IN THE MATTER OF LICENSE NO. 317072 MERCHANT MARINER'S DOCUMENT NO. Z-6664855-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert A. Craig

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1580

Robert A. Craig

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 7 April 1966, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for one month upon finding him guilty of misconduct. The specification as found proved alleges that while serving as master on board the United States SS REMSEN HEIGHTS under authority of the document and license above described, on or about 11 February 1966, Appellant, while the vessel was at sea, wrongfully addressed the radio officer with threatening language, the exact words, or substance of which, were: "There is the first S.O.B. I'm going to shoot."

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

The Investigating Officer introduced in evidence the testimony of the radio officer, and of the first and third assistant

engineers.

In defense, Appellant offered in evidence his own testimony and that of the purser.

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

The entire decision was served on 11 April 1966. Appeal was timely filed on 19 April 1966. Appeal was perfected on 18 July 1966.

*FINDINGS OF FACT*

On 11 February 1966, Appellant was serving as master on board the United States SS REMEN HEIGHTS and acting under authority of his license and document while the ship was at sea.

On the date in question, at noon, Appellant was seated at a table in the officers' messroom. One Green, first assistant engineer, was seated diagonally across form him.

The third assistant engineer entered and sat two tables away. He overheard a conversation in loud voices between Appellant and Green. Appellant was declaring that if a person deserted the ship and attempted later to reboard it he could be shot as a trespasser.

Just then the radio officer entered the room and Appellant, pointing at him, said words to the effect that was the first S.O.B. he would shoot.

The radio officer proceeded to sit with the third assistant and, in his own language, "growled up" his soup.

On later occasions the radio officer went ashore with Appellant and others and dined in the group at various clubs. He had on such occasions no fear for his safety.

Both before and after the episode in the messroom, the radio officer and Appellant engaged in mutual horseplay.

The radio officer never complained to a consul or any other authority ashore and, in fact, at the end of the voyage did not even file a complaint with the Coast Guard.

*BASES OF APPEAL*

The principal arguments on appeal are that the reliable and probative evidence of record does not support the findings, and that the Examiner made improper use of Appellant's prior record.

*OPINION*

I

In this case there was one and only one factual issue, "Did or did not Appellant say to one Hazaret N. Haronian, the radio officer, or about him in his presence, there is the first son of a bitch I am going to shoot, in such manner and under such conditions as to constitute a "threat" to the radio officer.

Despite the narrowness of the issue the transcript of proceedings covers one hundred twenty seven pages. Rarely has more non-probative testimony cluttered up a record.

There is much repetitious material in this testimony as to whether Appellant had firearms in his possession. It took a long time for counsel to elicit testimony that one witness with long service at sea had never known as American ship on which the master was not provided with a pistol or revolver of like weapon.

It is my opinion that most of this testimony, directed merely at the existence of the firearm was unnecessary. Examiners, with up to eighteen years of experience in the field of merchant marine safety, should properly take official notice of universal practices, and should not tolerate the waste of time as in this case in establishing the mere existence of a weapon.

The matter would be otherwise if what is to be established is

a habit of displaying or brandishing the weapon in an intimidating fashion. Only one piece of evidence was introduced in this record even touching on this point.

The witness Green, first assistant engineer, testified that on one occasion, when a party was gathered for a card game in Appellant's quarters, Appellant had pointed the weapon in question, unloaded, at the third assistant engineer, who objected to the action.

The general testimony of Green will be referred to again later, but it must be pointed out immediately that he admitted that the action of Appellant on this occasion was not construed by anyone present to constitute a threat. It is also, most pointedly, noted that the third assistant engineer, at whom the weapon was allegedly directed at the time of the card game, testified as a witness against Appellant and not only did not testify to the alleged pointing of the weapon at himself but did testify that he had never seen Appellant with a weapon.

If Green's testimony were true on this matter of the card game, two theories only can be discerned. First would be that Appellant had actually committed assault with firearms, even if unloaded. (If this were os, it would naturally be a much greater offense than the one actually charged in this case.) But Green's own testimony negatives this theory because, as he believed, no one construed the action to be a threat of any kind. The other theory would be that the testimony was relevant and material as establishing a practice of Appellant to use weapons threateningly. This theory is untenable for the same reason, Green's own testimony that no one construed a threat.

