

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

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UNITED STATES COAST GUARD

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* Docket No. CG S&R 00-0328

v.

* Coast Guard Case No. PA 00-000895

CHARLES H. ALSTON,

*

RESPONDENT

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DECISION AND ORDER

Respondent is charged in a two count amended complaint with violation of 46 USC § 7703 and 46 CFR § 5.27 (Misconduct).¹

The first count alleges that Respondent who holds Merchant Mariner Document [MMD] Number [REDACTED] was a Cook/Utility member of the crew of the vessel APL Korea. While serving under the authority of that document he assaulted and battered the Chief Cook, Karen Denney on September 6, 1999 by hitting her and putting her in a chokehold against a wall in a bar in Kaohsiung, Taiwan.

The second count alleges Respondent, still holding and serving under the authority of the same Merchant Mariner Document, assaulted and battered the Chief Cook, Mary Brayman on April 12, 2000 by verbally threatening her, pinning her to the deck and hitting her on board the APL Korea at sea in the North Pacific Ocean.

The Coast Guard requests that Respondents MMD be revoked.

Respondent answered the complaint in which he admitted all jurisdictional allegations, denied the factual allegations and asserted an affirmative defense of self-defense. He requested a hearing in this matter.

A hearing was scheduled for July 25, 2000 in Seattle, Washington. Respondent obtained counsel who, on July 12, 2000, appeared and requested a continuance stating that counsel had little time to prepare a defense and had advised Respondent he could leave to visit relatives on the East Coast and was thus unavailable for the hearing. The Coast Guard objected to the request stating that witnesses had been subpoenaed for the hearing and Respondent could return without any inconvenience. Nevertheless, the parties agreed to an adjourned date of August 15, 2000 at which time Respondent was informed through his attorney to be present for that hearing.

¹ The original complaint of May 11, 2000 alleged only one count of misconduct. An amended complaint dated June 15, 2000 added a second count of misconduct.

The hearing was convened on August 15, 2000. Respondent was present for the hearing, and represented by professional counsel. Respondent continued an objection to the hearing going forward again asserting counsel had not enough time to consult with his client and prepare a defense. The request was denied² and the hearing continued with the understanding that Respondent would be allowed to present a defense at a later date.

The Coast Guard presented seven witnesses and several marked and admitted exhibits. Each of the witnesses was cross-examined by Respondent's counsel. The hearing was then adjourned until November 16, 2000 to afford the Respondent the opportunity to recall any witnesses he chose and to present a defense.

On October 18, 2000 Respondent, through his counsel, informed this judge he was retiring from maritime service and he would not proceed further with the hearing then scheduled for November 16, 2000. He further informed this judge that he left the decision in this matter up to his discretion. See Respondent's Counsel's letter of October 18, 2000.

I then ordered the parties to file closing argument. Both the Coast Guard and Respondent by his attorney have filed such an argument.

After consideration of the testimony of the witnesses, documentary evidence, and the closing argument of the parties I find the following.

Count One

On September 6, 1999 Respondent Charles H. Aiston was serving as an assistant cook and utility person on board the APL Korea and was acting under the authority of his Merchant Mariner's Document Number [REDACTED]. He also acted under the authority of that MMD while on shore liberty in Kaohsiung, Taiwan. Jurisdiction of the Coast Guard extends to documented members of a ship's crew while on shore in a foreign port. Commandant Decision on Appeal No. 315 (Stennet). In any event, Respondent has admitted to the jurisdiction of the Coast Guard in this matter.

While on shore liberty Respondent and Karen Denney (Chief Cook) along with other crewmembers were drinking in a bar in Kaohsiung, Taiwan. While seated at a table Respondent asked Ms. Denney to give him his share of some cigarette lighters they had purchased since he wanted to return early to the APL Korea. She told him they were in her purse and she would divide them up later on board the vessel. He asked again, and again she responded: later. He grabbed Ms. Denney's purse, and Ms. Denney resisted. He became enraged and grabbed her by the throat, pushed her against the wall of the bar, and held her there. Ms. Denney responded by trying to kick Respondent in the groin. Ms. Denney denied the incident even took place. Ms. Denney inconsistently exclaimed it was "no big deal." However, from the testimony of Jeffrey M. Greco, Santino A. Zingales, and John J. Holtschlag, I find the incident occurred as described.

The term "misconduct" has long included the offense of assault. See Commandant Decision on Appeal No. 1218 (Nomikos) where the term was defined as follows:

An assault is committed by putting another in apprehension of

² In denying the request for a continuance, counsel was informed that Respondent's unavailability was his own fault and the continuance from July 25, 2000 afforded adequate time to prepare.

harm when there is the apparent ability to inflict injury whether or not the actor actually intends to inflict or is capable of inflicting harm. *Ladner v. United States* (1958) 358 U.S. 169, 177; *Guarro v. United States*, (CA. DC, 1956), 237 F.2d 578, 580.

Thus, it is sufficient to find an assault where the attack reasonably causes fear on the part of the victim, and it is immaterial whether or not the Respondent intended to injure the victim.

Respondent testified in his own behalf. He admits to a brief scuffle in which he sought to have his share of cigarette lighters given him so he could make an early return to the APL Korea. He admits to drinking alcoholic beverages. He says, however, no harm or injury was suffered by the victim.

Witness Jeffrey M. Greco, a second year cadet from the Merchant Marine Academy was serving on board the APL Korea and was in the bar that fateful evening drinking at a table with Respondent and the alleged victim, Ms. Karen Denney. Both Respondent and Ms. Denney were drinking. During the course of the evening, he testified that Respondent asked for his "belongings" and Ms. Denney responded they were in her purse and told him -- later. He observed Respondent grab Ms. Denney's purse, she grabbed back and then Respondent held her by the throat picked her up and pushed her against the bar's wall. She responded kicking Respondent in the groin. He, along with the crew, broke them apart. Cadet Greco admitted to having consumed alcohol and was intoxicated but denied he was so impaired that his observations of the incident were faulty.

