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**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD**

UNITED STATES COAST GUARD)
Complainant)

vs.)

MICHAEL WAYNE ROBERTSON)
Respondent)

DECISION & ORDER

Docket Number: 00-0417
PA Number: 00000435

BEFORE: THOMAS E. MCELLIGOTT
Administrative Law Judge

I
PRELIMINARY STATEMENT

At the signing of the "Complaint," the U.S. Coast Guard was represented by Investigating Officer Thomas Allen Johnson, at the time stationed at the U.S. Coast Guard Marine Safety Unit, U.S. Post Office Building, 601 Rosenberg, Galveston, Texas 77550.

At the hearing held on 20 November 2000, in the port of Houston, Texas, the U.S. Coast Guard was represented by Investigating Officer Lieutenant Marie Byrd and Investigating Officer Thomas A. Johnson, who actually presented the case with guidance by Lieutenant Byrd, both at the time stationed at the same Marine Safety Unit in the port of Galveston, Texas.

This adversary hearing was initiated by the U.S. Coast Guard in the performance of its missions to protect lives and properties at sea, enforce national laws and treaties, preserve marine natural resources, and/or promote national security interests. It was brought pursuant to the legal authority contained in 46 U.S. Code Chapter 77, including 46 U.S.C. 7701 through 7705; the U.S. Administrative Procedure Act, 5 U.S.C. 551 through 559; and 46 C.F.R. Part 5.

Respondent was duly advised of the hearing date when he was served with a "Notice of Continuance" and he chose to be absent and not to send anyone to represent him at the hearing. Therefore, he was in default. However, the Investigating Officers chose to proceed to offer their evidence.

Respondent filed his formal "Answer" to the Investigating Officer's "Complaint" on 30 August 2000, at the Administrative Law Judge (ALJ) Docketing Center in Baltimore, Maryland. Respondent wrote on his "Answer": "SET A TRIAL DATE AT YOUR CONVENIENCE." Respondent Michael Wayne Robertson, born in Baltimore, Maryland, on 30 January 1959, is a 41-year-old American Merchant Seaman.

The Investigating Officer's case included the testimony of three (3) witnesses. The first witness was Samir Rashid, Crewman and Able Seaman (AB), from the S.S. FAIRBANKS, on board 28 November 1999, while the vessel was in a port in Mozambique, southeast Africa. The second witness was Third Assistant Engineer and Respondent's Supervisor, Derek Steven Hooper. The third witness was the vessel's Captain and Master, Richard Ronald Cunio. The vessel was in Nacala, Mozambique, on 28 November 1999, in southeast Africa.

Respondent was duly notified of the hearing date when he was served with the "Notice of Continuance," as attested by its attached "Certificate of Service" at Respondent's last known residence address: PMB #79, 2705-61st St., Ste. B, Galveston, TX 77551-1866.

In addition to the three (3) witnesses testifying under oath listed above, the Investigating Officer's case included eight (8) exhibits. (See Appendix A, List of Witnesses and Exhibits.)

II

FINDINGS OF FACT BASED UPON THE ENTIRE HEARING RECORD

CONSIDERED AS A WHOLE

1. At all times herein mentioned and specifically including the date of 28 November 1999, the Respondent was serving under the authority of his captioned U.S. Coast Guard-issued U.S. Merchant Mariner's Document, as an Oiler on board the motor vessel known as the S.S. FAIRBANKS, with Vessel Official Number D559400.

2. Respondent acted under the authority of that Merchant Mariner's Document on or about 28 November 1999, by serving as an Oiler in the vessel's engine room aboard a vessel, S.S. FAIRBANKS, Vessel Official Number D559400, as required by law or regulation. While the vessel was docked in Nacala, Mozambique, the Respondent committed wrongful intimidation and assault by verbally communicating a threat to kill the Third Assistant Engineer, a violation of vessel and company policy. Respondent secondly committed wrongful discrimination by verbally communicating derogative racial and ethnic remarks towards fellow crewmembers, a violation of vessel and company policy. Thirdly, Respondent wrongfully destroyed vessel property by deforming a mortar trowel and breaking a beverage glass during an episode of rage.

3. The Coast Guard did prove that Respondent did commit wrongful acts of misconduct while serving as Oiler on board the S.S. FAIRBANKS, while the vessel was in Nacala, Mozambique, on 28 November 1999, in southeast Africa.

4. The eyewitness testimony proved the Investigating Officer's allegations that the Respondent wrongfully intimidated his fellow crewmembers. Respondent also appeared to be intoxicated, as evident by the reliable testimony as to his unsteady gait and smell of alcohol upon his person, on the date in question. The Master of the S.S. FAIRBANKS, Captain Richard Cunio, eventually did receive reports at his request, or

after having been directed to do so, from Third Assistant Engineer Derek Hooper and Able Seaman Samir Rashid that Respondent did commit these various acts of misconduct. Captain Cunio then promptly discharged and dismissed the Respondent from employment on board the vessel on 28 November 1999, for numerous wrongful violations of company policy, law and regulation.

