IN THE MATTER OF LICENSE NO. 370572 MERCHANT MARINER'S DOCUMENT
Z-385 281 D3 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Edward E. CLIFTON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1721

Edward E. CLIFTON

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 2 March 1966, an Examiner of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman's documents for six months upon finding him guilty of misconduct. The specifications found proved allege that while serving as a fireman-watertender on board SS YORK under authority of the document above described, on or about 7 June 1965, Appellant assaulted and battered one Melvin Chandler, a fellow crewmember, by striking him with his fists, and on 20 June 1965 wrongfully failed to perform duties between 0000 and 0800 by reason of being under the influence of alcohol.

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

The Investigating Officer introduced in evidence certain voyage records of YORK, the testimony of Chandler, depositions of

three other witnesses, and, by stipulation with counsel, a handwritten statement of another witness.

In defense, Appellant offered in evidence his own testimony.

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

The entire decision was served on 23 October 1967. Appeal was timely filed on 8 November 1967, and perfected on 13 April 1968.

FINDINGS OF FACT

On 7 and 20 June 1965, Appellant was serving as a fireman-watertender on SS YORK and acting under authority of his document while the ship was in the ports of Aden, Arabia, and Bombay, India.

On 7 June 1965, at about 2350, Appellant and Melvin Chandler were found fighting in a passageway in the crew quarters. No witness saw the beginning of the fight.

The fight was eventually broken up by the onlookers.

Subject to later comment, I quote the Examiner's finding as to the results of the fight:

> "Mr. Clifton, by reason of the fight herein considered, was bleeding from the face and head and Mr. Chandler received two black eyes and had a permanent bridge in his mouth knocked out."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that there is insufficient evidence to support a finding of assault and battery by Appellant. Not all of the specific exceptions need be recited, but one is of especial interest. "Petitioner excepts to the Hearing Officer's

interpretation of the depositions of Mr. Bolling and Mr. Moody." (Actually, the evidence from Bolling was not by way of deposition but was the handwritten statement, admitted by stipulation, previously referred to).

With respect to the second specification, it is urged that:

(1) while Appellant admits that he had been drinking prior to reporting for watch and that the engineer relieved him of his duties, Appellant asserts that he was ready, willing and able to work; and

(2) the only evidence against Appellant was pure hearsay.

APPEARANCE: Newton B. Schwartz of Houston, Texas, by Gary F. Wanzong, Esq.

OPINION

I

Before proceeding to the merits of this case, two procedural matters may be briefly noted.

(i)

At R-11, the Investigating Officer offered in evidence "the Articles of the SS YORK and extracts - certified extracts of the official log." When the Examiner ascertained that the official log was available he said, "Well, introduce the official log and we'll substitute the certified copies." Then he ordered that the same be done with the Articles. Thereupon, when both documents were apparently physically present, the Examiner said:

"Alright [sic], the Articles are admitted in evidence marked Government Exhibit A, and the extracts from the official log are admitted in evidence marked Government Exhibit B and certified extracts may be substituted for the Articles and the log."

Since the obvious purpose of reference to the articles is to establish Appellant's service aboard the vessel, it would be a quibble to insist that the live record apparently calls for entry of the entire set of articles in evidence while only an extract pertinent to Appellant was appended to the record. But as to the Official Log, there could be a different consideration. While "extracts" only were admitted in evidence, and copies were authorized to be substituted for them, the items to be admitted as "Exhibit B" were not identified at the time.

Seven months later, when a different attorney from the same firm was appearing for Appellant, he sought to enter an Official Log entry in evidence. R-97. It then appeared that this entry was already in evidence, and it was not until then that "Exhibit B" was identified as pages 14 through 19 of the Official Log for the voyage in question.

The fault here was either concurred in or waived by counsel, but it is clear that documents should be precisely identified at the time of their admission into evidence. Under certain perceivable conditions fatal error could result from the procedure followed here.

(ii)

It may be observed that the caption of this Decision identifies both a license and a Merchant Mariner's Document as within the matter of the hearing, while the "service" involved was only unlicensed service on a Merchant Mariner's Document, but no license. He qualified for the license before the Examiner's decision was served upon him. The Examiner's order suspended the "Merchant Mariner's Document" and "all other valid licenses and documents issued to you by the Coast Guard...." for a period to commence immediately upon service of the order ending six months "after the date on which you have surrendered your Merchant Mariner's Document to the nearest Coast Guard office....

While all licenses and documents were ordered suspended, the end of the suspension was determined by the date on which the Merchant Mariner's Document was surrendered. The question does not arise in this case because both the license and the MMD were turned in, within three weeks of each other and a temporary

license-document was issued on filing of the appeal. But, technically, the subject of this order could comply, and effectuate the running of the six months' suspension, merely by turning in his Merchant Mariner's Document. Use of the license during the period of suspension would, of course, be unlawful. Still, the possibility of unlawful use should be precluded so far as possible. In the future, orders of suspension the termination of which is conditioned upon the date of surrender of the documents affected should be so worded as to require the surrender of all licenses, certificates, or documents affected by the order, not merely on surrender of a single document held by the person charged at the time.