The second theory is even more weakened when it is considered that there is no evidence at all that the action of Appellant testified to by Green, but denied by the alleged victim, was ever made known to the radio officer such as to put him in fear of Appellant.

It seems to me that all testimony in this record as to possession and use by Appellant of a revolver a pistol is immaterial, and is also, if admitted in evidence, of no probative value whatsoever. It should be disregarded entirely in arriving at

findings of fact.

III

Another point of contiguity of the testimony of the witness Green to that of the third assistant engineer must be noted.

Green and the third assistant were the only other persons present when the radio officer entered the messroom and Appellant allegedly directed his statement to him.

Green testified unequivocally that he sat at a table with Appellant, that the third assistant sat two tables away, and that no conversation occurred between himself and Appellant up to the moment of the alleged threat when the radio officer entered to have lunch.

The third assistant recollects vividly that he overheard at this time a conversation between Appellant and Green to the effect that Appellant declared that he would shoot any deserter who attempted to return to the vessel as a trespasser. The declaration of the master culminated, in this version, on the arrival of the radio officer, in a statement to Green that the radio officer would be the first person shot.

I assume that the testimony of the third assistant as to the comments of Appellant before the radio officer arrived on the scene was considered relevant as indicting a willingness of Appellant to shoot someone. But once again, the evidence precludes a finding that the radio officer had this in mind when he heard the alleged remark because it shows that he had not heard the earlier statement.

(In this connection it is apparent that the Examiner misunderstood the testimony of the third assistant as to the discussion of the treatment of deserters. He takes it as having occurred on an earlier occasion when it was part and parcel of the conversation in progress when the radio officer entered the room).

IV

To turn to the testimony of the witness Green singly, I find that I must reject it entirely, in connection with the instant case.

He testified to a pointing of a weapon by Appellant at the third assistant. As I have noted before the third assistant did not testify that Appellant had not pointed firearms at him on the occasion mentioned by Green, but he did affirmatively testify that he had never seen Appellant with a weapon. This is a contradiction between the two witnesses.

Green's testimony that no conversation took place between himself and Appellant is contradicted by the third assistant's testimony that Appellant was talking to Green about shooting people when the radio officer walked in.

The record further shows that the witness Green refused at first to answer questions of the following import:

1) Were you ever an officer in the U. S. Coast Guard?

2) Did you lose your commission in the Coast Guard because of bribery?

3) Were you ever licensed as a chief engineer?

After being instructed by the Examiner to answer, Green again refused. He then demanded counsel, and apparently accepted as counsel an attorney who was present to represent the radio officer. After this he denied that he had ever been a Coast Guard officer, etc. He then proceeded to admit that in the course of the voyage in question he had made claims that he had been a Coast Guard officer, that he had lost a chief engineer's license, etc.

All testimony of the witness Green becomes of no probative value after this sequence of testimony. It should have been specifically rejected and should never have been used as a basis for the Examiner's finding (D-3) that "on one prior occasion the Master (Appellant) had displayed the pistol and pointed it..."

A last comment upon Green's testimony must be made. Pages of the transcript of proceedings are devoted to how Green felt when he heard the alleged threat by Appellant. Green claimed that it immediately made him feel bad and that he was still sick from the episode. (Offering to submit an "unfit for duty" certificate). But when asked on cross-examination why he was smiling after a certain reply to a question he declared that he smiled only because he felt so well.

This particular witness's testimony is of no value whatsoever.

V

The Examiner stated in his "opinion", that all persons present in the messroom "testified that, in their opinion, the Master was under the influence of alcohol to some degree on this occasion." From the tenor of his following remarks I gather that the Examiner meant this to be a "finding of fact" that Appellant was" under the influence of alcohol." If this was meant as a finding, it should have appeared in the findings. If it was not a finding it should not have been permitted to color the Examiner's opinion.

However, the Examiner's statement is incorrect anyway. Green is the only witness who gave such an opinion about Appellant's condition, and his testimony is unworthy of credence.

