IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1149914 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: EDMUNDO P. DA CUNHA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1654

EDMUNDO P. DA CUNHA

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 19 August 1966, an Examiner of the United States Coast Guard at New York suspended Appellant's seaman's documents for 1 month outright plus 5 months on 12 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a steward utility on board the United States SS FLYING FOAM under authority of document above described, on or about 26 May 1966, Appellant used foul and abusive language and threatened bodily harm to the Chief Officer.

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 official logbook and shipping articles of the vessel, and the testimony of

the Chief Officer.

In defense, Appellant offered in evidence the testimony of the two witnesses, and took the stand himself.

After the hearing, the Examiner rendered a decision in which he concluded that the charge and both specifications had been proved. The Examiner then served a written order on Appellant suspending all documents issued to him for 1 month outright plus 5 months' on 12 months' probation.

The entire decision was served on 22 August 1966. Appeal was timely filed on 24 August 1966.

FINDINGS OF FACT

On 26 May 1966, Appellant was serving as a steward utility on board the United States SS FLYING FOAM and acting under authority of his document while the ship was at sea.

On that date vessel's Chief Mate, after an alarm for drills had been sounded, went to Appellant's quarters and ordered him to report to his station. Appellant replied in the foul and abusive terms alleged in the specification.

Later, when Appellant was being "logged" by the master for this offense, Appellant threatened bodily harm to the Chief Mate when he should find him ashore.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the findings of guilty are contrary to the weight of the evidence, and on unjustified assumptions of the Examiner.

APPEARANCE: Abraham E. Freedman, of New York; by Irving James

Tenenbaum, Esquire

OPINION

In his brief, appellant states two separate arguments, both directed against the finding of "proved" as to each of the specifications. The grounds spelled out in each instance are the same. Each finding is asserted to be "contrary to the weight of the evidence". Appellants who offer no other reason to reverse findings should get short shrift. The Examiner in the trier of facts. The Examiner is assigned the task of giving weight to the evidence. On review, the question is whether there is substantial evidence to support his findings.

It can easily be said here that the testimony of the Chief Mate and the record made in the affirmed logbook constitute substantial evidence. The mere fact that there was testimony from Appellant himself and from two other "witnesses" which did not agree with the testimony of the one eyewitness against Appellant is not reason for the trier of facts to discount the testimony of that one eyewitness unless it is inherently implausible or self-contradictory. Examiners do not count the number of witnesses on each side and grant the finding to the greater number.

II

While it is true that Appellant has assembled three persons including himself to deny that he ever used the language to the Chief Mate alleged to have been used, it is interesting to note the character of the testimony which is urged as being so persuasive as a matter of law that it should be found that the Examiner failed to give it the proper weight.

III

All three witnesses for Appellant testified that the alarm for drill had not sounded when the mate came to Appellant's door to order him to this fire station. The witness Martinez declared, however, that the crew was not supposed to move to stations before the alarm, but that he liked to because then he wouldn't have to hurry.

A note of implausibility already rings in the defense, because if the policy of the ship (understandably) was that the crew should not move before the alarm it would be unlikely that an officer primarily concerned with carrying out that policy would be ordering men to their stations in advance of the alarm.

But this same witness said that the mate came to Appellant's door twice. "And then he move back but he come back right way," R-22. The witness heard the alarm as the mate came back.

Against this the witness Pasante who testified that he left Appellant's room as the mate first appeared, stated that he went slowly to his station, stopped, went slowly again, and heard the alarm just before he reached his station five or six minutes after leaving his room.

Testimony like this is not so overwhelming as to require that the Examiner's acceptance of the evidence that the alarm had been sounded before the episode began was reversibly wrong.

IV

The mate had testified that only Martinez was in the room with Appellant when he first arrived. (He testified that Appellant's roommate, later identified as Pasante, and other persons were present, but that Martinez was the only one who was in the room with Appellant.)

Martinez testified that he was in his own room, heard a knocking on the door of another room, came out in the passageway and observed and heard the mate in his first dispute with Appellant. From that point on he was a continuous observer until the drill took place. He did not mention Pasante at all.

Pasante testified that he alone was in the room with Appellant when the mate first came. Pasante was just leaving when the mate opened the door. Pasante passed the mate, and saw Martinez in the passageway adjusting his life jacket. Pasante left and observed no more.

The concurrence of these two versions of the first arrival of the mate on the scene is not such as to require the rejection of the mate's testimony.

Pasante testified that it was the practice in his and Appellant's room for him to garb first and Appellant later, because there was insufficient room for both of them to move about at once. Pursuant to this practice, according to Pasante, he had prepared for the drill and was departing the room when the mate arrived. Pasante, as mentioned before, passed the mate, left the scene, and sauntered to his station, hearing the alarm five minutes after leaving his room.