II

This is *prima*rily a case of asserted assault and battery by one seaman upon another in which no one but the participants in the fracas was present when the episode began. Appellant urges, among other arguments, that the issue is essentially a question of credibility between Appellant and his antagonist as to how the acknowledged fight began. If this were all there were to it the issue on appeal would have to be resolved against Appellant, because an examiner, as initial trier of facts, has the duty and the authority to assess credibility.

The grounds for appeal go beyond this however, and must be reviewed. In this case the Examiner was presented not with a simple confrontation between a person charged and an alleged victim of his assault and battery. In one form or another there is much evidence, apart from that of the combatants, which is usable, and was in fact used by the Examiner, in evaluating the testimony of the principals as to the beginning of the conflict. It remains to be seen whether this "third party" evidence was correctly understood and construed so as to justify credence in the testimony of the alleged victim of the assault and battery.

III

The Examiner, in rejecting Appellant's version of how the encounter began, was led to accept the version of the alleged victim, Chandler, because of the statement of Bolling and the deposition of Moody. The Examiner said:

> "The testimony of Mr. Robert W. Moody and the aforementioned statement of Jessie R. Bolling shows that they observed Mr. Clifton and Mr. Chandler, using Mr. Bolling's words "grappling" and Mr. Moody's words "engaged in what is commonly known as a fist fight." It was after first so observing these two men, Mr. Clifton and Mr. Bolling, "fighting" - "grappling" that Mr. Moody and Mr. Bolling saw Mr. Chandler using a flashlight on Mr. Clifton. The testimony of these two independent witnesses is accepted as substantial evidence of a reliable and probative nature, showing that the aforementioned fight did not commence as testified by Mr. Clifton. In view of what I have just stated I refuse to accept the aforementioned testimony of Mr. Clifton that Mr. Chandler started the fight. Mr. Chandler's testimony in the respect here considered is considered as substantial evidence of a reliable and probative nature.

This opinion seems to accept the Moody and Bolling material as supporting the testimony of Chandler that he drew his flashlight from his pocket in self-defense after being assaulted and battered by Appellant's fists.

Appellant directly challenges the Examiner's interpretation of this evidence.

IV

The statement of Bolling is that the fight was already in progress when he arrived on the scene, that both men were on deck with Appellant on top, that when Chandler shouted to be let up Appellant said, "Okay if you will knock this stuff off," that grappling somehow began again with both men going to the deck with Chandler on top, and that Chandler hit Appellant with a flashlight.

This does not negative the possibility that Chandler had the flashlight in his hand at all times. It does not imply that Chandler took the flashlight from his pocket while Bolling was watching.

Accepted, as it was by the Examiner, as "substantial evidence

of a reliable and probative nature" it does not show that the "fight did not commence as testified by Mr. Clifton."

It definitely contradicts the testimony of Chandler that the only time he struck Appellant with the flashlight was when he was on the deck and Appellant was standing on one foot and stomping him with the other.

The testimony of Moody is that he and Bolling arrived at the scene to discover Appellant and Chandler engaged in a fight. "We observed the fight for two possibly three minutes. Mr. Chandler had a flashlight in his hand, right hand, and struck him on the head several times with the flashlight...."

The only fair inference from this is that Chandler had the flashlight in his hand from the time of Moody's arrival on the scene. It does not show that the "fight did not commence as testified by Mr. Clifton." Again, like Bolling's statement, it definitely contradicts the Chandler version of the fighting.

Correctly understood, the witnesses Bolling and Moody tend to prove the unreliability of Chandler's testimony.

V

This unreliability is further highlighted by a significant omission by the Examiner. The specification as originally framed asserted assault and battery not merely by striking with fists but also "by kicking and stomping him with your feet." Although Chandler testified vividly and at length that as he struggled on the deck Appellant held his legs up and "stomped his body so badly that he feared for his life, the Examiner did not find that part of the specification proved. It is note-worthy that while Chandler embellished this part of his testimony with a statement that Appellant wore big, heavy shoes, other witnesses described Appellant's footgear as "go-aheads," "Japanese slippers," or "shower slippers."

VI

Ordinarily the amount of damage done by one seaman to another in a fracas is not even evidentiary in determining the identity of an aggressor unless the issue becomes that of unlawful measures in

self-defense. In this case the amount and kind of damage to Appellant also bears upon the credibility of the witness Chandler.

The Examiner's finding as to injury has been quoted in the Findings of Fact." The record presented for review indicates that the Examiner's findings do not go far enough.

