

NTSB Order No.
EM-55

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 26th day of November 1976.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

JOSEPH SABO, Appellant.

Docket ME-53

OPINION AND ORDER

The appellant, Joseph Sabo, has appealed from the Commandant's decision affirming the revocation of his merchant mariner's document (No. Z-928973-D3) and other seaman's papers for misconduct aboard ship.¹ He was serving at the time as an able seaman on the SS FREDERICK LYKES, a United States merchant vessel engaged on a voyage to the Far East.

Appellant had appealed to the Commandant (Appeal No. 2037) from the initial decision of Administrative Law Judge Dee C. Blythe, issued at the conclusion of a full evidentiary hearing.² Throughout the proceedings, appellant has been represented by counsel.

The law judge found proved specifications that appellant wrongfully had possession of intoxicating liquor, and wrongfully failed to perform his duties on various dates during the voyage. It was established that a bottle labeled "Artificial Fransch Brandy", about half full of an amber liquid, was found during a search of appellant's room conducted by the chief mate on September 24, 1974, while the vessel was at Malili, Indonesia. The chief mate testified that the search was performed because appellant appeared to be intoxicated; and further, that the contents of the bottle "had an alcoholic odor" (Tr. 35). His testimony,

¹The sanction was entered pursuant to 46 U.S.C. 239(g). This appeal therefrom is authorized by 49 U.S.C. 1903(a)(9)(B).

²Copies of the decisions of the Commandant and the law judge are attached.

corroborated by a log-book entry on that date, was held to prevail over appellant's denials, in the log, that he brought intoxicants aboard and, under oath, that it was his bottle of liquor (Tr. 71).

The law judge held that the remaining offenses were established by logbook entries, which recorded appellant's absences "from his duties and the vessel without permission" for 3 hours on October 7, in the port of Bangkok, and for 9 hours on October 18, 1974, at Singapore. Appellant's excuses for believing he was not scheduled for duty on the former occasion, and that he was entitled to shore leave on the latter, were rejected by the law judge.

Appellant's disciplinary record with the Coast Guard was next considered, disclosing that he had been suspended three times since November 1969 for similar offenses. The law judge concluded that "a more severe sanction is indicated" in this instance. He therefore entered the order of revocation.

In his brief on appeal, appellant contends that (1) It was not proved that he willfully and intentionally committed the offenses charged, (2) the charge on possession of intoxicating liquor was not properly pleaded, (3) neither his custody and control of the bottle nor the identity of its contents were established, (4) the logbook entries contain inadmissible statements and failed to establish charges of his failure to perform duties, (5) his disciplinary record was inadequately considered, (6) his constitutional rights were violated, and (7) the sanction is excessive. He urges that the sanction be reversed, modified, or remanded. Counsel for the Commandant has filed a brief in opposition.

Upon consideration of the parties' briefs and the entire record, the Board concludes that the findings of the law judge are supported by reliable, probative, substantial evidence. We adopt his findings and those of the Commandant, on review, as our own. Moreover, we agree that the sanction is warranted.

In the first contention, appellant is disputing the findings of wrongful conduct on his part. He argues that the terms "wrongfully" and "willfully" have been held to be synonymous by the Commandant in cases involving misconduct. His argument is not sustained by the decisions which he cites. Only one (Appeal No. 1765) is applicable,³ and there the Commandant construed a willful violation as "more flagrant than the others..." which were

³The added citations are appeal decisions No. 1767 and No. 1915, neither of which concerns or discusses offenses alleged or found to be willful.

identical violations but alleged as wrongful. Moreover, he fails to cite a decision (Appeal No. 489) in direct conflict with his argument, wherein the Commandant disposed of the issue as follows: "If the word `willfully' had been used in the specification then it might be required to show... a specific intent or purpose to do something wrong. The two words are not synonymous because although the meaning of `wrongful' is comprehend with in the definition of `willful', the reverse is not true for the reasons pointed out...." In this case, where wrongful conduct alone was alleged, we have no reason to equate it with willful or intentional misconduct. The latter characterizations would imply the gross or deliberate flouting of authority whereas the allegations here would require a lesser showing, namely, that appellant violated established rules of conduct aboard his vessel without justification.⁴

The specification charging appellant with wrongful possession of intoxicating liquor is challenged with the argument that it neither identified the substance nor alleged where it was found or whether it was under his custody and control. The record shows that appellant received a copy of the logbook entry, after it was read aloud to him aboard ship, wherein the full particulars of the incident were recited. A copy of the entry was also furnished to his counsel in advance of the hearing and the law judge advised that a continuance would be granted, if requested, to prepared a defense in light of the evidence presented (Tr. 6). Under these circumstances, the complaint that appellant was not properly informed of the offense charged is unfounded. It is well settled that the notice-giving function of pleadings is fulfilled "if there has been actual notice and adequate opportunity to cure surprise."⁵

Appellant next asserts an insufficiency of proof on the elements of this offense. The findings are supported by circumstantial evidence, including the admitted facts that appellant was the sole occupant of the room in which two bottles with brandy labels were found, the half-full one on his desk and an empty one in his trash receptacle, and the further fact that appellant was intoxicated at the time. Appellant argues in his brief that his appearance of intoxication may be attributed to overwork, illness, or other physical problems. However, the influence of such factors is not borne out by his own testimony. He gave no indication of being ill or have any physical problem that would render him "unsteady, unstable, speech somewhat slurred, in an argumentative mood," as testified by the chief mate (Tr. 32,

⁴46 CFR 5.05-20(a)(1).

