IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-817 946-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Nicolas GARCIA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD
1796

Nicolas GARCIA

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 January 1969, an Examiner of the United States Coast Guard at New York, N.Y., revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a bedroom steward on board SS ARGENTINA under authority of the document above captioned, on or about 13 January 1968, Appellant, at Port Everglades, Florida:

(1) assaulted and battered a fellow crewmember, one Samuel Alston,, by slapping him with his hand;

(2) created a disturbance in the passageway leading from the crew messroom; and

(3) assaulted and battered Alston by stabbing him with a deadly weapon a knife.

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 certain witnesses, records of the Broward General Hospital (Fla.), and voyage records of ARGENTINA.

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

The entire decision was served on 20 January 1969. Appeal was timely filed on 3 February 1969, and perfected on 16 September 1969.

FINDINGS OF FACT

On 13 January 1969, Appellant was serving as a bedroom steward on board SS ARGENTINA and acting under authority of his document while the ship was at Port Everglades, Florida.

The person charged while serving as aforesaid wrongfully did assault and batter a fellow crewmember, Samuel Alston, Messman, in the passageway leading from the crew messroom by stabbing him with a deadly weapon, to wit, a knife, while the vessel was in Port Everglades, Florida on 13 January 1968.

In addition to the above findings, with respect to ultimate facts, I make the following findings with respect to specific facts.

At about 1645 on 13 January 1968, Chief Cook Casanova and Second Cook Henderson were working at the steam table. The messmen and other crewmembers were in the line in front of the steam table picking up orders. The person charged was standing to one side of the steam table. Sam Alston, Messman who was on line in front of steam table, was arguing with Chief Cook, Casanova, by complaining about the way the order was made up, interlacing his remarks with profanity. He told the Chief Cook to serve the order as he had given it to him.

The person charged interjected himself into the situation by suggesting to the Chief Cook that he not take such talk from the Messman and he told the Messman in no uncertain terms to "knock it off" or words to that effect. The person charged slapped the Messman, Alston in the face. Alston struck back and the men struggled. The person charged received the worst of it.

Alston continued to serve his orders in the messhall and the person charged went to his room.

While Alston was working in the Messroom, the person charged, who was angry, came in, tapped Alston on the shoulder and invited him out into the passageway. The men struggled and the person charged stabbed Alston in the abdomen t the left side and above his navel.

Sam Alston, the Messman, was taken to Broward General Hospital, Florida, where he remained for two weeks.

BASE OF APPEAL

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

APPEARANCE: Zwerling & Zwerling, New York, New York, by Sidney Zwerling, Esquire

OPINION

I

Appellant's sole ground for appeal is that the Examiner's decision is against the weight of the evidence. As a general principle it can be said that this is not a sufficient bottom for an appeal. When there is conflicting evidence, it is the function of the trier of facts to assign weight to the evidence, to resolve

conflicts, and to find facts. In a strict sense, an examiner's decision cannot be against the weight of evidence because the examiner himself assigns the weight to be given.

On the facts alone, the test for review of an examiner's decision is not whether a reviewer might disagree with the examiner but whether there is substantial evidence to support the examiner's findings. *O'Kon* v.*Roland*, D.C. S.D. N.Y. (1965), 247 F. Supp. 743; *Ingham* v. *Smith*, D.C. S.D. N.Y. (1967), 274 F. Supp. 137.

To disapprove of an examiner's findings, it must be found that they are not based on substantial evidence. To say that they are not based on substantial evidence, it must be found that the quality of the evidence is so inherently incredible, unreliable, or irrelevant that no finding can as a matter of law be supported.

II

Appellant has marshaled instances of conflicts in evidence, all urged as favorable to his cause. Appellant does not mention matters in evidence which could be resolved against him.

The technique of this appeal was proper for argument before the Examiner at the hearing itself to persuade him to assign weigh to evidence in accordance with the desires of Appellant. The technique fails on appeal when the Examiner has already considered these contentions and rejected them.

A single sample of Appellant's effort may be cited.

In his brief, Appellant says:

> "Mr. Alston himself stated he really wanted to get Mr. Garcia, `I really wanted to hurt him.' (Page 37)."

This is urged to support the belief that Alston was the aggressor in the activities in the passageway. However when one turns to R-37 one sees that the statement of Alston was made as to what he wanted to do after he had been stabbed, not before.

On this same point, when Appellant argues that Alston must have been the aggressor in this incident, he omits any reference to his own testimony that:

(1) he had his nose broken in the first incident;

(2) he went to his room merely to wash his face; and then

(3) he sought out Alston in the messroom and invited him into the passageway.

When one considers that there is no medical evidence of a broken nose the vulnerability of Appellant's testimony under scrutiny by the Examiner becomes apparent.

Would a person who had received a broken nose in an initial fist fight merely go to his room to wash his face and then go to another place to seek out the nose-breaker with no motive other than to make peace?

There is no need to detail all Appellant's complaints about the Examiner's findings. It is evident that when an examiner sees that a man has been stabbed almost to death, as was the case with Alston, he would shirk his duty if he failed to make findings at all. It is evident also that the Examiner's sifting and sorting of the evidence in the instant case is not to be disturbed by some kind of counting of all discrepancies in the evidence both *pro* and *con* Appellant. The Examiner has done that.

III

Appellant in fact asks for a hearing *de novo*. He is not entitled to that on appeal. He had his hearing before the Examiner and has presented no allegation of error to be corrected on appeal.

CONCLUSION

The appeal in this case has no merit. There is no reason to

disturb the Examiner's findings.

ORDER

The order of the Examiner dated at New York, New York,on 20 January 1969, is AFFIRMED.

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

Signed at Washington, D.C., this 26th day of June 1970.

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