IN THE MATTER OF MERCHANT MARINER'S DOCUMENTS NO.Z-952264
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Rafael Emilio PEREZ-MARTINEZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1802

Rafael Emilio PEREZ-MARTINEZ

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 22 May 1969, an Examiner of the United States Coast Guard at Portsmouth, Virginia, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a fireman/watertender on board SS OVERSEAR ANNA under authority of the document above captioned, on or about 4 April 1969, at sea, Appellant:

(1) assaulted the master of the vessel by pushing him with his hands, and

(2) assaulted the chief mate of the vessel by grabbing him around the neck.

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

The Investigating Officer introduced in evidence voyage

records of OVERSEAS ANNA, and the testimony of three witnesses.

In defense, Appellant offered in evidence his own testimony and that of an eyewitness, his roommate.

At the end of the hearing,, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 3 June 1969. Appeal was timely filed on 9 June 1969 and perfected on 6 October 1969.

FINDINGS OF FACT

On 4 April 1969, Appellant was serving as a fireman/watertender on board SS OVERSEAS ANNA and acting under authority of his document while the ship was at sea.

On that date the master of the vessel, as a result of a report that Appellant and one Leonard S. Gerson, had been "pushing" marijuana among the crew, ordered a search of the quarters occupied by Appellant and Gerson, the search to be accomplished immediately after a fire and boat drill. The search party, comprising the master, the chief mate, the chief engineer, and the second mate, entered the room. The chief mate began the actual search.

When the chief mate discovered a package in Appellant's bunk Appellant shoved the master aside,, grabbed the chief mate by the neck, and succeeded in taking the package from the chief mate and in throwing it out the porthole to the sea. In so doing, Appellant also engaged in a struggle with the master during which he hit the master twice with his elbow.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that:

(1) There was a failure of due process because Appellant was not represented by a qualified

attorney at hearing;

(2) The Examiner improperly rejected Appellant's evidence merely because licensed officers testified against Appellant;

(3) All evidence as to marijuana should have been left out of consideration since possession of marijuana was not a specified offense; and

(4) The order is unduly severe, without hope of rehabilitation.

APPEARANCE: Nachman, Feldstein, Laffite & Smith, San Juan, Puerto Rico, by Salvador Antonetti Zequeira, Esquire.

OPINION

I

In this case the usual procedure was followed in advising Appellant of his right to counsel. On 8 May 1969, at the time of service of the notice of hearing, the Investigating Officer advised Appellant that he had the right to counsel. On 15 May 1969, the Examiner himself advised Appellant of his right to counsel, asking him whether he wanted an attorney. Appellant replied that he wished to proceed with the non-professional counsel who accompanied him.

Due process in these proceedings requires only that the respondent be accorded the right to professional counsel and reasonable opportunity to obtain one. An Appellant may not consciously elect to proceed without counsel and then, having awaited the outcome, argue that the absence of professional counsel is automatically a denial of due process.

The Examiner did not summarily reject the testimony of Appellant and his witness merely because the persons who testified against him were licensed officers. What the Examiner noted was the substantial consistency of the testimony of these three witnesses with no appearance of a motivation which could lead to a

suspicion of collusion.

The Examiner specifically invited Appellant to make a showing that the testimony of the witnesses against him should not be accorded credit, but nothing was forthcoming. Having heard testimony, which as to the violence asserted to have occurred was absolutely contradictory, he assigned greater weight to evidence which was not inherently incredible. This is the function of the trier of facts.

In this connection, it may be mentioned that Appellant attempts to raise an issue for the first time on appeal. In one appellate document it is asserted that Appellant was the only Negro in the crew. This is contradicted by another appellate document, Appellant's own affidavit, which admits that his roommate, who was also his counsel at hearing, is a Negro. No assertions of this nature were made before the Examiner and no real issue is raised on appeal.

It is not enough to point out that one is a member of a minority group. It must be demonstrated that the fact in some way operated to the prejudice of the seaman, e.g. it affected the credibility of an adverse witness.

Matters relative to the search for marijuana could not have been suppressed at this hearing even though Appellant was not charged with possession of marijuana. The reason for the research at sea was part of the res *gestae* surrounding the entry into the quarters of Appellant and the method of search that was used.

It is conceded that in a close case there would have to be careful consideration given to the question of whether the Examiner had been influenced in the framing of his order by a suspicion that what Appellant had thrown through the porthole had been, in fact, marijuana, and had therefore imposed a more severe order than what the established facts called for. As will be explained below, I do not think that such speculation is called for here.

IV

When Appellant urges that the order is too severe, he links

this argument to the thought that professional counsel would have elicited at the hearing the fact that Appellant had no prior record of misconduct as a seaman. At this point, a procedural error of the Examiner may be noted. At no time did he call for, or advert to, Appellant's prior record.

I have held that "prior record" is usually to be ascertained on the record and that a party has the right to challenge the record and present matters in his own behalf. Decision on Appeal No. 1472. In the instant case, the Examiner's failure to ascertain the prior record in open hearing, in fact not ascertaining it at all, deprived Appellant of the benefit of the Examiner's knowing that he had no prior record. It remains to be seen whether this error was prejudicial.

I take official notice of the fact that Appellant has had a Merchant Mariner's Document since March 1966 and had made six voyages without prior record. I do not think that such knowledge would have affected the Examiner's order.

The offenses which were found proved against Appellant were alleged merely as "assaults" against the master and chief mate. The record clearly establishes, however, that from the first "logging" Appellant was on notice that he was charged with pushing the master, grabbing the chief mate around the neck and laying violent hands on the master and mate in performance of their duties. While the specifications use only "assault" as a term of art they clearly spell out "assault and battery", and, in fact, the batteries were the matters litigated before the Examiner, not "assaults" without batteries. *Kuhn* v. *C.A.B.*, CA D.C. (1950), CA D.C. (1950), 183 F. 2nd. 839.

The examiner also correctly noted that appellant's conduct, which was not alleged as such, constituted interference with the master and chief mate in the performance of their duties. All of this was litigated, and all of these considerations were available to the Examiner in the formulation of his order.

Whatever Appellant's prior record might have been, and presented to the Examiner, the order of revocation can be sustained as

appropriate. What the Examiner tacitly declared was that on the merits of the instant case he found revocation the appropriate order whatever the prior record might have been and however clear it was.

This case can be clearly distinguished from that in Decision on Appeal No. 1472 cited above. There the appellant showed that he had evidence available which would tend to prove that the prior record should not be accorded as great weight as it might have received on its face. When the evidence was adduced, the examiner changed his order. In this case, only the absence of prior record is urged as a fact which should have been considered and, as I have pointed out, the Examiner has said, in effect, that he would revoke for the offenses proved whatever the prior record.

ORDER

The order of the Examiner dated at Portsmouth, Virginia, on 22 May 1969, IS AFFIRMED.

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

Signed at Washington, D.C., this 26th day of June 1970

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