IN THE MATTER OF LICENSE NO. 321754 MERCHANT MARINER'S DOCUMENT
Z-147 353
Issued to: Alfred M. CASTRONUOVO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1751

Alfred M. CASTRONUOVO

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 9 April 1968, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for three months upon finding him guilty of misconduct. The specifications found proved allege that while serving as second assistant engineer on board SS SANTA MARIANA under authority of the document and license above captioned, on or about 17 August 1967, when the vessel was at Callao, Peru, Appellant;

(1) wrongfully created a disturbance involving another crewmember, and

(2) wrongfully assaulted and battered that same crewmember.

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 the testimony of three witnesses and voyage records of SANTA MARIANA.

In defense, Appellant offered in evidence his own testimony, the recorded testimony of two witnesses given in another proceeding (by stipulation), and certain documents.

At the end of the hearing, the Examiner rendered an oral 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 three months.

The entire decision was served on 11 April 1968. Appeal was timely filed on 19 April 1968. After extension granted, appeal was perfected on 6 November 1968.

FINDINGS OF FACT

On 17 August 1967, Appellant was serving as second assistant engineer on board SS SANTA MARIANA and acting under authority of his license and document while the ship was in the port of Callao, Peru.

(The Examiner's evidentiary findings are adopted and quoted. The numbering of the Examiner's findings has been omitted, but the paragraphing has been retained).

> "The person charged and the ship's butcher, Zdzislaw G. Janczewskl, were arguing in the crew's passageway of the main deck of the said vessel at about 4:20 a.m. on 17 August 1967.
>
> "The loud argument between the person charged and Janczewskl attracted the attention of Third Officer Boris Lorenzson and of several crewmembers who gathered in the area of the main dock in front of the elevator.
>
> "The person charged addressed loud and profane language

to Janczewakl.

"Third Officer Lorenzson told the person charged to be quiet and not to argue in the crew's passageway. Mr. Lorenzson told the person charged and Janczewskl to go to their rooms and then walked down a passageway.

"The person charged slapped Janczewskl's face at his right temple.

"The person charged and Janczewakl resumed their argument.

"Using his fist the person charged hit Janczewskl and knocked him against a bulkhead.

"The person charged and Janczewskl then wrestled with Janczewskl being thrown to the deck striking his head.

"The person charged fell on top of Janczewskl.

"As Third Officer Lorenzson was pulling the person charged off Janczewskl, the person charged raised one of his shoes in his hand and was attempting to strike Janczewskl."

BASES OF APPEAL

I

"There was clear error and a denial of due process in that the Hearing Examiner failed to disqualify himself upon motion duly made by the person charged here in a companion case: In the Matter of Merchant Mariner's Document No. Z-1071543-D1 Issued to Zdzislaw G. Janczewskl, Case No. 5952/73338 the transcript of which in its entirety is made a part of the record in this case."

II

"It was clear error and an abuse of discretion for the same Investigating Officer and the same Hearing Examiner to refuse to

call the alleged co-combatant, Castronuovo, in the companion case of Janczewskl, although Castronuovo was ready, willing and available to testify."

III

"The Investigating Officer arbitrarily and willfully failed to carry out his duties in a proper and lawful manner to the prejudice of the person charged."

IV

"The decision and findings in the instant case are unsupported by substantial evidence of a reliable and probative character."

V

"Assuming, *arguendo*, that the charge and specifications found "proved' were justified, the decision and order are excessive."

OPINION

I

The first basis of appeal in this case is a novel one, that the Examiner in this case failed to disqualify himself in another case.

The record of this case includes as Appellant's Exhibit C the first 42 pages of the record of a hearing held in the case of the seaman whom Appellant allegedly assaulted. Appellant's brief on appeal presents also, as Exhibit C-1, pages 43-79 of that transcript.

The exhibit shows that at the first session of the hearing in the other case, Appellant's counsel appeared as "friend of the court" and moved that this Examiner disqualify himself in that case because the Examiner had both cases before him at the same time. This was on 1 September 1967. The Examiner, noting that counsel had no standing on that record, refused to accept the suggestion.

Appellant's brief on this point ends with this paragraph:

> Since the motion to disqualify was made by Mr. Phillips in a companion case, not in the case in which Mr. Phillips was counsel for the person charged [now Appellant], Mr. Phillips could not avail himself of the procedure set forth in 137.20-15 of the Suspensions and Revocation Proceedings [46 CFR 137.20-15]. . . ."

The cited regulation deals with procedures by which examiners may be disqualified from hearing a certain case.

It is obvious that if Mr. Phillips did not have available the procedure of the cited section it is because he did not ask the Examiner to disqualify himself in the instant case.

Appellant's own profferings on appeal show that the "other case" ended on 17 October 1967, while Appellant's own case remained open as to findings, made in open hearing on the record, until 29 March 1968.

A motion to disqualify must be timely. It should be addressed to the person to be disqualified. The question of whether "newly discovered evidence" may justify raising a question of disqualification for the first time on appeal from an initial decision is not presented here. Although different attorneys appear "of counsel" at the hearing and on appeal, the appearance of the law firm has been unchanged. What was known to Mr. Phillips on 29 March 1968 is not newly discovered evidence.

