IN THE MATTER OF LICENSE NO. 248277 MERCHANT MARINER'S DOCUMENT NO. Z-369973-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Eugene C. PORTER.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1577

Eugene C. PORTER

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 23 February 1966, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for six months outright plus six months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as second assistant engineer on board the United States SS NORBERTO CAPAY under authority of the document and license above described, on or about 11 January 1966, at Manila Philippine Republic, Appellant

(1) wrongfully assaulted and battered the chief mate of the vessel,

(2) wrongfully assaulted and battered another crewmember, Wilder Wallace; and

(3) wrongfully failed to join the vessel.

At the hearing , Appellant elected to act as his own counsel, with the assistance of his wife. Appellant entered a plea of guilty to the charge and to all specifications except that alleging assault and battery upon Wilder Wallace.

The Investigating Officer introduced in evidence documentary evidence from the ship's articles and official log book, and the testimony of the two alleged assault victims and of the first assistant engineer of the vessel.

In defense, Appellant offered unsworn statements by his wife and himself.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and all specifications had been proved. The Examiner later entered an order suspending all documents issued to Appellant for a period of six months outright plus six months on twelve months' probation, and the entire decision was served on 28 February 1966. Appeal was timely filed on 28 March 1966. Appeal was perfected by filing of a brief on 10 June 1966.

FINDINGS OF FACT

On 11 January 1966, Appellant was serving as second assistant engineer on board the United States SS NORBERTO CAPAY and acting under authority of his license and document while the ship was in the port of Manila, Philippine Republic.

On this date, Appellant approached the chief mate of the vessel, on deck, and asked him a question about shifting of the ship. Dissatisfied with the answer, he directed foul and abusive language to the mate, invited him to take off his glasses, then struck him on the head, knocking the glasses off. In the melee that followed several more blows were struck, latterly by the mate in self defense.

When the episode ended, Appellant went to the engineroom where he was on watch. An ordinary seaman, Wallace, was ordered by the chief mate to unlock a padlock, on a door, which could be reached

only by transversing the engine spaces. Appellant, who apparently had earlier difficulties with Wallace ashore in another port, approached Wallace belligerently and several times pulled him by the arm. When Appellant threatened further battery upon Wallace by raising a large wheel wrench over his head Wallace struck Appellant in the face at least twice, causing injuries in the area of the eyes.

Appellant then departed the ship, leaving his license and some personal effects aboard, and never rejoined before the completion of the voyage.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

Several bases of appeal are urged. First is that Appellant did not have a lawyer counsel at the hearing and was thereby prejudiced.

The second is a matter of mitigation. It is noted that the voyage records show that NORBERTO CAPAY was on an extended voyage, that the offenses alleged all occurred with in a two hour period after arrival at Manila on the 242nd day of the voyage, that for about 80 days prior to the critical date, the vessel had been at anchor in either of two ports with only twelve hours of steaming time and no shore liberty for the crew. Under this heading it is also suggested that there is evidence that the acts of Appellant were caused by a temporary psychiatric disorder.

Third, Appellant urges a twenty-five year record of service as a naval and merchant marine officer without blemish, as a mitigating factor.

The fourth point suggests that evidence was available which was not adduced at the hearing. This point was expanded upon in a supplemental brief which will be considered below.

The fifth point is that the order of the Examiner is unduly

harsh in that 46 CFR 137.20-165 indicates a six month outright suspension as the "average" suspension for a first offense of assault and battery while the order here provides for a greater than "average" suspension when actually a less than "average" suspension should have been ordered.

A sixth point is that orders relative to licensed personnel should be no harsher than are orders for unlicensed personnel for the same misconduct since CFR makes no distinction between them.

The supplementary brief filed on behalf of Appellant repeats some of the points already noted, adds a letter (mentioned above under the fourth point) from the chief engineer to the effect that Appellant was a good engineer, and points to the Examiner's statement that Appellant "willfully left the vessel with intent to remain away permanently and that is tantamount to desertion," as erroneous. In this connection it is declared that Appellant's plea of guilty to the specification alleging failure to join was ill-advised.

APPEARANCE: Harold williams, Esquire,
San Francisco, California

OPINION

I

I wish first here to comment upon a matter in the preparation of the charges in this case. The three specifications referred to in the preliminary remarks were actually alleged in reverse order with the failure to join first and the earliest offense last.

This disorder, particularly with no specific times mentioned and with all offenses occurring on the same date, can be misleading. In this case, the Examiner was moved to ask the Investigating Officer, because of his confusion as to the order of events, at the very end of the hearing (R-35): ". . . Am I misunderstanding this case entirely?"

He was not and he did not, but an orderly array of the specifications would have averted this confusion.

There is no rule which says that offenses under a certain charge must be stated in chronological order (Sometimes, indeed, this may be impossible), but I strongly suggest that when such order can be achieved it should be, for the clarification of the record.

II

To take the last raised point of Appellant first, I will admit that the comment of the Examiner that Appellant's actions in leaving the ship were tantamount to desertion is of no significance. Appellant was not charged with desertion, only with failure to join. Failure to join is the only offense charged in the first specification and is the only one found proved. The comment does not enlarge the finding nor prejudice it.

III

To return to the order of points on appeal presented by Appellant, I look now to the first: that he had no lawyer-counsel at the hearing.