5. I find all the witnesses who testified credible, namely, Captain and Master Richard Cunio, Third Assistant Engineer Derek S. Hooper, and Crewman and Able Seaman Samir Rashid.

6. There was also admitted into evidence Investigating Officer's Exhibit 2, a copy of the letter of termination, issued to the Respondent and dated 28 November 1999, signed by the Master of the S.S. FAIRBANKS, Captain Richard Cunio. Captain Cunio testified that he personally typed up this letter of discharge addressed to the captioned Respondent, Michael Wayne Robertson, and either served it on Robertson or had it served upon Robertson that same day. He also said that he arranged with the local agent for the ship and shipping company to arrange to pay for flight and transportation back home to the United States of America, Houston, Texas, for Michael Wayne Robertson, since he was being discharged in a foreign port in southeast Africa as a result of his misconduct. The Captain entitled his letter of discharge as a "Letter of Termination," dated 28 November 1999, to Mr. Michael W. Robertson, listing Michael Robertson's Social Security Number, Oiler of the 8 – 12 Watch on board the S.S. FAIRBANKS, owned or operated at the time by Sabine Transportation Company. The "Letter of Termination" stated in relevant part:

"You are hereby notified in writing that you are guilty of the following offenses that constitute cause for immediate discharge. You are being discharged for the following causes as per company policy posted in the crew lounge:

"1. Fighting or attempting bodily injury to another, drunkenness, conduct which violates common decency or morality.

“2. Intimidating, discriminating, or coercing of one employee by another employee or employees, for membership or lack of membership, in any religious organization, society, fraternity, or labor organization, or because of race, color, age, religion, sex, national origin, veteran status, or handicap.

“3. Insubordination, failure to carry out assigned work or instructions, in a reasonable period of time, or defiance of authority.

“4. Willful neglect in care of use of company’s property or equipment.

“Last month it was reported that while on watch the Third Assistant Engineer (Derek S. Hooper) asked you to assist him in his duties. You refused to help him. Since this was not a direct order, no action was taken at the time.

“On 28 November 1999 it was reported that you returned from shore leave and entered the mess room and proceeded to yell racial and ethnic connotations regarding many of the members of the crew.

“On 28 November 1999 you threatened to kill the Third Assistant Engineer (Derek S. Hooper) while on watch. You also destroyed company property in a violent manner.

“Your wages have been terminated. You will be provided transportation to Houston, Texas, In the United States and Re-Patriated. You will be logged in the Official Log book and subsequent reports made to the United States Coast Guard.”

This letter was signed and typed Richard R. Cunio, Master.

III

ULTIMATE FINDINGS

1. The Investigating Officer’s “Complaint” is found proved by reliable, probative and substantial evidence. This includes all jurisdictional allegations and factual allegations.

IV

CONCLUSIONS OF LAW

1. The U.S. Coast Guard and the Administrative Law Judge have jurisdiction over the subject matter of this hearing under the provisions of 46 U.S. Code Chapter 77,

including 46 U.S. Code 7701 through 7705; the U.S. Administrative Procedure Act, 5 U.S. Code 551 through 559; 33 C.F.R. Part 20 and 33 C.F.R. Part 95.

2. The “Complaint” and all its allegations are found proved by a preponderance of the reliable, probative and substantial evidence.

V

OPINION

The above Preliminary Statement, Findings of Fact and Conclusions are incorporated herein as set forth in full.

46 U.S. Code 7703 is entitled “Bases for suspension or revocation” and states as follows:

“A license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder –

“(1) when acting under the authority of that license, certificate, or document –

“(A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or

“(B) has committed an act of incompetence, misconduct, or negligence;

“(2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner’s document; or

“(3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401 note).”

Misconduct is defined in 46 C.F.R. 5.27 as follows:

“‘Misconduct’ is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship’s regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.”

The factual allegations of misconduct as found in the "Complaint" are found proved by reliable, probative and substantial evidence.

Respondent's actions as alleged and proved amounted to misconduct which violated 46 U.S. Code 7703.

Specific intent to assault need not be proved where the law does not clearly make it an element of the offense. Parker v. the United States, 359 F.2d 1009, 1012 (D.C. Cir. 1966); People v. Rocha, 3 Cal. 3d 893, 92 Cal. Rptr. 172, 479 P.2d 372 (1971). Intent to injure is not an element of assault or battery. Appeal Decision 2452 (MORGANDE) and Appeal Decision 2273 (SILVERMAN). Appeal Decision 2512 (OLIVO) (1990), pages 8 and 9.