VI

If the charge against Appellant is to be found proved, the support must be found in the testimony of the radio officer himself and that of the third assistant.

VII

The testimony of the third assistant seems to be of excellent probative value as to what was said by Appellant. It sheds no light upon the sound of the remark to, its effect upon, the radio officer. Taking the testimony of the third assistant at face value, I can see only that Appellant had declared that a deserter

could be shot as a trespasser if he tried to reboard the vessel against the master's will and that Appellant would shoot the radio officer first.

I understand that the radio officer claims only to have heard the latter part of this statement, not the first.

Then, what was uttered was not in fact a threat but at most a conditional threat. If I interpret the testimony of the third assistant correctly, (and he is the only credible third party witness), what Appellant said was, "I have the right to shoot as a trespasser any deserter who tries to reboard the ship and he (the radio officer) would be the first one I'd shoot."

When the radio officer declares that he heard the latter part of this remark, but not the first, that he then sat down and, as customary, "growled" up his soup, and that he later had dinner ashore with Appellant on other occasions, with no complaint to available authority, his testimony that he was placed in fear becomes incredible.

There is not one shred of evidence in this record that the radio officer had, prior to the occasion in question, one single reason to question the temperament or character of Appellant. There is evidence that even after the episode relations between the two person remained unchanged.

The radio officer's own statement renders his alleged "fears" suspect. He first testified that as a result of Appellant's remark he kept his door locked at night. Later he admitted that he had always kept his door locked at night, and then hastily qualified this by declaring that previously he had not jammed a chair against it.

In accordance with the rules of administrative review I recognize that determination of credibility is primarily the function of the Examiner. But when testimony is so inherently unbelievable as this, I must reject it.

Recalling that the radio officer had no prior knowledge of Appellant's threatening another officer with a revolver (because, obviously, it had not happened), and recalling that he had not

heard the earlier comment by Appellant that he had reason to believe he could shoot a deserter who attempted to reboard the vessel without Appellant's permission, we see that the remark of Appellant about the radio officer, overheard by the radio officer as he entered the messroom but not "addressed" to him, as the Examiner found could not and did not constitute a "threat".

My doubt that an officer who heard the remark made seriously considered it a "threat", and then sat down and "growled up" his soup, is so great that I have no doubt to the contrary.

The effort of the radio officer in this case is a clear case of *arriere pensee* to change the character of a past act to something more sinister than it was. My opinion of Green's testimony can be none other than that it was a later fabrication to assist the radio officer's afterthought

IX

Distastefully, I must comment upon other aspects of *this* proceeding. I note first that the investigating officer's opening statement contained a recitation that he had heard many complaints against Appellant, that he had interviewed all complainants in the presence of Appellant, and that of the myriads of complaints he had singled out the *one* charged because he thought he could prove it.

It is obviously improper for an investigating officer to advise an Examiner that he had sifted through many complaints before sorting out this one as basis for charges. It was just as improper for an examiner to hear this.

X

Appellant's point about the introduction of his prior record is well taken.

The prior record was made the basis of the Examiner's second "evidentiary fact." Appellant argues that this indicates that the prior record was used in arriving at ultimate findings. While I surmise that no examiner would seek to know a party's prior record before findings, I must admit this its placement in the decision

gives a semblance of plausibility to Appellant's assertion.

However, there was error in the Examiner's use of this information.When decisions are made in open hearing, it follows naturally that such information is introduced in the presence of the person charged. He has a right to be confronted with the record and a right to be heard in rebuttal or on matters in mitigation.

Without express consent of a person charged, a prior record may not be furnished to an examiner except in open hearing. Failure to observe proper procedure in this matter is cause to set aside the order and to remand. See Decision No. 1472.

## CONCLUSIONS

Upon the only reliable evidence presented in this case, it must be found that Appellant did not threaten the radio officer but merely made a coarse joke which was understood as such at the time.

## ORDER

The order of the Examiner dated at San Francisco, California, on 7 April 1966, is VACATED, the findings are SET ASIDE, and the charges are DISMISSED.

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

Signed at Washington, D.C., this 26th day of August 1966.

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