

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1227499 LICENSE NO R22583
Issued to: NORMAN E. ARMAD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2007

NORMAN E. ARMAD

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 9 August 1973, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for six months outright upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Radio/Telegraph Operator on board the SS JEFFERSON CITY VICTORY under authority of the document and license above captioned, on or about 9 December 1972, while the vessel was at sea, Appellant did wrongfully assault and batter a fellow crewmember, Third Assistant Engineer J.E. Frazer, and did wrongfully assault and batter him a few days later ashore.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence various documents and the testimony of the alleged victim.

In defense, Appellant offered in evidence various documents, his own testimony and that of a Saloon Messman on the vessel.

The Judge rendered a written decision in which he concluded that the charge and specification had been proved. He entered an order suspending all documents, issued to Appellant, for a period of six months outright.

The entire decision and order was served on 14 August 1973. Appeal was timely filed on 12 September 1973 and perfected on 2 July 1974.

FINDINGS OF FACT

On 9 December 1972, Appellant was serving as a Radio/Telegraph Operator on board the SS JEFFERSON CITY VICTORY and acting under authority of his license and document while the ship was at sea. On two occasions in the few months preceding that date, Appellant and Frazer engaged in arguments. For this reason, they tended to avoid one another.

On 9 December 1972, in the performance of his shipboard duties, Frazer passed close by Appellant, who was on deck painting a radio speaker box. Appellant said, "I guess this thing isn't finished yet." Frazer replied, "I guess not. Well, not here on the ship." Appellant then attempted to strike Frazer, who avoided the blow and struck Appellant. The altercation continued until the intervention of fellow crewmembers.

A few days later, after the vessel had reached Saigon, Appellant attacked Frazer ashore. This fight was terminated by military police.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that

- (1) The Administrative Law Judge's amendment of the specification to conform with the proof was an abuse of discretion and a denial of due process;

(2) Prejudicial error resulted from the admission of evidence tending to prove assault and battery for which Appellant had not been charged.

(3) The decision of the Judge was not supported by substantial evidence.

(4) The decision was based on prejudice or passion and constitutes a denial of due process.

APPEARANCE: Jeff Gorelick, Richmond, California

OPINION

I

The original specification under the charge of misconduct was for a single act of mutual combat. At the close of the Investigating Officer's case, the Judge ruled that a *prima facie* case of assault and battery had been made and that the specification could be amended. Counsel made no objection. Thus there is no question that Appellant was given actual notice of the issues in litigation prior to the presentation of his defence. Under these circumstances the doctrine of *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839 (1950) is fully applicable. Contrary to Appellant's assertions, suspension and revocation proceedings are remedial, not criminal, in nature; and the *Kuhn* rationale has been consistently applied thereto. Given the close relationship between assault and battery and mutual combat and the fact that Appellant had actual notice that the former was in litigation, the fact that the former might be considered a more serious offense than the latter is not controlling.

Unfortunately the Judge did not confine his amendment of the specification to a mere replacement of mutual combat with assault and battery. He further added the allegation of the later assault which occurred ashore. This must be considered as a second offense arising from an incident quite separate from that formed the basis

for the original charge and specification. I note also that the Judge ruled early in the proceedings that this matter was irrelevant to the charge and specification then under consideration. Under these circumstances it cannot be said that Appellant was placed on notice that his seaman's documents were in jeopardy as a result of this later incident. A proportionate reduction in the suspension ordered by the Judge is, therefore, warranted.

II

Appellant's second basis for appeal is without merit. As to the assault and battery which occurred on 9 December 1972, his contention would appear to be that evidence tending to prove assault and battery rather than mutual combat cannot be admitted in a proceeding under a specification of mutual combat. Especially in view of the fact that suspension and revocation proceedings are not criminal in nature and in light of the *Kuhn* doctrine, Appellant's suggestion is without merit. As to the later assault and battery ashore, it need simply be noted that counsel not only failed to object to the admission of the evidence, but specifically said, "Go ahead," (R.96).

II

Appellant has taken pains to expound upon the meaning of "substantial evidence," and he relies principally upon two cases wherein appellant courts found the findings of the trier of fact unsupported by such evidence. Both cases are, however, clearly distinguishable on their facts. *Rivas v. Weinberger*, 475 F.2d 255 (1973) involved findings based solely upon questionable inferences running counter to the overwhelming weight of the evidence. *Jacobowitz v. United States* involved findings based solely upon hearsay evidence which was contradicted not only by other hearsay evidence, but also by other evidence of a non-hearsay nature. In the instant case, the live witnesses testified not only to the statements of others, but also to their own statements and to the facts relevant to the charge in question. The Judge's findings are neither contrary to the weight of the evidence nor based in the main upon hearsay. They are, rather, based upon a determination of the relative credibility of conflicting testimony, a determination peculiarly within the discretion of the trier of

fact. Those findings are, therefore, as a matter of law, based upon substantial evidence.

IV

In his attempt to show that the decision of the Judge was based upon prejudice or passion, Appellant alleges a number of factual discrepancies between the record and the Judge's findings. The first of these involves a mere harmless summary of Appellant's words referred to at R.79. The second involves the testimony of Frazer at R.12. The language of the findings of fact is in this instance, however, fully supported by Appellant's own testimony at R.80.

The remainder of Appellant's brief on this issue merely concerns matters discussed above. As stated above, the findings are based on substantial evidence.

CONCLUSION

As stated above, the error of the Judge in expounding the specification found proved to include the assault and battery ashore requires a proportionate reduction in suspension. The period of suspension is, therefore, reduced to three (3) months outright.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 9 August 1973 is AFFIRMED as modified herein.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 5th day of September 1974.

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