IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-777299 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert William BOZEMAN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1826

Robert William BOZEMAN

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 15 September 1969, an Examiner of the United States Coast Guard at Tampa, Florida, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a deck maintenance man on board SS HOOSIER STATE under authority of the document above captioned, on or about 28 May 1966, Appellant, while the vessel was at sea, assaulted and battered a fellow crew member, Carl POYAS, with a weapon, to wit, a knife.

At the outset of the hearing at San Francisco, California, Appellant did not appear but was represented by professional counsel. Appellant subsequently appeared in Tampa and entered a plea of guilty to the charge and specification.

The Investigating Officer introduced in evidence the depositions of seven witnesses.

In defense, Appellant offered no evidence, in view of his plea, but made a statement to the Examiner.

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

The entire decision was served on 17 September 1969. Appeal was timely filed on 24 September 1969 and perfected on 6 February 1970.

FINDINGS OF FACT

On 3 June 1966, Appellant was serving as a deck maintenance man on board SS HOOSIER STATE and acting under authority of his document while the ship was at sea.

On that date, Appellant assaulted and battered another crew member, one Carl Poyas, with a knife. At the time of the encounter, Poyas was not armed. As a result of the stabbing Poyas was hospitalized for more than ten days.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

Appellant makes four points on appeal:

(1) That the Examiner made his findings solely on the testimony of witnesses taken on deposition without adequate notice to Appellant;

(2) That the Examiner was improperly influenced in his finding that Appellant had committed assault and battery with a knife by knowledge of a prior medical record of Appellant;

(3) That the Examiner should have advised Appellant that he

had the right to appointed counsel in the proceeding;

(4) That since the evidence is as consistent with a finding of mutual combat as with assault and battery, the Examiner should have changed the plea of "guilty" to "not guilty."

APPEARANCE: Morison Buck, Esq., Tampa, Florida.

OPINION

I

Before proceeding to Appellant's contentions on appeal, I must discuss some procedure irregularities in this case relating to notice to the Appellant concerning continuances and taking depositions. This discussion requires consideration of certain collateral matters which demonstrate there was no prejudice to the Appellant.

II

The charges in this case, with notice of hearing, were originally served upon Appellant on 3 June 1966. The hearing was set for 1000, 24 June 1966, at the Coast Guard Marine Inspection Office in San Francisco.

The actual record of proceedings before an examiner begins at 1515 on 6 June 1966. (The document which contains this record is identified in the "Contents" sheet of the record as "Examiner [Exhibit] A" and is physically marked as "HE EX. A-A-12.") In this connection it is noted that the "charge sheet" (CG-2639) in the record shows a handwritten change in the date of hearing to 7 June 1966. An order of the Examiner presiding at the time the record opened (HE EX.B-B1) shows that the case was taken out of order on 6 June 1966 at the request of both the Investigating Officer and Counsel, so that Counsel could move for a change of venue.

When the proceedings opened before the Examiner on 6 June 1966 Appellant did not appear. Instead, a professional attorney, with whom the Investigating Officer had obviously had dealings off the

record, appeared for him. When this counsel immediately move for a change of venue to Tampa, Florida, it became apparent that some question of medical competency had arisen, in addition to the misconduct issue raised by the charges themselves.

The Investigating Officer objected to the motion for change of venue for the reason that he had:

(1) some reason to believe that needed witnesses on the misconduct issue might soon be available in San Francisco, and

(2) arranged for a psychiatric examination of Appellant, USPHS Hospital, San Francisco on 9 June 1966.

Appellant's counsel admitted that he had raised the question of incompetence before the hearing opened, and the Investigating Officer admitted that he had consented to a change of venue, since the vessel bearing the witnesses might come into a port other than San Francisco so as to require the taking of depositions instead of having the witnesses appear before the Examiner.

The Investigating Officer stated that he had earlier consented to the change of venue provided that Appellant would appear, deposit his merchant mariner's document (because of his suspected incompetency), and sign an agreement to that effect. When the Investigating Officer protested that Appellant had not appeared on 6 June 1966 to sign the agreement, Counsel volunteered to sign it for him since the document had already been deposited. No reason was given for Appellant's failure to appear.