For whatever reason Appellant's counsel decided not to ask the Examiner to disqualify himself in this case, the choice was made. It would verge on absurdity to consider seriously on appeal that an examiner should have disqualified himself in another case when his qualifications were not challenged in this case.

II

Appellant's second point is similarly without foundation. Conduct of another case is *prima facie* irrelevant on

appeal, especially when the matters referred to were known during the pendency of proceedings in the instant case and were not raised on the record.

III

Appellant's third point, which is supported by assertions that someone else should have been charged with something else, is completely irrelevant.

IV

Appellant's fourth point is supported by two assertions.

The first is that the Examiner based his findings upon testimony of unlicensed personnel of the vessel who were testifying against an officer. Appellant asserts:

These men were all members of the same unlicensed seamen's union. They had a common cause. . . . In any sort of incident involving an unlicensed seaman against licensed personnel, it is a certainty that the unlicensed will support one of their own. This attitude stems from trade union concepts of `brotherhood' and `fraternalism'."

While there is nothing in the record relative to Appellant's affiliation or non-affiliation with any union, it is a matter of common knowledge that most, if not all, seagoing American seamen are unionized, and it is a fair inference that if the unlicensed seamen of SANTA MARIANA were unionized, so were the licensed officers.

The attack in this case purports to urge that unlicensed personnel are inherently unbelievable when they testify against an officer. This view must, of course, be completely rejected. But Appellant's brief goes beyond even this. It would require belief that principles of trade unions, involving "brotherhood" and "fraternalism" (and this would encompass unions of unlicensed seamen generally, unions limited to deck, engine, or steward departments, and unions limited to deck officers or engineers), encourage perjury. So proposed and stated, this argument must not

only be rejected but denounced.

V

A second argument under this point is thus stated:

> "Appellant contends that the close examination of the evidence in this case will lead to the inescapable conclusion that there is substantial evidence of a reliable and probative character *contra* to [sic] the decision of the examiner."

There is no reason to enter here the field of speculation as to whether once the trier of facts has made his evaluation of the evidence, and the evidence upon which he has based his findings have been found to be legally substantial, the contrary evidence loses any claim to be substantial. The issue here in only whether the Examiner's findings were based on substantial evidence regardless of the other evidence submitted. It is not whether I personally would have reached the same findings as the Examiner, nor whether a court would have reached the same conclusions. (See, directly connected with proceedings like this, *O'Kon v Roland*, S.D. N.Y., 1965, 247 F. Supp. 743, as to the function of an examiner as trier of facts.)

On this appeal the question is not whether there was substantial evidence *contra* the Examiner's findings but whether there was substantial evidence to support them, so that it cannot be said that as a matter of law his findings were arbitrary or capricious.

VI

Appellant's last point goes to the severity of the order, in the event that the facts should be found proved. Appellant urges that the injuries inflicted upon the victim were minor, and that Appellant has been found to have committed misconduct only once before, in 1962.

Examiners have latitude in determining appropriate orders of suspension. When an Examiner's findings are supportable, there is

no reason to reduce a suspension ordered unless it is clearly inappropriate. There is no showing here that the Examiner's order is obviously excessive.

CONCLUSION

Since no challenge was made at hearing to the activity of the Examiner in this case, and since there is substantial evidence to support the Examiner's findings, there is no reason to disturb his decision. His order is not excessive under the circumstances.

ORDER

The order of the Examiner dated at New York, N. Y. on 9 April 1968, is AFFIRMED.

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

Signed at Washington, D. C., this 12th day of March 1969.

Appeals

Conduct of another case prima facie irrelevant
Duty to affirm unless clearly erroneous
Findings of examiner, adoption of
Findings of examiner, weight of
Newly discovered evidence not found
Motion to disqualify must be timely

Charges and specifications

Failure to charge other person irrelevant

Disqualify examiner

Failure to do in another case not error
Motion to must be timely

Motion to must be addressed to examiner to be disqualified
Motion to must be made in case at hand

Examiner

Conduct of another case prima facie irrelevant
Disqualification, motion for
Disqualification of
Disqualification of, no basis for
Disqualification of, not required
Failure to disqualify in another case not error
Motion to disqualify must be addressed to examiner to be disqualified
Motion to disqualify must be made in case at hand
Motion to disqualify must be timely

Findings of Fact

Based on substantial evidence
Basis for
Duty to affirm unless clearly erroneous
Evidence needed to support
Not arbitrary or capricious
Not disturbed when based on substantial evidence
Upheld even though substantial evidence *contra* the examiner's finding

Investigating Officer

Failure to charge another person irrelevant
Presentation of another case prima facie irrelevant
Witnesses, necessity of producing

Order of Examiner

Examiners have latitude
Held not excessive
No showing it is obviously excessive
Not reduced unless clearly inappropriate

Testimony

Allegation that principles of trade unions encourage perjury denounced
Allegation that unlicensed personnel are inherently unbelievable when testifying against officers rejected
Credibility of

Witnesses

Allegation that principles of trade unions encourage perjury denounced
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Impeachment of

***** END OF DECISION NO. 1751 *****

Top