IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-74366 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: John GRADDICK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1975

John GRADDICK

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 16 June 1972, an Administrative Law Judge of the United States Coast Guard at San Francisco, California revoked Appellant's seaman's documents upon finding him guilty of misconduct.The specification found proved alleges that while serving as Utility Messman on board the SS STEEL NAVIGATOR under authority of the document above described, on or about 24 April 1972, Appellant wrongfully assaulted and battered the Utility Messman Camilo Rojas by striking and cutting him on the hand with a knife.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of the SS STEEL NAVIGATOR and the testimony of several witnesses.

In defense, Appellant offered in evidence his own testimony

and sworn statements of two other witnesses.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then entered an order revoking all documents issued to Appellant.

The entire decision was served on 30 June 1972. Appeal was timely filed on 3 July 1972.

FINDINGS OF FACT

On 24 April 1972, Appellant was serving as Utility Messman on board the SS STEEL NAVIGATOR and acting under authority of his document while the ship was in the port of Surabaja, Republic of Indonesia.

On that date, difficulties had arisen between Appellant and one Camilo Rojas who was also serving as a Utility Messman on the vessel. It appeared that on previous occasions and again on this date Rojas had been shirking his work which required Appellant to fill in for him. On this particular occasion, Appellant complained to the Chief Steward about the situation. Later when Rojas, who had been ashore, returned, a scuffle broke out between Appellant and Rojas. This altercation did not result in any injury and is not the subject matter of the present charge.

Subsequently, Appellant was standing in the passageway near the pantry along with the Chief Steward and some of the other witnesses. Rojas came out of the pantry, tapped Appellant on the shoulder and suggested that they proceed to the dock to settle the dispute between them. As Rojas walked away from Appellant toward the passageway, Appellant ran after him grabbing Rojas about the neck with his left hand while he reached for his knife with his right hand. Appellant then raised the knife, which he carried as part of his duties, to Rojas' throat. At that point the two were separated by the Chief Steward and others. As a result of the scuffle, Rojas received a rather extensive gash on his hand which required medical attention. Rojas was removed from the vessel at that point; however, Appellant remained with the ship until the end of the voyage.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. The grounds for appeal as stated by Appellant are as follows:

"I. The facts as set forth in the Decision do not substantiate the conclusions reached.

II. There was justification for appellant's actions because they were the result of the provocation and aggravation, if not an outright assault, by the man allegedly assaulted by the appellant.

III. The penalty imposed on appellant is unduly severe and burdensome and is not warranted in view of surrounding circumstances."

APPEARANCE: Schulman, Abarbanel, McEvoy & Schlesinger of New York, New York, by D. Nicholas Russo, Esq.

OPINION

I

Included within the first ground of appeal is Appellant's assertion that he was served with a defective specification which failed to adequately put him on notice of the offense. This complaint was not renewed by the March 6, 1973 addition to Appellant's earlier statement. In any event, the specification and charge clearly comply with the requirements of 46 U. S. C. 239 and the regulations found in Part 137 of Title 46 Code of Federal Regulations.

The major thrust of Appellant's argument on his first point is that there was insufficient evidence to support the findings and conclusions of the Administrative Law Judge. I find that the testimony of the several eye witnesses together with the other evidence offered at the hearing constitutes substantial evidence of a reliable and probative nature to support the findings and conclusions. It is to be remembered that questions of credibility

and weight of the evidence are to be decided by the Judge as trier of fact and will not be upset in the absence of a clear showing that his evaluation was arbitrary or capricious.

II

The defense of provocation or of self defense raised by Appellant is simply not borne out by the evidence. The evidence discloses that the only possibility of assault or aggravation by Rojas against Appellant occurred at the earlier scrap between them. The incident now under consideration was preceded by a "cooling-off" period such that had Appellant been provoked by actions of Rojas, he was no longer justified in responding to it. Furthermore, 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. Even in such a situation, only such force as is necessary to repel the attack is justified. Clearly, it was not necessary for Appellant to have resorted to a knife to ward off any threat he may have thought existed. The evidence indicates a clear case of assault and battery upon Rojas by Appellant.

III

Appellant's final point finds some support in the record and in the surrounding circumstances. First, to be considered is Appellant's previously unblemished record following many years of service at sea. There was also testimony by the Chief Steward to the effect that he had never had any difficulty with Appellant before and would not hesitate to sail with him as a member of the crew in the future. Secondly, there is the matter of Appellant's family situation as outlined in his statement on appeal. And finally, the facts surrounding the incident, while not amounting to a legal justification for the actions taken, do constitute matters to be considered in mitigation. In view of these circumstances, an order of revocation would seem to be punitive rather than remedial, as is the proper nature of these proceedings. On the basis of the above, it is my opinion that the order should be modified to provide for the outright suspension of Appellant's documents for a period of 12 months.

CONCLUSION

The charge and specification alleging an assault and battery on the Utility Messman, Camilo Rojas, is found to be proved by substantial evidence of a reliable and probative character. The findings of the Administrative Law Judge are affirmed. The order of revocation is considered excessive under the circumstances. Accordingly, the order is modified to provide for the outright suspension of Appellant's Merchant Mariner's Documents for 12 months.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California on 16 June 1972, as modified, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 10th day of July 1973.

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