Apparently several changes of mind took place, because the Examiner,after first finding no merit in the agreement of the Investigating Officer and Counsel to change of venue, decided to grant the change for the reasons that:

(1) deposition testimony could be taken as well from Tampa as from San Francisco, and

(2) the psychiatric - competency question raised by Appellant's counsel, although not formally before the

> Examiner, could as well be resolved by reference to USPHS facilities in Florida as by reference to USPHS facilities in San Francisco.

While the Examiner may take official notice that a particular USPHS facility (e.g., Lexington and Ft. Worth) has the capability of handling certain cases not subject to especially expert attention elsewhere, it does not follow that an examiner or an investigating officer can assume that every USPHS facility can handle any medical matter submitted to it. Without my resorting to official notice, it can be seen from the record in the case that the facilities for psychiatric examination available at San Francisco were not available in Tampa or anywhere else in Florida. The record shows that Appellant had to go to USPHS, New Orleans, to undergo the necessary psychiatric examinations.

In this case, when a psychiatric examination requested by Appellant had been scheduled for a date three days after the opening of the hearing at a facility having the capability of making the highly expert examination contemplated, neither the Investigating Officer nor the Examiner should have consented to a change of venue to Tampa, Florida, without ascertaining that the examination asked for by Appellant's counsel could be made there, and certainly, no finding should have been made by the Examiner, in his order granting change of venue, that facilities were available in Florida unless he had made adequate inquiry. The information needed here for proper findings was readily available from USPHS both to the Investigating Officer in San Francisco and the Examiner in San Francisco.

II

The official transcript shows the hearing as being "convened at Tampa, Florida, on the 19th of June 1969." At R-2, the Examiner stated, "...Mr. Bozeman did appear at the Marine Inspection Office in Tampa, Florida, and was certified, I think through Public Health for examination to the Public Health Hospital at New Orleans, and was subsequent to that time, found fit for duty and his document was returned to him. At that time Mr. Bozeman wa notified of the pendency of this proceeding and signed a written statement that he understood the pendency of this proceeding. This document was signed on the 18th of July 1966, which document will later in this

hearing be made of this record. Since that time the whereabouts of Mr. Bozeman have been unknown."

The document was made Investigating Officer's Exhibit "1" In it, Appellant acknowledged:

(1) that he was aware of the pending charge of misconduct;

(2) That he had conversed with the Examiner, who was in Jacksonville;

(3) that he understood that depositions would be obtained from witnesses;

(4) that he would keep the Investigating Officer and the Examiner advised of his whereabouts for the purpose of receiving notice of the taking of depositions or of continuation of the hearing; and

(5) that he was aware of the fact that if he did not keep the Investigating Officer and the Examiner advised of his whereabouts the hearing would proceed in his absence.

Investigating Officer's Exhibit "2" was his application to the Examiner, dated 21 July 1966, to take the testimony of seven witnesses by oral depositions at San Francisco. A copy of this application was sent to Appellant at the address he had given for receipt of notice.

The Examiner states in his Decision that he made several efforts to give notice to Appellant of his granting the request to take testimony by oral deposition but that Appellant could not be reached. (It was somehow ascertained later that Appellant had been absent from the United States from July 1966, "almost continuously," to June 1969.) The seven requested depositions were taken at San Francisco in September 1966.

It does not appear that Appellant was given notice as to any "time and date certain" on which proceedings would be had. However, Appellant had acknowledged that if he did not keep the Investigating Officer and the Examiner informed of his location for

service of notice the hearing could proceed in his absence.

IV

Appellant's first assignment of error is that the charges have been found proved solely on the testimony of absent witnesses taken by depositions without adequate notice to Appellant.

It is clear from the record that witnesses were expected to be in San Francisco within two or three weeks of the day the hearing opened in San Francisco. However, Appellant urged, through his counsel, for a transfer to Tampa on the grounds that the witnesses might come into Seattle rather than San Francisco, and that deposition could be as readily ordered from Tampa as from San Francisco.

(The argument for a change of venue because of residence would not have persuaded me to act on the mere speculation that the witnesses might appear in Seattle or Long Beach rather than San Francisco.)