Appellant was adequately advised of his right to counsel upon service of the charges by the Investigating Officer, and at the opening of the hearing by the Examiner. To argue on appeal that the absence of lawyer-counsel alone, on the stated choice of Appellant, is reason to reverse the Examiner, is to go even beyond the bounds of *Miranda v. Arizona* (1966), 384 U. S. 436, applicable only in criminal cases.

IV

The duration and trying conditions of NORBERTO CAPAY's voyage are urged in mitigation.

On considering cases of assault and battery, and like offenses, under ordinary conditions of seaman's life, I have frequently had occasion to note that the confined situation of men aboard a ship renders the profession of seaman somewhat different

from others. Conduct which might be tolerable in shoreside employment can be completely unacceptable aboard ship.

It may be, as urged, that Appellant expected a voyage of only two or three months. He engaged himself for a period of up to one year.

The Investigating Officer pointed out that the close confines imposed by this voyage was not an excuse for misconduct of the type found here and that others in the crew successfully weathered the voyage without "blowing". It has been argued on behalf of Appellant that his two hour period of aberration ". . . served as a relief valve for the entire crew under the pressure of the circumstances. If accumulated tension had not been broken through in the person of Porter, it surely would have erupted through other members of that harassed and boredom-beleaguered crew."

This argument I cannot accept since it is completely unsupported by any facts or evidence. At this period of time, I may take official notice that the profession of seaman imposes severe hardships on persons in some areas, but these hardships are voluntarily undertaken, and the standards of shipboard conduct cannot be relaxed because one volunteer seaman fails to meet them.

V

Under the heading of the "hardship" argument just discussed, it was urged that there is medical evidence that the acts of Appellant were caused by a temporary psychiatric disorder.

If Appellant desired to enter a defense of incompetency at the time of the alleged offenses, the defense could properly be entertained. I need no go into the question whether it could be raised for the first time on appeal, while acknowledging that if the condition also existed at the time of the hearing it could be so raised.

In this case the question of medical evidence was raised in the first brief filed on appeal. Although other supplementary evidence (the letter of the chief engineer) was offered on appeal,

the supplementary brief proffered no such medical evidence.

I cannot help but note that the letterhead of counsel who filed the documents on appeal declared him first as "M.D." and secondarily, in smaller print, as "ATTORNEY AT LAW."

The primary "M.D." I read as "Doctor of Medicine" in its usual sense.

It seems to me certain that if a doctor who was also an attorney-at-law had the evidence to prove that the acts of Appellant were committed under such conditions that his responsibility for these acts could be legally challenged such challenge would have been made. While the intimidation is suggested, the challenge was not made.

I am of the opinion that this suggestion is without merit.

VI

The evidence "not adduced" at the hearing but produced on appeal is a letter of the chief engineer to the effect that Appellant was a good engineer and that he did "not blame Mr. Porter for a portion of his action."

To accept this letter at face value, despite the fact that it is not in the record before the Examiner, I see first that it disclaims any personal knowledge of the writer because of the fact that he was ashore at the time of the episodes involved. Secondly, it does not purport to absolve Appellant from all blame, in the opinion of the author, but from blame for "a portion of his action."

Which "portion" the letter author meant I need not speculate upon. If he meant that he too would have liked to hit the chief mate or the ordinary seaman, the matter is immaterial. If he meant that he too desired to leave the vessel, I note that he did, in possibly more legal fashion than did Appellant.

The letter adds nothing to Appellant's case.

VII

Appellant's point concerning the "average" orders in the Code of Federal Regulations overlook the fact that he was found guilty not of one assault and battery, as a first offense, but of two assaults and batteries and of a failure to join in addition. On this score the suspension ordered was well within the discretion of the Examiner.

As to Appellant's sixth point, there is nothing in the Examiner's decision to indicate that his order is harsher than it would have been had Appellant been an unlicensed member of the crew.

VIII

One other point on the appeal must be mentioned. Appellant states that there is some doubt in the evidence as to who struck the first blow in the encounter between Appellant and Wilder Wallace in the engineroom. I have no doubt, upon this record, that Wilder Wallace struck the first "blow."

That, however, is not conclusive. Appellant was charged with assault and battery. The evidence shows that he had on several occasions placed hostile hands upon Wallace. These actions constituted assault and battery.

It is true that the evidence further indicates an attempted battery by Appellant with a dangerous weapon, the wrench with which he tried to strike Wallace. This effort was aborted by Wallace's striking him.

Appellant was not charged, as he might have been, with specifications alleging both assault and battery (proved by his manhandling of Wallace) and assault with a dangerous weapon (resulting in a self-defensive action by Wallace which occasioned injury to Appellant's face).

That Wallace may have struck the first "blow" is immaterial. Appellant had already committed assault and battery upon Wallace by

unlawfully laying hands upon him.

I might add here that the repeated testimony of Wallace about "keeping hands off" even before the wrench was raised is a most persuasive statement of Wallace's understanding of his personal rights against battery by another.

To sum up this point, Appellant had already committed assault and battery upon Wallace before he raised the wrench to strike him.

IX

Upon this entire record, it is my opinion that the findings and order of the Examiner should be undisturbed.

ORDER

The order of the Examiner dated at Long Beach, California, on 23 February 1966, is AFFIRMED.

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

Signed at Washington, D. C., this 18th day of August 1966.

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