

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-890547-D2
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Jesus R. VASQUEZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1753

Jesus R. VASQUEZ

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 16 July 1968, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for nine months outright plus three months on one year's probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a bath steward on board SS INDEPENDENCE under authority of the document above captioned, on or about 28 November 1967, Appellant, while the vessel was at sea,

- (1) wrongfully drank intoxicants;
- (2) assaulted another crewmember, Robert F. Zorn;
- (3) wrongfully used foul and abusive language to the staff captain;

- (4) wrongfully used foul and abusive language to the chief mate;
- (5) assaulted and battered the chief mate by wrongfully placing his hands upon him;
- (6) assaulted and battered the staff captain by striking him with his fists and tearing his shirt;
- (7) failed to obey an order of the staff captain to leave the room he was in improperly;
- (8) threatened to kill the staff captain.

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 voyage records of INDEPENDENCE, and the testimony of a bellboy, the staff captain, the third mate, and the chief officer.

In defense, Appellant offered in evidence the testimony of three members of the crew and gave his own testimony.

Both the Investigating Officer and Appellant placed shirts in evidence.

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 nine months plus three months on a year's probation.

The entire decision was served on 18 July 1968. Appeal was timely filed on 29 July 1968. Although Appellant had until 12 November 1968 to file additional matter on appeal, he has not done so.

FINDINGS OF FACT

On 28 November 1967, Appellant was serving as a bath steward on board SS INDEPENDENCE and acting under authority of his document while the ship was at sea.

At about 2315 on 28 November 1968, Robert F. Zorn, tourist class bellboy, finished his work and went to his room, CC-17, to go to bed. The room had four bunks, and three other men also occupied it. One of the occupants, one Rivera, was asleep. The two others, Valentin and Ortiz, were engaged in conversation with Appellant, who had been invited to the room by Valentin. The three were drinking rum. Zorn objected to the gathering and said he wished to go to bed. One of the three told him to go elsewhere. Zorn left, but returned shortly. On return, he tripped over Appellant's legs. Zorn apologized. Appellant swung a blow at Zorn, but missed. Zorn left the room to file a complaint.

Soon Zorn returned to the room, accompanied by the Staff Captain, Robert E. Adams, and Chief Officer Anthony Pallazzola. Pallazzola immediately began to search the room. He picked up a small dog. Appellant put a restraining hand on his arm but withdrew it when ordered to. He then addressed vile and obscene language to the Chief Officer.

In the meantime Captain Adams was telling those present that the activity in the room should have ended at 2000, and, on learning that Appellant was not an assigned occupant of the room, ordered him out. Appellant stated that as staff captain Adams had no authority to give him orders and pushed the staff captain back about two feet. With vile language, Appellant told the staff captain to "get the hell out."

Adams ordered Palazzola to get the key to the brig. When that officer left, Appellant picked up a glass of rum. Adams attempted to take it from him, and the rum was spilled. Appellant shouted foul and vulgar words at Adams and threatened to kill him. Appellant then punched Adams on the jaw, a collar bone, and the left upper arm. Adam's shirt was torn.

Adams made no effort to strike back, but ordered Valentin and Ortiz to restrain Appellant. Valentin seized Appellant from behind. Ortiz did not help.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the decision was against the weight of the credible evidence.

APPEARANCE: Philip Brown, Esq., Brooklyn, N. Y.

OPINION

The only ground for appeal is that the decision was against the "weight of the credible evidence." Appellant deigns not to suggest which evidence is credible and which is not (for any stated reasons) nor to assay the weight either *pro* or *con*. Since Appellant has chosen not to translate his assertion into specifics, the only determination to be made is whether the Examiner's findings are supported by substantial evidence.

This is a fairly typical case in which there are conflicts in the testimony as to details of events. Some too peripheral to consider, some circumstantial but not essential, and some, primarily generated by the testimony of Appellant himself, in direct conflict as to essentials.

It is axiomatic that the trier of facts is the prime evaluator of credibility of witnesses. Once he has made his evaluation, and assigned weight to the evidence, that is were the weight of the evidence lies. His findings therefore cannot be "against the weight of the evidence" unless the evidence upon which he relied was not, taken by itself without reference to other evidence, reliable, probative, and substantial.

There can be, under the tests of administrative law, substantial evidence on both sides of an issue. As to whether an examiner's findings are based on substantial evidence the test is not whether a reviewer would agree with the examiner if he had heard the case in the first instance but whether a reasonable man could make the finding, even if another reasonable man might disagree. (See, especially with respect to these proceedings, *O'Kon v Roland*, S.D.N.Y. 1965, 247 F. Supp. 743)

To hold that an examiner's findings are "against the weight of the credible evidence," it would have to be found first there was no substantial evidence to support those findings. To find so would require a finding that the evidence upon which the examiner relied was so inherently incredible that only an arbitrary and capricious choice by the trier of facts could have given the evidence any weight at all.

On careful scrutiny of the record in this case (especially in the absence of any affirmative aid or direction from Appellant), there is not the slightest reason or even temptation to say that the evidence relied upon by the Examiner was so inherently unpalausible that a reasonable man could not have accepted it and predicated findings upon it.

CONCLUSION

The grounds for appeal in this case are so insubstantial as to be inconsiderable. There is no reason to disturb the findings or order of the Examiner.

ORDER

The order of the Examiner dated at New York, N. Y., on 16 July 1968, is AFFIRMED.

W. J. SMITH
Admiral, United States Coast Guard
Commandant

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

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