If Appellant is complaining now that the "open" depositions in San Francisco authorized by the Examiner sitting in Tampa were unfair because he would have been required to hire San Francisco counsel to represent him, send Florida counsel to represent him, or go to San Francisco himself, I must reject his argument. (Counsel on appeal argues specifically that the inadequacy of notice about the depositions is rendered more reprehensible because it was known that Appellant had counsel at San Francisco.) Once the change of venue was granted, the San Francisco attorney, his job done, was no longer counsel of record (putting aside the adequacy of the evidence in the record as to his capacity which has been cured by Appellant's ratification of his actions).

While under the reasoning in "III" above, the notice given to Appellant of the taking of depositions in this case was inadequate, Appellant admitted that he had actual notice, having received the notice sent to him by the Examiner that the depositions were to be taken. He chose to ignore that notice. If Appellant had denied receiving notice and no proof of service had been given, I would have had to hold the depositions inadmissible for any purpose. But the case is otherwise.

V

The second assignment of error was that the Examiner was improperly influenced by evidence of Appellant's medical history, introduced *via* one of the depositions. Appellant pleaded guilty to the misconduct alleged. The plea was entered before the depositions were admitted into evidence. Further, the Examiner's findings were not predicated on medical history.

VI

Appellant's third point is that the Examiner had a duty to inform Appellant that he had the right to appointed counsel. Although Appellant states that this right is provided for in U.S. Supreme Court decisions, no cases are cited.

There is no such right to appointed counsel in an administrative proceedings. Boruski v. SEC, CA2 (1969), 340 F. 2nd 991.

VII

Appellant's last point is that the depositions, which should not have been admitted in evidence, leave open the question as to who was the aggressor in the matter and that the Examiner should have held the guilty plea improvident and entered a plea of not guilty, because a finding of "mutual combat" might have been made. That evidence also shows, however, that the victim of the stabbing was unarmed at the time. Whatever provocation Appellant might have had, real or fancied, his use of the knife was assault and *battery*.

VIII

One other matter must be discussed here which demonstrates that the finding and order are legally sufficient even if the depositions are rejected as evidence.

The table of Average Orders at 46 CFR 137.20-165 speaks of "assault with dangerous weapon (no injury)" as misconduct meriting, on first offense, a six month suspension, and speaks also of

"assault with dangerous weapon (injury)" as meriting revocation for a first offense. The Table speaks of "assault and battery" and mentions a six month suspension, it does not speak of "assault and battery with a dangerous weapon."

It might be argued from this that Appellant's plea of guilty to an assault and battery with a knife cannot be a predicate for a finding of "injury" such as to justify an order of revocation, but that "assault and battery with a knife," with no evidence of injury, should be equated to "assault with dangerous weapon (no injury)," and thus better dealt with by a mere six month suspension rather than an order of revocation.

The argument would then proceed, that since the depositions which established the injury and incapacitation of the victim should have been excluded from the record a finding based on the plea alone could not support an order of revocation because the plea did not admit injury.

There is an obvious omission in the Table in that it lists only "assault with dangerous weapon," and not "assault and battery with a dangerous weapon" (as we have in the instant case) as distinguished from "assault and battery" (with no reference to a weapon) which does appear in the Table.

The omission, I think, does not cause an error in the proceeding. An assault with a dangerous weapon can be committed without injury when there is no battery. However, an assault and battery with a dangerous weapon cannot be committed without a necessary inference of injury. Even without the deposition evidence, the plea of guilty to "assault and battery with a knife" requires the inference that there was injury. A battery with a knife must cause injury of some kind. Thus, the offense, even if bottomed on the plea alone, is in the category calling for an order of revocation.

CONCLUSION

I conclude that the examiner's findings are based on both a provident plea of guilty and on evidence of the quality required. An order of revocation is appropriate in the case of a seaman who injures another with a knife in the course of an assault and

battery.

ORDER

The order of the Examiner, dated at Tampa, Florida, on 15 September 1969, is AFFIRMED.

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

Signed at Washington, D.C., this 13th day of November 1970.

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