⁵Kuhn v. Civil Aeronautics Board, 183 F. 2d 839- 842 (D. C. Cir., 1950).

50-1). He also testified to working the same hours as the rest of the crew (Tr. 69), who were not similarly affected. Thus, he in no way refuted the evidence of his intoxication.

Appellant's sole defense was that anyone could have placed the offending bottle in his room, since he kept it unlocked. This is mere speculation. In our view, it was sufficiently outweighed by evidence that the bottle was in appellant's possession. With respect to the identification of its contents, appellant complains that they were not subjected to chemical analysis to verify the chief mate's sense of smell. The law judge ruled that this would be relevant in the Coast Guard's rebuttal, if appellant denied that the substance was alcoholic (Tr. 35-6). Since appellant made no denial, he is not now in a position to criticize the absence of such verification. The law judge resolved this issue by his credibility finding in favor of the first mate, which we affirm. We also find that he could reasonably infer therefrom that the substance was alcoholic.

Appellant objects to the logbook entry of this offense as hearsay, and argues that portions were irrelevant and prejudicial. As we have recently held, logbook entries are admissible under the exception to the hearsay rule created by the Federal Business Records Act (28 U.S.C. 1732).⁶ The question portions recite that appellant appeared to be intoxicated that his possession of alcohol was a violation of ship's discipline. These facts are obviously relevant to issues which were litigated. We discern no prejudice, particularly since they were brought out in the chief mate's examination under oath.⁷

Appellant also objects to the subsequent log entries recording his absences from the vessel, arguing that they unfairly shifted the burden of proof. Where, as here, the entries have been made in compliance with statutory requirements (46 U.S.C. 701, 702), appellant had the burden "of going forward with the evidence."⁸ This did not relieve the Coast Guard of sustaining the ultimate burden of proof or transfer it to appellant. Since appellant admitted that his absences were during duty hours, the only contested issue was whether he had permission.

⁶Commandant v. Burke, EM-51, adopted June 14, 1976.

⁷His testimony included the fact that no liquor was allowed aboard under the "shipping agreement" between the owner and crew (Tr. 51-2).

⁸Kellar v. United States, 273 F. Supp. 945, 947 (E. D. Va., 1967). 46 CFR 5.20-107(b).

On the first occasion, appellant made his own assumption that sea watches would be in effect (Tr. 78) and that consequently his schedule of day work while the vessel was at Bangkok would be changed. Although he claimed to overhear a conversation in which the master and other ship's officers had predicted the vessel's departure, he conceded that he received no kind of official notice about the sailing time (Tr. 77). The chief mate testified that it was customary practice for seamen to be "notified [of sea watches] through the boatswain and the deck delegate or prior to sailing, when the sailing board is posted and the time, or prior to that, the notices are posted that sea watches are set for the deck department" (Tr. 44). Since a notice of sailing was not communicated to appellant by any of these methods, he had no right to assume that sea watches would be set or, if they were, that he would be off duty. Appellant's excuse for his longer absence on the second occasion at Singapore was simply that he was entitled to some "discretionary" time off (Tr. 75). Since, in this instance, his request was actually denied before he went ashore, appellant not only did so without permission but also in defiance of authority.

The evidence of appellant's prior record is not disputed as inaccurate. However, appellant argues that the entire record, rather than a summary, should have been produced and available for his examination. He was afforded ample opportunity to contest or explain the offenses and sanctions set forth in the summary. His counsel requested no additional information or time in order to present evidence in rebuttal or mitigation. With respect to one of the sanctions in 1971, appellant attempted to excuse the failure to join his vessel in Istanbul by testifying that he received a letter of commendation from the master of another vessel on which he had shipped out. This fact was extraneous to the offense, and nothing further has been presented in opposition to the findings on appellant's prior record. In the absence of any contrary showing, we find that adequate evidence thereof was contained in the summary document provided by the Coast Guard.

The constitutional issues raised concern the search of appellant's quarters and the claim that he was denied due process in these proceedings. In the latter contention, he asserts the right to a trial by jury. This right is not applicable to administrative proceedings under the Constitution, since "Administrative agencies do not impose criminal penalties, and proceedings before agencies are not suits at common law."⁹ We also find that the search was reasonable in view of chief mate's undisputed testimony that appellant was under the influence of

⁹Davis, Administrative Law Treatise, §8.16.

alcohol while working with other crewmembers in cargo discharge operations at the time, and that he considered him "dangerous to be on duty" (Tr. 41).

In assessing sanction, we agree with the Commandant's application of our prior decision in Commandant v. Winborne.¹⁰ As in that case, we affirm the sanction of revocation here because of the continuing "pattern of violation" by appellant. The likelihood that he would repeat the pattern aboard any vessel on which he might serve is apparent from the record herein. We thus find that his prior suspensions and misconduct in this case justify the order of revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The order of the Commandant and the law judge revoking appellant's seaman documents be and they hereby are affirmed.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

¹⁰1 N.T.S.B. 2349, 2351 (Order EM-26, adopted September 11, 1972).