

In the Matter of Merchant Mariner's Document No. Z-742215R
Issued to: ARCHIE HAMILTON

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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ARCHIE HAMILTON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 19 February, 1953, an Examiner of the United States Coast Guard at Honolulu, T. H., suspended Merchant Mariner's Document No. Z-742215R issued to Archie Hamilton upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a waiter on board the American SS LURLINE under authority of the document above described, on or about 5 January, 1953, while said vessel was at sea, he assaulted and battered a member of the crew; one Harry Whitelaw, room steward.

At the commencement of the hearing on 2 February, 1953, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Counsel for Appellant then moved for a continuance and this request was granted by the Examiner.

The hearing was reconvened when the LURLINE returned to Honolulu from San Francisco on 14 February, 1953. Appellant was

not present. Counsel stated that he had received a phone call, from a representative of Appellant's union, informing counsel that Appellant had been "fired" at San Francisco and requesting that the hearing be transferred to San Francisco. At this time, counsel made a motion to transfer the case to San Francisco. The Examiner denied the motion (on the grounds that the postponement had been granted at Appellant's request and the Investigating Officer's witnesses were present but might not be available to testify in San Francisco) and the hearing was conducted in absentia.

Counsel for Appellant was present throughout the hearing but he refused to enter a plea to the charge and specification; and the Examiner entered a plea of "not guilty" on behalf of the Appellant. After the Investigating Officer had made his opening statement, counsel waived his right to make an opening statement and objected to the continuation of the hearing in Appellant's absence. This objection was noted by the Examiner.

Thereupon, the Investigating Officer introduced in evidence the testimony of the person alleged to have been assaulted and the testimony of another member of the crew who stated that he witnessed an unprovoked attack upon Harry Whitelaw by Appellant. Counsel declined to cross-examine either of these witnesses on the grounds that Appellant was not present to be confronted by the witnesses or to advise counsel with respect to cross-examination.

The testimony of the only person who was subpoenaed to appear as a witness in Appellant's behalf was not taken because counsel declined to call this person as a witness since Appellant was not present at the hearing. At this point, counsel claimed a lack of due process and requested an adjournment "to some other time or place where he [Appellant] can be present and can adequately present his case and be confronted with the witnesses against him" The Examiner denied this request and stated that it was Appellant's responsibility to be present at the hearing in Honolulu to which he had been subpoenaed despite the fact that it might be inconvenient for Appellant to arrange for his transportation to Honolulu after having been discharged from the LURLINE in San Francisco. The Examiner then adjourned the hearing in order to give counsel an opportunity to submit an application to take Appellant's deposition.

The hearing reconvened on 19 February, 1953. Counsel stated that he had no application to submit for the taking of the deposition of Appellant who was still in San Francisco. Counsel then made a motion to dismiss the proceedings on the ground that Appellant had been deprived of due process, as follows: Appellant was not present and confronted by witnesses; he was not given adequate opportunity to be heard in his own defense and to cross-examine witnesses; and he was not given reasonable notice of time and place of the hearing. Counsel requested that, in the alternative, the case be transferred to San Francisco. In support of his verbal statements, counsel submitted a written motion which is reiterated in the exceptions taken on appeal from the Examiner's decision (see below). The Examiner denied the motion *in toto*.

At the conclusion of the hearing, having heard the argument of the Investigating Officer and Appellant's counsel having waived argument, the Examiner gave both parties an opportunity to submit proposed findings and conclusions before announcing his findings and concluding that the charge had been proved by proof of the specification. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-742215R, and all other certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of one month outright and two months on twelve months probation from the effective date of the order.

From that order, this appeal has been taken, and it is urged that:

- "1. The hearing herein was conducted in violation of appellant's rights under the Fifth and Sixth Amendments to the United States Constitution and under Sections 1004, 1005 and 1006 of the Administrative Procedure Act.
- "2. The hearing herein was conducted in violation of 46 U.S.C.A. Section 239(g).
- "3. The charge herein fails to state matter properly within the scope of 46 U.S.C.A. Section 239(b).
- "4. Appellant did not and could not receive a fair and

impartial hearing as required by the Constitution and the said Administrative Procedure Act in that Examining Officer and the Charging Officer were both employees of the Coast Guard.