Another Merchant Marine Academy engineering cadet, Santino A. Zingales also described the incident from the viewpoint of sitting at the bar along with the Bosun. He admitted not seeing a great deal, was startled when the commotion broke out at the table.

The victim, Ms. Karen Denney testified that she has been at sea for eleven years and was serving under her MMD on the APL Korea as the Chief Cook. She first met Respondent on the vessel.

When asked about the alleged assault, Ms. Denney denied it happened. She later expressed that the incident was "no big deal."

From the totality of the circumstances revealed by the testimony of the victim, Respondent and the witnesses, I find that Respondent flushed with anger, because the victim rejected his demand for his share of come cigarette lighters, did grab her and attempt to assert his dominance over her. When the victim kicked Respondent in attempt to defend herself, that demonstrated a fear in her of potential injury.

I find the Coast Guard has proven Respondent assaulted Ms. Denney and therefore such conduct constitutes misconduct as provided by statute and regulation.

Count Two

The second count alleges Respondent assaulted the Chief Cook a Mary Brayman on April 12, 2000.

Respondent was serving on board the APL Korea under his MMD on April 12, 2000 as the Assistant Cook and Steward. Respondent admits to the jurisdiction of the Coast Guard in this matter.

Mary Brayman testified that she has held a MMD for 15 years and was at sea for about 80 days between February, 2000 and April, 2000.

On April 12, 2000 during the dinner meal, she was in the area of the refrigerators and food boxes engaged in her usual duties. She asked Respondent to mop the area s deck since it had not been attended to for about four days. Ms. Brayman explained that she and Respondent shared the mopping duties and she told him that it was his turn to mop. She then proceeded into one of the food boxes or refrigerators and Respondent followed her.

When she exited the box he grabbed her screaming "I'll kill you, bitch" and they wrestled to the deck outside the food boxes. They were separated by the Master and the Chief Steward.

Respondent claims Ms. Brayman tried to hit him and he responded by grabbing her arms to hold her off which resulted in their falling to the floor with him on top holding her arms to the deck. He also said that he objected to her giving him an "order" to mop the deck since it was not his job as a steward since he had a number of unfinished duties including making up the rooms of the Master and Chief Mate.

Ms. Brayman testified she later told a port agent she only had balled up her fist and threatened to hit Respondent.

Both Ms. Brayman and Respondent were ordered to remain away from each other the remainder of the voyage and upon reaching port both were terminated. The Master gave Ms. Brayman a letter of recommendation, but none was given to Respondent.

Respondent claims that because he is black, this suggests some discriminatory animus toward him, which has culminated in this charge being asserted against him.

A review of the ship's logs shows the Master's Report of Character. It shows that Ms. Brayman's conduct was evaluated as VG -- Very Good and ability as VG -- Very Good. However, Respondent's conduct evaluation was I -- Indifferent, and his ability as M -- Middling. This may explain the absence of a recommendation. Otherwise, there is no evidence of any discriminatory animus toward Respondent affecting this proceeding or the bringing of the charges against him.

Respondent also asserts a self-defense claim to the charges. The fact that Ms. Brayman admits to having balled up her fist and threatened to hit Respondent appears, in part, to be the foundation of that claim. Respondent also says that she actually swung her arms and hands against him, which he sought to restrain by grabbing them. In essence I understand his defense theory is that in response to those threats of potential harm, he sought to defend himself.

It is clear that self- defense is only that amount of force sufficient to cause the assailant to desist. Commandant Decision on Appeal No. 2391 (STUMES); Appeal Decision 2163 (WITTICH) and Appeal Decision 1803 (PABON).

Moreover, the only real provocation which justifies the use of force is an actual attack leaving the victim with no other means of defense except the use of force." Commandant Decision on Appeal No. 1 975.(Graddick).

There are only two witnesses to the origins of this incident, Respondent and the Chief Cook, Ms. Brayman. All others come upon the scene of Respondent astride Ms. Brayman with her back on the deck and arms held down by Respondent.

I am not persuaded that Ms. Brayman actually attacked Respondent as he claims. She does admit to balling her fist and threatening him. But, that is not an attack, which justifies his grabbing her arms and wrestling her to the floor.

I find the Coast Guard has proven Respondent assaulted Ms. Brayman and therefore such conduct constitutes misconduct as provided by statute and regulation.

Sanction

The Coast Guard requests that Respondent's document be revoked. Respondent's history with the Coast Guard shows him having received a letter of warning for Misconduct for abusive and insubordinate behavior toward a vessel Master. See, Case No. PA93001603.

Respondent's Merchant Mariner's Document [REDACTED] is hereby REVOKED.³

The basis of my decision to revoke is centered on the prior record of Respondent, and the short period of time between the two separate assaults, particularly against women. Unfortunately these assaults do not appear to be isolated, out-of-character responses to individuals he found insufferable or insulting. They do suggest an anger control problem, particularly with women, which if not corrected reveal a potential for violence that militates against placing at risk the safety and welfare of those with whom he might sail in the future, should he be returned to merchant marine service.

Respondent is directed to turn over the document forthwith to the Coast Guard Marine Safety Office at Puget Sound.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A).

Dated: November 15, 2000.



Edwin M. Bladen
Administrative Law Judge

³ 46 CFR § 5.569 (Table of Suggested Range of Appropriate Orders) suggests a period of two to six months suspension for violent acts against another person without injury.