The "Complaint" and its supporting allegations and paragraphs are ruled proved and the findings in this matter have been found to be supported by and in accordance with a preponderance of the reliable, probative and substantial evidence. Steadman v. SEC, 450 US 91, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981); Commandant's Appeal Decision 2468 (LEWIN); 46 U.S. Code Chapter 77; 5 U.S. Code 556(d); and Title 46 C.F.R. 5.63.

The Respondent is advised of the right to appeal in accordance with 33 C.F.R. Part 20, which is enclosed herein.

After findings were made upon the record, Respondent's prior record with the Coast Guard was inquired into. Respondent's Merchant Marine Personnel Record was entered into evidence as Investigating Officer's Exhibit 8, which shows that within the last ten (10) years of his service in the American Merchant Marines, Respondent has not had any other cases proved against him by an Investigating Officer of the U.S. Coast Guard.

VI

CONSIDERATION OF A PROPER ORDER OR SANCTION

Commandant's Appeal Decision 2193 (WATSON) (1980) involved assault and battery with use of a weapon and injury to the victim. On appeal to the Commandant, it was held that because of Respondent's-Appellant's previous unblemished record, his family situation and the facts surrounding the incident, the Commandant's Appeal Decision reduced a revocation order to a 12-month outright suspension. Here, in Respondent Michael W. Robertson's case, we have no weapon and no injury, nor even a striking or touching of the master.

We also have the case of Appeal Decision 2452 (MORGANDE) (1987), heard on the Pacific Coast, where the Respondent had committed four assaults and batteries on four ships, including on a master, on a chief mate, and two others, and the order was affirmed on appeal for 18 months' outright suspension and 12 months on 24 months' probation.

Commandant's Appeal Decision 1486 (KNUTSON) states: "... entries in the Official Logbook constitute substantial evidence in support of the offenses alleged since the entries were made in substantial compliance with the requirements of 46 U.S. Code 702."

It was also well stated in Commandant's Appeal Decision 1473 (NASH): "A threat is a declaration of one's purpose or intention to work injury to the person of another with a view of restraining such person's freedom of action (Black's Law Dictionary). A threat is an avowed present determination to injure presently or in the future, United States v. Metzdorf, 252 Fed. 933 (E.D. Mich. 1918), and even the fact that

it is made conditional upon the ability of the defendant to carry it out does not render it any the less a threat. United States v. Jasick, 252 Fed. 931 (D. Montana 1918).”

Black’s Law Dictionary, Sixth Edition, gives further information on the definition of the word “assault.” It defines assault as follows: “Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another. State v. Murphy, 7 Wash. App. 505, 500 P.2d 1276, 1281.” Respondent in effect assaulted the Third Assistant Engineer by the threat to kill him while the two of them were alone in the engine room spaces, while the Third Assistant Engineer was Respondent’s Supervisor and the Duty Watch Officer.

VII

ORDER


That the captioned Respondent’s U.S. Merchant Mariner’s Document and all other valid licenses and/or documents issued to Respondent by the U.S. Coast Guard and now held by the Respondent and valid, be, and the same are hereby suspended OUTRIGHT effective immediately on the service hereof upon Respondent of this Decision & Order. The said OUTRIGHT suspension shall remain in effect for SIX (6) MONTHS after Respondent delivers the valid U.S. Merchant Mariner’s Document and License, if any, to the nearest U.S. Coast Guard Office, which Respondent is hereby directed to do so without delay. Respondent may deliver these documents by hand or by mail to the U.S. Coast Guard Marine Safety Office. There is an additional probationary period as follows:

Respondent's documents are further suspended for an additional SIX (6) MONTHS, which additional suspension shall not take effect provided no subsequent charge under 46 U.S. Code 7703, 46 U.S. Code 7704, or other navigation or vessel inspection law, is later proved against Respondent for acts committed during the foregoing period of OUTRIGHT suspension, or for acts committed within SIX (6) MONTHS from the date of completion of the said foregoing OUTRIGHT suspension.

DURING THE FIRST SIX (6) MONTHS, Respondent is to go to Alcoholics Anonymous (AA) meetings, at least thirty (30) times in the first thirty (30) days and then each month thereafter, for at least two (2) times a week for the next five (5) months. Respondent is to file reports establishing that he did attend such meetings by filing a list with the date; the meeting or group name; the signature of one member of the group to attest to his presence by first name and last initial, so as to keep the other member's name anonymous; and the phone number of a witness or organizer or sponsor of the group. (See attached "Meeting Attendance Log.") If Respondent fails to file the documents showing the proper numbers of attendance, his document will be suspended for a second six (6) months after the first six (6) months.

If it is later found proved that this probation is violated, the probationary order may be added to or form a part of an order which is entered by an Administrative Law Judge.

DATED THIS 06th DAY OF December 2000
HOUSTON, TEXAS


THOMAS E. MCELLIGOTT
Administrative Law Judge
U.S. Coast Guard

Dated: 06 December, 2000