Appellant, however, testified twice that after the mate's first visit to his room he then yielded maneuvering space to Pasante, and that Pasante did not leave until the second time the mate appeared, R-41 and 45. Appellant testified also that he left the room at the same time as Pasante R-45.

The inconsistencies between the testimony of Appellant and that of Pasante on this point are not conducive to a belief that an Examiner must be reversed for accepting the testimony of the Chief Mate.

Further, Pasante testified that the mate opened the door the first time he appeared at the room and that was the only time Pasante was there, Appellant testified that he himself opened the door the first time the mate appeared and that Pasante was there on both occasions.

V

Appellant testified that when he finally left his room he started to follow the Chief Mate but changed his mind and went in the other direction. Martinez testified that after witnessing the whole proceeding he saw Appellant follow the mate and he followed Appellant,being the last person to leave the area. Once again, this discrepancy does not lead to a persuasion that the Examiner

was necessarily wrong in assigning little weight to the testimony in Appellant's defense.

V

While the arithmetic rule of addition has already been rejected as determinative of the weight to be assigned to testimony by an Examiner, it is hoped that the review of Appellant's defense case here indicated that there is no point in talking about wight of the evidence when the Appellant's evidence is of such contradictory nature.

Conflicts in evidence must often be resolved, but when the conflicts are introduced by Appellant via his own witnesses they need not be resolved by the Examiner one by one. One reliable witness is enough.

VII

Although Appellant's brief is formally limited to the "weight of the evidence" question it also implies that the second specification was not proved because the evidence did not establish an assault upon the mate. After citing Prosser as to what is needed to constitute "assault" when a person has used threatening language, Appellant's brief says:

"In the present instance the Chief Mate, the person supposedly threatened has testified that he felt no fear of Mr. Da Cunha and realized that Mr. Cunha was in no position to carry out any threats against his person."

In truth, this is an over simplification of the mate's testimony, who had said that he was not in fear of Appellant *aboard ship*, although he had indeed been moved to adopt the unusual practice of locking his door when he turned in for the night. But the whole matter is irrelevant.

We are not concerned here with the question of what fact conditions must accompany an uttered threat to constitute an

assault. Appellant was not charged with assault; he was charged only with threatening bodily harm. Threatening bodily harm to a ship's officer is misconduct in and of itself, even if the harm is to be accomplished off the ship at a future date. Whether the threat was made was a question of fact which the Examiner found in the affirmative on substantial evidence.

VIII

Two complaints are made of the Examiner's decision which are easily disposed of.

In connection with his discussion of Appellant's position that his language at the time of the logging meant only a desire to "discuss" matters with the mate ashore not a threat of harm, the Examiner said:

"When questioned about this on cross-Examine, the Chief Mate replied with a rhetorical question: `What would I have to discuss with the person charged ashore?" or words to that effect." D-5.

Appellant declares that this is a misquotation. He invites attention to the actual testimony; "I have nothing in common with this man, " and refers one to D-17, line 3. In reading this, I read also 1 and 2 of that page:

"Q. Isn't it perhaps merely an invitation and not actually a threat?

A. Why would he invite me on the dock, and why would I want to go on the dock? I have nothing in common with this man."

The Examiner did not "misquote". He did not purport to quote, since he used the phrase "or words to that effect". It may be that precise quotation should be resorted to rather than a general recollection of the Examiner, but the fact that the witness did reply with a rhetorical question, the import of which was correctly construed by the Examiner. Appellant's selected quotation of the sentence following the rhetorical question does not, of course,

give the true picture presented by the record I have quoted with respect to the Examiner's stated opinion.
H/ The construction placed upon the testimony by the Examiner was well founded even if he did not quote precisely. It would be difficult to accept Appellant's implied contention (in the question put to the witness) that he intended only a "man to man" discussion of matters ashore, in view of what an "invitation to the dock" means to seamen.

It is further complained that the Examiner, in considering the evidence on the first specification, "made the assumption that if a man said `Get the hell out of here', in all probability he used the language set out in the first specification." Here again Appellant is not citing a full context. What the Examiner said was that since the mate had testified as to the language used, set out in the specification, and since Appellant's own witnesses testified to improper language by Appellant, he was persuaded that the mate's testimony was credible.

There was here absolutely no unjustified inference of the kind alleged by Appellant.

ORDER

The order of the Examiner dated at New York on 19 August 1966, is AFFIRMED.

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

Signed at Washington, D. C., this 10th day of August 1966.

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