IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-808329-D1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Edward T. Rogan

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1735

Edward T. Rogan

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 20 June 1967, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for three months on six months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a wiper on board the United States SS KINGS POINT under authority of the document above described, on or about 21 May 1967, Appellant, at Saigon, S. Vietnam:

(1) wrongfully used foul and abusive language to the Chief engineer of the vessel, and

(2) wrongfully created a disturbance on board the vessel.

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 introduce in evidence an entry form the Official Log Book of KINGS POINT and asked for a postponement until later that day to obtain the testimony of the Chief engineer who had been required to be aboard the ship for a "shift" on the morning of the hearing on 15 June 1967. The Examiner properly held that a prima facie case had been made out the voyage records and that the presence of the chief engineer might not be required. He then permitted the defense to be heard.

In defense, Appellant offered in evidence his own testimony and that of a witness. After hearing this, the Examiner noted discrepancies and adjourned the hearing for three hours to obtain the presence of the chief engineer. Appellant did not appear for the later session, and the chief engineer's testimony was heard.

At the end of the hearing, the Examiner rendered a written 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 three months on six months' probation.

The entire decision was served on 24 June 1967. Appeal was timely filed on 21 July 1967, and was perfected on 13 October 1967.

FINDINGS OF FACT

On 21 May 1967, Appellant was serving as a wiper on board the United States SS KINGS POINT and acting under authority of his document while the ship was in the port of Saigon, S. Vietnam.

For findings as to the substance of what occurred, I quote from the Examiner:

> ". . . it appears that while the vessel was at Saigon, Rogan came aboard one night and took a shower and was unable to get cold water from the shower. He subsequently went to see the Chief

engineer and in seaman's language he asked that officer what he was going to do about "the God-damned wash water". He further explained to the chief engineer that he had "damned well better get some cold water soon." When he was reprimanded by the chief engineer for his language and his loud and boisterous attitude he told the chief, "This ship is not as sea now, and I don't have to take any from you or anyone else". In this testimony the chief engineer described the person charged as making a lot of noise and screaming so he could be heard on the next deck and that he was completely irrational about the matter."

BASES OF APPEAL

This appeal has been taken from the findings made by the Examiner.

Appellant's notice of appeal, accompanied by a request for a transcript of proceedings, urged as grounds:

(1) that although Appellant testified in his own behalf, and had a independent witness testify for him, the Examiner's assigning of more weight to the witness who testified against him wa error, but this should not have been done, considering Appellant's prior record and

(2) that "defendant should be afforded rights.... [;] a man is automatically guilty, per se, if he is charged by a superior officer.

In his later brief, Appellant argues:

(3) that the testimony against him shows that the witness against him admitted that Appellant did not "directly curse me,"

(4) the Examiner "did not bother to go over the transcript but rather took it upon himself to give more weight to Mr. [...]'s testimony only because he was in fact an officer;

(5) the evidence does not support a finding of "creating a disturbance;"

(6) Appellant "was not represented by counsel at his original hearing and thus was treated with utter disdain by both the Hearing Examiner and the Investigating Officer;"

(7) the Examiner gave more weight to the evidence of an officer than/to that of other crew members because of bias.

(8) the Examiner should not have heard the testimony against Appellant, or, in the alternative, should not have considered it.

OPINION

When the Examiner assigned "weight" to the evidence before him, he was not aware of Appellant's prior record. While Appellant could have urged his prior record (which was not, within the ten months just before this instant hearing, spotless) as aiding his credibility, he did not do so. It cannot then be said that the Examiner failed improperly to accord weight to Appellant's testimony predicated upon his good prior record when the Examiner did not know of it, and could not properly have known of it unless Appellant himself had placed it in issued to support his credibility.

II

Appellant's second point is that he was denied his rights because he was automatically found guilty since he was accused by superior officer. Appellant did not immediately support this assertion when made in his notice of appeal, but he collaterally raises it again in his brief in other terms. As stated at this stage, the point has no merit.

III

The third point goes to the substance of the evidence against Appellant. He quotes from the testimony of the chief engineer, "He didn't directly curse me." R-19. He says also, ". . . the Chief Engineer himself said that Mr. Rogan did not use foul and abusive language to him." B-3.

It must be admitted that the first statement by Appellant is correct. The chief engineer did use the words quoted, in his testimony. It is not correct, however, to say that "the Chief Engineer himself said that Mr. Rogan did not use foul and abusive language to him."

The witness testified that he recorded the language almost immediately and supplied this record to the master, for entry in the Official Log, the next morning.

