finding that the assault occurred while the vessel was moored in Guam is clearly erroneous. Consequently, the specification should have been amended to allege that the assault occurred while the vessel was

underway en route the port of Guam. However, this erroneous finding and resulting deficiency in the specification do not constitute reversible error. The location of the assault is not an essential element of the offense of assault. The elements of assault include "putting another in apprehension of harm when there is the apparent present ability to inflict injury whether or not the actor actually intends to inflict or is capable of inflicting harm." Appeal Decision No. 2198 (HOWELL), citing Appeal Decision No. 1218 (NOMIKOS).

The purpose of alleging the location of the offense in the specification is to give the Respondent notice of the charged offense to permit adequate preparation, response, and litigation of the issues. It is clear from the record that Appellant knew the nature of the charge of assault against him and had an adequate opportunity to defend the charge and litigate the issues at the hearing. I have previously held that "[f]indings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated. Appeal Decision No. 2422 (GIBBONS), citing Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950) and Appeal Decision No. 1792 (PHILLIPS). A specification need not meet the technical requirements of court pleadings, provided it states facts which, if proved, constitute the elements of an offense.

Appeal Decisions No. 2166 (REGISTER) and 1574 (STEPKINS). It follows, then, that failure to prove the location of the offense alleged in the specification does not constitute reversible error when the location is not an element of the offense. It is enough that the elements of the offense charged have been proved and that the Appellant knew and understood the nature of the Government's case and had adequate notice and an opportunity to litigate the issues. I find no prejudice to the Appellant and consider the Administrative Law Judge's erroneous finding and the Government's failure to prove the location of the offense to be harmless error.

II.

Appellant's first basis of appeal is that he was denied due process because he could not afford an attorney and was not given the opportunity to obtain affordable counsel. I find that this assertion lacks merit. Appellant was first apprised of his right to be represented by counsel, in writing and orally, by the Investigating Officer at the time Appellant was served with the "Notice of Hearing and Charge Sheet" on November 29, 1993. [I.O. Ex. 3].

Appellant was again notified of his right to be represented by counsel when served with the Administrative Law Judge's hearing instructions on or about December 6, 1993. [ALJ Exs. IV and V]. These instructions, among other things, notified

Appellant of the availability of pro bono legal services and gave the Appellant suggested organizations and telephone numbers to call to seek pro bono legal representation. Appellant acknowledged receipt and understanding of these rights by signing and returning to the Judge page 9 of these instructions. [ALJ Ex. IX]. These instructions and Appellant's acknowledgment and understanding were made exhibits to the record without objection by Appellant. Furthermore, at the commencement of the hearing, the Administrative Law Judge asked Appellant if he had any questions about the instructions, and Appellant responded in the negative. [Tr. p. 10]. The Administrative Law Judge also stated, on the record, without objection by Appellant, that Appellant had decided to represent himself. [Tr. p. 10]. At no time during the hearing did Appellant raise the issue of being denied an opportunity to obtain representation.

Appellant's argument would require the Government to notify respondents of all available means of seeking free or affordable legal services. This is not required, nor is it practical. It is sufficient that Appellant was notified of his right to be represented by counsel, as required by 46 C.F.R. Part 5. Contrary to his assertions, in this case Appellant was, in fact, notified by the Administrative Law Judge of potential sources of obtaining free or affordable legal services. Despite this information, Appellant decided to represent himself pro se.

I also find that Appellant's veiled contention that he was denied due process because he could not afford an attorney to be without merit. Respondents have the right to be represented by counsel; however, they are not entitled to free, appointed counsel at these hearings because these proceedings are not criminal and the Sixth Amendment therefore does not apply. Appeal Decision Nos. 1826 (BOZEMAN), 2242 (JACKSON & GAYLES), AND 2327 (BUTTS).

III.

Appellant's second basis of appeal is that he was provoked by the master to destroy his merchant mariner's document because the master denied him adequate medical care. Appellant misses the point. The charge is not that he destroyed his merchant mariner's document, but that he assaulted the master. Provocation to destroy the document, even if taken as true, has no relevance to the ultimate issues in this case, except possibly mitigation of the sanction. Appellant apparently raises this issue on appeal to suggest that he was provoked by the master when he committed the assault. I find this to be without merit because Appellant has consistently denied that he threatened to strike the master with his fist to be released early from the ship. Appellant must now hypothetically be conceding that he assaulted the master. Appeal Decision No. 5212 (OLIVIO). However, even so, Appellant's argument fails because

provocation is not a defense to assault. Appeal Decision No. 1911 (GEESE).

IV.

Finally, Appellant asserts that he was denied a fair hearing because all relevant witnesses were not called to testify. I also find this assertion to be without merit. The record clearly shows that Appellant was adequately notified of the rights of a respondent and understood those rights. The notifications included, among other things, the right to have witnesses subpoenaed. [I.O. Ex. 3; ALJ Exs., IV, V, and IX]. More importantly, the following discussion took place at the hearing:

THE COURT: If you were -- are you saying now that you would like the boatswain and the chief mate to testify?

MR. CARTER: I don't think it's necessary, sir. I'll be truthful with you. I don't really give a damn one way or the other -- I stated that earlier this morning -- which way this goes. I'm retiring the 1st of February on social security -. [Tr. pp. 119-120].

It is clear from this exchange that Appellant did not desire to have additional witnesses called to testify at the hearing, despite the offer from the Administrative Law Judge. Appellant understood his right to have witnesses subpoenaed and declined to do so. By failing to exercise this right, he waived it. He cannot now raise on appeal what he waived at the hearing. 46 C.F.R. # 5.701(b); Appeal Decision No. 2376 (FRANK).

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated February 4, 1994, at Houston, Texas, is AFFIRMED.

/s/ A. E. HENN
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C. this 13th day of February, 1995.