
IN THE MATTER OF MERCHANT MARINER'S DOCUMENT
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Daniel M. TICER Z-276855-D3

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1664

Daniel M. TICER

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 Houston, Texas revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as boatswain on board the United States SS WHITEHALL under authority of the document above described, Appellant:

(1) on 7 January 1966, wrongfully absented himself from the vessel at Qui Nanh, Viet Nam; and on 3 February 1966; at Naha, Okinawa,

(2) assaulted and battered the chief mate,

(3) failed to obey an order of the chief mate,

(4) assaulted and battered the master,

(5) incited the deck crew to refuse to obey orders,

(6) created a disturbance by reason of intoxication,

(7) failed to perform duties by reason of intoxication;
and

(8) on 5 February 1966, at sea, had liquor in hispossession without authority.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification, except the eighth to which he pleaded guilty.

The Investigating Officer introduced in evidence certain documents and the testimony of officers and members of the crew.

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

At the end of the hearing, the Examiner rendered a

written decision in which he concluded that the charged and all specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 5 May 1966. Appeal was timely filed on 17 May 1966 and perfected on 7 April 1967.

FINDINGS OF FACT

On all dates in question, Appellant was serving as boatswain on board the United States SS WHITEHALL and acting under authority of his document.

On 7 January 1966, Appellant absented himself from the vessel at Qui Nanh, Viet Nam, without authority, with full knowledge that American military authorities ashore had prohibited landing from ships.

On 3 February 1966, at Naha, Okinawa, in the course of a dispute with the master, Appellant jabbed his hand against the master's chest and then, having been advised that he would be demoted from the rating of boatswain, told members of the deck force not to obey orders of any other person.

Appellant was restored to duty the next morning. On that day liquor was found in his quarters and confiscated.

OPINION

I

Appellant's first argument is that he was not prohibited from going ashore at Qui Nanh Bay on 7 January 1966, because there was only a posted order emanating from a military commander, and he was under the impression that military orders did not apply to civilians.

The fact that the master posted these orders could be construed as adopting and promulgating them as his own. A second poster expressing the company's lack of responsibility for men who went ashore is not inconsistent with this because the prohibition order itself allowed exceptions, such as for men who needed medical attention, and it would be to these that the company's declaration was addressed if they failed to abide by the rules after getting ashore.

However, it is also considered that notice must be taken that in South Viet Nam, American military authorities ashore in certain places function as "local authorities." An American seaman who violates local law in foreign ports, governing smuggling, landing privileges, and the like, commits an act of misconduct irrespective of master's orders. Ordinances of military authority in South Viet Nam are such orders.

II

Several of Appellant's points deal with the credibility of the chief mate, who testified against him. Much of the evidence admitted into the record to attack his credibility was irrelevant, and much of it was meaningless. Two things, however, stand out.

One is that while the mate testified flatly that he had drunk just one bottle of beer, at about 1100, on the day of his altercation with Appellant, an apparently disinterested witness, a member of the engine department, testified that he had been with the mate during his stay at the Seamen's Club, and that the mate had drunk seven bottles of beer.

The other is that the mate had described the alleged assault and battery upon the master in precisely the same terms as he had described the alleged assault and battery upon himself. In each case the alleged victim had turned away from Appellant who "grabbed" by the shoulder and "spun him around." When the master testified about his encounter with Appellant, he said, and demonstrated, only that in a face to face encounter Appellant had jabbed his finger against his chest.

It is noted that the specifications dealing with alleged assaults and batteries on the mate and the master used almost identical terms in describing the batteries:

> (1) "by . . . placing your hand or hands upon his shoulder and turning him around" and
>
> (2) "by placing your hands upon his person and turning him around."

This second allegation, in the case of the master, was amended at the outset of the hearing to read:

> "by jabbing him with your hand."

It is evident that the original specification had been predicated upon the mate's description and that the master's own statement on investigation had prompted the amendment.

These considerations lead me to believe that the testimony of the mate is not worthy of credence, except as it may be corroborated by other reliable witnesses.

III

The same considerations lead me, on the other hand, to accept the testimony of the master more readily.

While Appellant urges that the master's testimony was shaped to support the chief mate's position, the very fact that the master, after charges had been served, described events in such fashion as to require amendment of a specification, shows that his testimony was not given to support the mate's but was given absolutely independently, and therefore bears more plainly the mark of truth.

Thus, while the assault and battery on the mate may not be supportable by the requisite quantum of evidence, the wrongful battery upon the master may be, in the terms of the master's description.