The witness actually testified (R-19), possibly making a distinction between "curse me" and the language of the specification, thus:

> "Well, he came up and he says "I want to know what your are going to do about that god-damned water down there. I want to take a cold shower." I said "The water won't be cold until tomorrow morning about 6 o'clock." And he said "you'd better get all over done about this god-damned water and get it done fast. I want a shower, a cold shower. I'm entitled to it." He said "This fucking ship is at

> the dock, it is not at sea now and I'm not taking any shit from nobody." By this time, I had gotten him out in the passageway. I don't know; a man comes up with water all over him an a towel wrapped around him and red in the face and screaming. It just appeared to me like he was about ready to tear somebody up. And naturally I got him out in the passageway, out of the room."

This may not be "cursing" someone. It is "foul and abusive language." And the chief engineer did in fact say that Appellant used this language to him. He did not anywhere, as Appellant contends, say that Appellant "did not use foul and abusive language to him."

Appellant's third point has no foundation.

IV

Appellant's fourth point is meretriciously urged, and is noteworthy only because appellants who are represented by counsel should so recognize and not offer such arguments.

It is quite natural that "the Examiner did not bother to go over the transcript" before he made his decision. The fact that the Examiner here did not "go over the transcript" is not a fault at all. The regulations clearly indicated that an Examiner will ordinarily make his findings in open hearing 46 CFR 137.20-175. A "transcript" of proceedings is normally an appellate document only. Decision on Appeal 1679.

Except in the most complicated cases, decision on the record in opening is a virtue, not a fault. Appellant's fourth point is therefore rejected.

V

Appellant's fifth point I am inclined to agree with. Conduct which might not otherwise be misconduct can become so when it actually creates disturbance on a ship. Conduct which is "misconduct" should not be separately held to be a different act of misconduct as a "disturbance" unless a separate disturbance is shown. I do not think it enough, as was done here, to find that Appellant's foul and abusive language could have been heard a deck away, also to find that there was in fact a disturbance a deck away. There is no evidence as to the distant disturbance.

VI

Appellant's sixth point, as framed by Counsel, it that he "was treated with disdain by both the Hearing Examiner and the Investigating Officer."

Counsel admits, "In the many hearings I have appeared at, I have of course always been given the fullest of cooperation and consideration."

The record of proceedings has been thoroughly read and re-read. Absolutely nothing appears, and Counsel has pointed to not one word in support of his allegation, to indicate that Appellant was treated with other than the consideration that Counsel himself has always received. The only evidence of an act of disdain is the fact that Appellant disdained to return to the hearing after recess.

VII

Concerning Appellant's assertion of bias, I will quote two remarks from the appellate brief:

(1) "This seems to be a common practice by A.P.A. Examiners, that is, to give more weight of evidentiary nature to those officers aboard a vessel rather than an equal weight with the rest of the crew members."

(2) "It seems, on a careful reading of the transcript and of the charges as presented, Mr. Rogan has been duped by the Coast Guard into believing that there were he to present evidence on his behalf, he would perhaps stand a chance of being found not guilty. This, of course, is not true as one can see from reading the transcript. . .

" This is strong language.

(In the first quotation, the reference to "A.P.A. Examiners" is construed to mean "examiners of the United States Coast Guard, "because there are many examiners employed by many agencies because the "Administrative Procedure" laws in Title 5, U.S. Code, who do not deal with seaman.)

The first specification of bias is a general charge, unsupported by any offer of proof that there exists a "general practice" of examiners to discriminate against unlicensed seaman. There are available for public inspection decisions on some fourteen hundred appeals of merchant seamen, licensed and unlicensed alike, from appeals of Coast Guard examiners. Since Appellant's counsel, who apparently has much experience in proceedings of this nature, offers nothing to support private opinion that "there seems to be a common practice, "this allegation must be rejected.

As to the second quotation from Appellant's brief, supporting a charge of bias, I am not sure that Appellant's point has been made clear. In the history of litigious actions there have been many assertions that persons have been"duped" into pleading "guilty" or tricked into making settlements. Such is not the case here.

There is no need to go into a semantic analysis of what Appellant's statement could be converted into by use of symbolic logic. Here again, the brief urges only that "reading the transcript" is enough. The transcript has been read and re-read.

What is shows is that the Examiner first found a *prima facie* case established by the Official Log Book entry, and then heard the testimony of Appellant and Appellant's witness. He

suggested then that the personal appearance of the Chief engineer was needed because he apparently felt that the *prima facie* documentary case might have been rebutted by Appellant's case.

Appellant, on proper notice, refused to appear later in the day so as to exercise his right to confront and cross-examine the chief engineer.

This is not, on its face, a "duping" of anyone.

VIII

In urging that the testimony of the chief engineer should not have been heard, or, if heard, should have been given no weight, Appellant says this:

> ". . . his word should not be allowed to be given the weight to find Mr. Rogan guilty on the charge of disturbance, and that he himself must protect himself since there was a witness who saw him push or kick Mr. Rogan."