- "5. The Examining Officer committed error and therefore denied to appellant a fair and impartial hearing in that:
- (a) He denied appellant's motion that the cause be transferred to San Francisco, California for trial *de novo*, under a proper charge.
 - (b) He denied appellant's motion for a continuance and held the hearing in the absence of the appellant."

APPEARANCES: Messrs. Bouslog & Symonds, of Honolulu, by James A. King, Esquire, of Counsel.

FINDINGS OF FACT

On 5 January, 1953, Appellant was serving as a waiter on board the American SS LURLINE and acting under authority of his Merchant Mariner's Document No. Z-742215R while the ship was at sea. On this date, there occurred an altercation which involved Appellant and another member of the crew, Harry Whitelaw.

There is no record of prior disciplinary action having been taken against Appellant.

OPINION

In view of the action to be taken on this appeal, it would not serve any purpose to extend my above findings of fact.

The record indicates that the LURLINE arrived in Honolulu on 2 February, 1953; Appellant was served with the charge and specification approximately two hours before the hearing commenced at 1300 on 2 February, 1953; the LURLINE departed from Honolulu at 1600 on 2 February, 1953; and the LURLINE customarily arrives in Honolulu on the morning and leaves for the west coast of the United States on the afternoon of the same day. These factors explain the haste in commencing the hearing on 2 February, 1953, and the

granting of a continuance on this date in order for Appellant to prepare his defense.

But Appellant contends that since he was unable to return to Honolulu after being discharged at San Francisco and because the Examiner then refused to transfer the hearing to San Francisco, Appellant was not given adequate notice of the time and place of hearing and, consequently, he was deprived of his right to due process of law in that he did not receive a fair and impartial hearing because he was not afforded an ample opportunity to be present in order to testify in his own behalf, to be confronted by the Investigating Officer's witnesses, and to cross-examine such witnesses. In support of these propositions, Appellant cites the Constitution of the United States, the Administrative Procedure Act, and 46 U.S.C. 239.

Although reference to the Fifth and Sixth Amendments to the Constitution is without merit since they refer to criminal prosecutions, I think Appellant was deprived of his rights as set forth in the Administrative Procedure Act and 46 U.S.C. 239.

Appellant received only about two hours notice before the hearing was convened on 2 February, 1953; and before counsel repeatedly requested that the hearing be transferred to San Francisco, the Examiner was informed that Appellant had been discharged from the ship at the latter port. In effect, Appellant had not received adequate notice of the hearing to be held in Honolulu until some time after he had departed for San Francisco on the LURLINE in performance of his contract of service on board this ship. Presumably, he was not able to return to Honolulu - a distance of more than 2,000 miles - except at his own expense. Under these circumstances, I do not think that the Examiner gave "due regard . . . for the convenience and necessity of. . ." (Administrative Procedure Act, sections 5(a) and 6(a); 5 U.S.C. 1004(a), 1005(a)) Appellant in denying the two motions of Appellant's counsel to transfer the hearing to San Francisco.

However, Appellant was represented by counsel of his own choice who was afforded ample opportunity to cross-examine the Investigating Officer's two witnesses and to obtain the testimony of the witness who had been subpoenaed to appear in behalf of Appellant. But counsel neglected to take advantage of any of these

opportunities to put in a defense. Therefore, the testimony contained in the present record is not objectionable; and the findings of the Examiner are supported by the testimony.

For these reasons, the following order is considered to be appropriate:

ORDER

The decision and order of the Examiner dated at Honolulu, T. H., on 19 February, 1953, are vacated and the record shall be remanded to a Coast Guard Examiner in San Francisco, California, with directions to reopen the hearing in order to permit the introduction of evidence by the Investigating Officer and the Appellant herein. It is further directed that, in the absence of evidence submitted by or on behalf of Appellant, the decision and order of the Examiner dated 19 February, 1953, shall be reinstated by the Examiner reopening the hearing.

VACATED and REMANDED with instructions.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 27th day of July, 1953.

***** END OF DECISION NO. 678 *****

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