Appellant's testimony is quoted:

> "Q. He got on top of you and was doing what? Just sittin' on you?
>
> "A. He was striking me very heavily and viciously with the flashlight.
>
> "Q. He was striking you around the----
>
> "A. All over I couldn't see because blood was in my eyes." (R-17).

Counsel then called the Examiner's attention to scars on Appellant's face. R-17, 1-13. The Examiner made no record of what he had been called on to look at. It must be presumed then, in favor of Appellant, that he exhibited "big scars" (R-17), attributable to the encounter in question since there was no evidence that they came from any other source.

More important, however, is evidence not mentioned by, and possibly overlooked by, the Examiner. The record in the Official Log shows that the Chief Mate found it advisable at 0050 to take Appellant ashore for medical treatment because of his head injuries and because of his apparent nausea. (There are intimations in the record that nausea may have been induced by intoxication. Whether or not the nausea, if properly documented, could have been the basis for a finding that Appellant failed to perform duties is immaterial. Appellant was not so charged.)

While it was found necessary to remove Appellant from the ship at 0050 for medical attention, the same record shows that Appellant's alleged victim of vicious assault and battery was administered first aid on board the ship.

The treatment found necessary for Appellant, while not evidence tending to prove that he was not an aggressor, is not consistent with Chandler's testimony that he struck Appellant only once.

VII

Appellant has argued that the Examiner erred in rejecting his testimony. When the testimony of a person charged is considered independently of other evidence it cannot be said as a matter of law that an examiner erred in failing to give it the weight that the party would like see assigned to it. In my view of this case, as already intimated, whether or not Appellant's testimony was convincing is immaterial.

It would not matter had the Examiner found Appellant's own testimony inherently incredible (which he did not, professing instead to rely on his interpretation of the statement of Bolling and the deposition of Moody). Rejection of the testimony of a person charged does not prove anything. (Decision on Appeal No. 894). There must be reliable and probative evidence to support the findings. The testimony of Chandler, contradicted in material part by other witnesses against Appellant, and tacitly rejected in material part by the Examiner, is not of sufficient reliability or probative value to sustain a finding that Appellant was an aggressor.

VIII

As to the specification alleging failure to perform duties between 0000 and 0800 on 20 June 1965, by reason of being under the influence of alcohol, the only evidence against Appellant adduced by the Investigating Officer is the testimony of two unlicensed engineroom personnel that they saw an entry in the engineroom log to the effect that Appellant had reported for work after drinking and had been "knocked off" by the watch engineer. A finding cannot be based on hearsay alone.

In this case, however, Appellant himself testified that on the

date in question he had been drinking before he reported for work and that the engineer in charge of the watch had dismissed him because of his condition. From this evidence could be inferred a proper finding in support of the specification, and in proceedings such as these testimony of the person charged himself may be utilized to fill gaps in the prima *facie* case in the absence of a stipulation to the contrary.

Certain aspects of this case persuade me that this theory should not be applied here. The first is that Appellant, although possibly for his own convenience, testified before any substantive evidence was produced against him. This brings about the unusual situation that an argument is correctly made that a *prima facie* case was not established, but is presented for the first time only after Appellant himself had earlier voluntarily furnished adequate grounds for the Examiner's finding.

This consideration by itself would not, in the ordinary case, inhibit an affirmance of the Examiner's findings on the second specification.

But it is now three years since the offense. Appellant has been sailing since 1943, when he was seventeen years of age, with no other blemish on his record. Since the offense and since the hearing itself, he has earned a license. The Examiner's order would have to be modified, probably to an admonition. 46 CFR 137.20-165. The order would necessarily blemish both the document and the license. In a proper case this would be neither unjust nor inequitable.

Here, the time, effort, and expense were devoted to an issue which makes the single failure to stand a watch relatively trivial. Affirmation of the findings as to the second specification, on the basis of Appellant's own testimony, would be a classic case of the laboring mountain bringing forth a ridiculous mouse.

CONCLUSION

The first specification was not proved by reliable, probative, and substantial evidence, and must be dismissed. The second

specification should be dismissed not because of any legal failure but in the interest of equity, through the exercise of administrative clemency.

ORDER

The order of the Examiner dated at Houston, Texas on 22 March 1966, is VACATED. The findings are SET ASIDE, and the charges are DISMISSED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 16th day of August 1968.

INDEX (Clifton)

Duty and authority to assess credibility

Findings

Cannot be based on hearsay alone

Hearsay evidence

Not sufficient basis for finding

Party

Testimony may fill gap in case

Prima facie case

Party's testimony may fill gaps

Revocation or suspension

Applicability to licenses and documents
Date of termination

Testimony

Consistency with injuries
Contradictory
Party's used to fill gap in case

Witnesses

Contradictory testimony
Credibility of
Testimony inconsistent with injuries

***** END OF DECISION NO. 1721 *****

Top