IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-908589
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: William J. TURNER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1811

William J. TURNER

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

By order dated 25 August 1969, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for one month outright plus two months on eight months' probation upon finding him guilty of misconduct. The specifications found proved alleged that while serving as an ordinary seaman on board SS MORMACBAY under authority of the document above captioned, Appellant:

1) on or about 7 July 1969, at sea, wrongfully and without permission had in his possession a dangerous weapon, a 410 gauge pistol-shotgun, manufacturer "Boito."

2) on or about 3 July 1969, at sea, used "wrongful" language to the chief mate by saying to him, "If any accident, such as a mashed hand or crushed finger, happens to me, you better curl up and die. That will happen."

At the hearing, Appellant elected to act as his own counsel.

Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of the chief mate and certain voyage records of MORMACBAY.

In defense, Appellant offered in evidence his own testimony and a record he had made of an injury suffered aboard the vessel.

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 suspending all documents issued to Appellant for a period of one month outright plus two months on eight months' probation.

The entire decision was served on 29 August 1969. Appeal was timely filed on 18 September 1969 and perfected on 18 December 1969.

FINDINGS OF FACT

On all dates in question, Appellant was serving as an ordinary seaman on board SS MORMACBAY and acting under authority of his document.

On 3 July 1969, when Appellant, after having been temporarily assigned to sanitary duties, was ordered to work on deck, he said to the chief mate, "If any accident, such as a mashed hand or crushed finger, happens to me, you better curl up and die. That will happen."

On 7 July 1969, while the chief mate and the chief engineer were searching for contraband, they found in Appellant's locker a 410 gauge pistol-shotgun of "Boito" manufacture. Appellant had no authority from the master to have this weapon, which had recently been purchased in Brazil, aboard the vessel.

The gun was impounded by Customs on arrival.

BASES OF APPEAL

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

(1) there is no evidence that the weapon was dangerous (there being no evidence that there was ammunition for it nor even that it was operable), and

(2) a conditioned threat does not constitute an assault.

APPEARANCE: Louis H. Cohen, Esquire, of New York, New York.

OPINION

I

To look at Appellant's second point first, it is apparent that he had misconceived the Examiner's findings and the applicable law.

The specification in question originally alleged that Appellant "threatened" the chief mate by use of the language quoted. It is conceded that a threat to do bodily harm conditioned on an impossibility is not an assault even if the means to consummate an unlawful act are present. *Tuberville* v. *Savage*, Nisi Prius 1669, 1 Mod. Rep. (English) 3. But Appellant was not charged with assault. He was charged with making a threat. A threat to do bodily harm is misconduct under R.S. 4450, 46 U.S.C. 239.

In this case, however, the Examiner, on his own motion, eliminated the concept of "threat" from the specification and amended the specification to allege only "wrongful language." Appellant's argument here is totally irrelevant.

II

There remains a question. When the Examiner spoke on the record he talked, at times, in terms of "disrespectful language." Disrespectful language by certain persons aboard ship to other

persons on the ship may be misconduct. Nevertheless, the formal change made by the Examiner to the specification was not to "disrespectful language" but to "wrongful language."

I can recall no case in these proceedings in which an unadorned characterization of language as "wrongful" has been found to be a sufficient allegation of misconduct. Some descriptive words which indicate the nature of the wrong have always been used. This matter cannot be remanded to the Examiner for him to determine whether he meant "disrespectful," not merely "wrongful" in his formal amendment and findings because the Examiner is no longer available to the agency. The matter is not worth remanding to another examiner for hearing de *novo*.

I could, in all propriety, substitute the word "disrespectful" for the word "wrongful" because the matter was effectively litigated on the record. *Kuhn* v. *Civil Aeronautics Board*, CA D.C. (1950), 183 F. 2nd 839; 5 U.S.C. 557. Because of the language used by the initial trier of facts, I am not inclined to. The Examiner said that "the language used... was not in the nature of a threat but rather a foretelling of what might happen or what would happen to the Chief Officer since on other occasions when persons had seemingly imposed on him they had suffered unusual incidents." D-3. The Examiner further gave the opinion that he "was convinced that the respondent was making this statement in a prophetic rather than a threatening fashion..."

This is not the place to attempt to lay down affirmative statements about what constitutes "disrespectful" language from a merchant seaman to a superior, nor is it, I think, the place to say for the first time in this case that "prophetic" language was *per se* "disrespectful." Daniel was rewarded for prophecy of a dark future for Balthazar, a prophecy which came true that very night; no *lese majeste'* was found. Daniel 5, 29-31. In the area of language used by merchant seamen there must be different standards, albeit under different conditions, from those applicable in other areas of employment. The custom and the discipline of the sea must prevail.

Here, the issue was so beclouded at hearing and in the Examiner's decision that it is not appropriate for one to formulate a rule on review. With no practical possibility of remand for

clarification, I am of the opinion that the specification involved should be dismissed.

III

The specification relative to the gun also requires some discussion, even apart from Appellant's asserted grounds for appeal.

I am not persuaded that to find a weapon such as a pistol-shotgun a dangerous weapon there must be proof that there was ammunition available or that the weapon was operable. It would be incumbent upon Appellant to prove that what appeared to be a dangerous weapon in his possession was not in fact dangerous. He did not do so.

The search which disclosed the weapon was for the purpose of discovering contraband. The weapon was seized on the grounds that it was contraband. Although Appellant claims that he did not know until his encounter with Customs on arrival in the United States that such weapons were prohibited, it is obvious that at the time of finding and seizure the weapon, whether dangerous or not, was undeclared property, subject to seizure, the possession of which was unlawful.

The contraband nature of the weapon was discussed before the Examiner. The unlawfulness of its possession was established.

Even with deletion of the word "dangerous" from the specification, an offense would still be stated. Even with deletion of the word "weapon" an act of misconduct would still be stated. The search of the vessel was for contraband. The fact of seizure by Customs of contraband is spelled out in the record; indeed, it was admitted by Appellant that the property was contraband. The wrongfulness of possession of the property is amply spelled out in the record even if the weapon were not "dangerous" *per se* or even without decision as to whether it was a weapon.

The specification as to the wrongful possession of the weapon

may be upheld.

CONCLUSION

It is concluded that the second specification found proved should be dismissed. The findings as to the first specification found proved should be affirmed. The order of the Examiner should be amended, in view of the change in findings and Appellant's prior clear record. Normally I would place the entire period of suspension on probation, but I note here that the one month outright has already been served. I is appropriate then to reduce the order to that one month.

ORDER

It is hereby ordered that the findings of the Examiner, entered at New York, New York, on 25 August 1969 are AFFIRMED, except that the findings as to the first specification found proved are SET ASIDE and the charges thereto are DISMISSED.

The order of the Examiner is MODIFIED, to provide for a suspension of Appellant's documents for one month, and, as MODIFIED, is AFFIRMED.

T. R. Sargent
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 20th day of August 1970.

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