In the same vein, the failure to obey an order of the mate to leave the deck may be found unsupported.

IV

The question as to whether Appellant was under the influence of intoxicants, as alleged in the sixth and seventh specifications, I need not discuss. If he did "create a disturbance" and did "fail to perform his duties," the matters are amply covered in the other specifications which allege acts of misconduct whether or not Appellant was intoxicated.

V

A most serious offense is alleged in the fifth specification which introduced the concept of "mutiny." The question at issue is whether Appellant told other members of the deck force not to obey any orders but his. The issue is raised by testimony of persons present in the master's office who said that Appellant told the master that he had so instructed the deck force, and testimony of

certain members of the deck force who said that Appellant had told them only not to work, after he had been demoted, until they had a competent supervisor.

There is evidence that the master tried to persuade another AB seaman to assume the duties of boatswain, meeting with refusal. There is no evidence that the mate himself gave orders to the seamen to carry on the work. The conduct of the situation was not praiseworthy.

But doubt as to what Appellant might have said to the members of the deck department is resolved in the testimony of one of his own witnesses, D'Grazia, who said:

> " . . . he told me not to take orders from anybody . . ." R-120.

VI

Irrelevant matter found proved in the specifications as alleged cannot be sustained. When it is alleged, for example, that Appellant assaulted and battered the master "by addressing him with insubordinate, derogatory and argumentative remarks," while committing a wrongful battery, the allegations are so poorly made as to fall outside the scope of relaxed pleading permitted in administrative proceedings. *Kuhn v Civil Aeronautics Board*, CA D.C. (19450), 183 F 2nd 839, has frequently been cited in these decisions for the proposition that niceties of pleading have no part in these proceedings.

This does not, I think, sustain a view that an element completely foreign to a common law act of misconduct like assault and battery should be permitted to be pleaded in a specification. It is possible that the language used could have been made the basis for other specifications of misconduct, but it cannot be accepted that the language here should be pleaded as though it constituted a part of assault and battery.

It may not be amiss here to point out that language accompanying certain acts may be evidentiary material either to support or weaken a view that an act constitutes "assault." This is not a matter for pleading, however, and has rarely any significance when an actual battery has been committed.

VII

In view of the fact that the Examiner's order was one of revocation,this "Opinion" must necessarily reconsider the quality of the offenses proof of which must be sustained.

Appellant has introduced into the record evidence that another person who absented himself from the ship at Qui Nanh Bay was allowed off with a warning. The proof of the specification against Appellant alleging such an unauthorized absence does not need consideration here, nor does the admitted possession of liquor aboard the ship. If the order is to be reassessed, what must be looked to is the gravamen of the offenses of assault and battery against the master, and of inciting the crew to disobey orders.

In review of the record I must find that the battery against the master is a technical offense. It was a wrongful battery, and chargeable as such, against the commander of the ship. But it was not a product of an intent to injure or do harm. While even a technical battery against a master comes within the scope of 46 U.S.C. 701 (sixth item), I cannot conceive that Appellant would have been sentenced to two years' imprisonment by any court after conviction of the offense.

Most important to be considered here is Appellant's proved incitement of other members of the crew to refuse to obey orders. On the admission of Appellant's own witness, D'Grazia, (possibly inadvertent) I have been constrained to find that the Examiner had adequate grounds to find the fifth specification proved even with the other conflicts of testimony.

I do not think, however, that this case comes within the bounds of Decision on Appeal No. 355 where another boatswain attempted to flout the authority of the master of the ship.

The factual distinctions are plain. The master in the earlier case took direct action to remove the offender from the ship by recourse to the local police. The master, in this case, permitted Appellant to go back to work in his capacity of boatswain within twelve hours after the commission of acts labeled "mutinous," and apparently he served the rest of the voyage back to Houston, Texas, without further incident.

VIII

The Examiner, in this case, found that Appellant had a prior record of misconduct "off the record," *i.e.* not in the presence of, or with the consent of, the person charged. Whether the Examiner did consider the prior record or not, I disregard it

in appellate action. (Decision on Appeal No. 1472)

ORDER

Specifications 2, 3, 6, and 7 are dismissed.

Specification 4 is amended by striking therefrom the words "by addressing him with insubordinate, derogatory and argumentative remarks and."

The ultimate findings of the Examiner as to specifications 1, 4 (as amended), 5, and 8 are AFFIRMED. The order of the Examiner is MODIFIED to provide for a suspension of one year.

P. E. TRIMBLE
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 10th day of October 1967.

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