What this means is that the testimony of the chief engineer is unworthy of credence because what he said about the foul and abusive language used to him must have been invented to protect himself from a charge of assault and battery attested to by Appellant himself,and by his witness.

In this respect, the first notation must be that Appellant's "independent" witness did not testify on the specific offenses alleged at all. The specified offenses occurred before Appellant went up the ladder to the chief engineer's room and before he and the chief engineer went to the master's room.

The "independent" witness testified, not as to the merits, but as to what he saw "happen coming off the captine's ladder." R-12. This witness gave no testimony as to whether the dialogue in question between Appellant and the chief engineer occurred. If it had any probative effect, it could be only to attack the credibility of the chief engineer's testimony as to what had

happened earlier.

The witness described what he saw thus:

> "I had been working on the deck machinery and was coming back into my room to get the blue print, then I saw you and the chief engineer coming down the ladder and you were ahead of him. He pushed you, and I think you were about half way down the ladder, as I remember. You caught yourself on the handrail, turned around and recovered , and you told the chief engineer, `You pushed me.'" R-12).

Appellant himself had described this "episode" in these words:

> "When we were going down the stairs, from the captain's landing down, he made a remark, he said, `I'll have someone take you off this ship, `and I said, `Well, that will be fine with me and maybe we can get some cold water in the shower.' Then about third step from the bottom he gave me a push, and I didn't go down on my knees, but I twisted my foot on the bottom or second step, I don't know which one it was. That's when I said to him, I said, "You pushed me and hurt me." He said `I did not,` and he walked away." (R-7).

Appellant has resolved this case into a simple issue of credibility of witnesses. It is his word against the chief engineer's. His collateral attack on the chief engineer's credibility is presented in the two excepts of testimony quoted above.

The hearing examiner is the trier of facts and his evaluation of weight to be assigned to evidence is ordinarily to be accepted. The terms "arbitrary" and "capricious" are associated with improper findings by an examiner, while "reliable, probative, and substantial evidence" will support his findings.

There is nothing in this record to support a view that the Examiner's actions were arbitrary or capricious. There is nothing to undermine a belief that there was evidence of the needed quality

to support the findings that he made.

In view of Appellant's assertion that the Examiner's findings were predicted upon an assertedly habitual bias of examiners, it is not improper to look at the testimony offered in defense. The testimony quoted above suffices to show that an examiner who rejected it did not act arbitrarily or capriciously.

Appellant has himself, clad in shower "clogs," tripping on the bottom or next to the bottom step of the ladder, but not falling to his knees. Appellant's witness has Appellant pushed about halfway down the ladder and reversing himself by grabbing the rail and turning.

Appellant's witness, it may also be noted, having seen a described assault by a ship's officer upon a person he knew, testified that he merely went on about his business.

When Appellant was "logged" the Chief Engineer report to the master that Appellant had accused him of pushing Appellant. Appellant's reply was, "There is some discrepancy here." There was no claim made by Appellant directly to the master that he had been pushed, nor was any reference made to a witness who might confirm the pushing.

These factors affect the credibility of both Appellant and of his witness.

Appellant's brief also asserts:

> "In this particular instance Mr. Rogan brought in a man who testified not only that he did not use foul and abusive language and that he did not yell or scream, but also showing that the Chief Engineer is not trusted as one who could testify against Mr. Rogan. The reason for this is that there is direct testimony showing that Mr. Rogan was pushed or kicked by the Chief Engineer."

Just as the testimony given before the Examiner fails to raise a real question even as to a suspicion of habitual bias, this

statement on appeal further undermines Appellant's credibility. His witness, as has been pointed out, never testified that Appellant had not used foul language as charged, and there is not a shred of evidence, even in the rather inconsistent statements of Appellant and his witness, that the Chief Engineer might have kicked him.

The Chief Engineer's evidence, which Appellant says should not have been heard, was properly admitted.

CONCLUSION

The hearing was properly conducted. The Examiner's findings were based on substantial evidence. The grounds for appeal urged by Appellant have no merit.

The "disturbance" found proved in the second specification is found to be no different from the misconduct alleged in the first specification since there is no evidence that others than the two principals were affected by it.

This does not require any modification of the Examiner's order.

ORDER

The findings of the Examiner mad and entered at San Francisco, Cal., on 20 June 1967, are MODIFIED since the second specification should have been dismissed as superfluous. The second specification is hereby DISMISSED. As MODIFIED, the findings and the order of the Examiner dated at San Francisco, Cal., 20 June 1967 are AFFIRMED.

P. E. TRIMBLE
Vice Admiral, U. S. Coast Guard

Acting Commandant

Signed at Washington, D. C., this 6th day of November 1968.

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