

In the Matter of Merchant Mariner's Document No. Z595364-D2
And All Other Licenses, Certificates and Documents

Issued to: CARMELO NUNEZ

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

834

CARMELO NUNEZ

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.

On 15 June 1955, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z595364-D2 issued to Carmelo Nunez upon finding him guilty of misconduct based upon one specification alleging in substance that while serving as a messman on board the American SS EXCHANGE under authority of the document above described, on or about 26 November 1954, while said vessel was in the vicinity of Kavalla, Greece, he wrongfully cut a fellow crew member, Robert G. Thomas, with a dangerous weapon; to wit a large knife.

At the hearing, 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. Although advised of his right to be represented by counsel of his own selection, Appellant voluntarily elected to waive that right and act as his own counsel. He entered a plea of "not guilty" to the charge and specification

proffered against him. During the latter part of the hearing, Appellant was represented by an attorney.

After the Investigating Officer made his opening statement, he introduced in evidence several documentary exhibits including a certified copy of the record Appellant's conviction as a result of the incident alleged in the above specification.

In defense, Appellant offered in evidence his sworn testimony and two statements attesting to Appellant's good conduct on the voyage except for the incident in question. Appellant stated that he became angry after he was hit in the eye by Thomas for no reason; Appellant returned to Thomas' room, with a bread knife, 3 or 4 minutes later in order to threaten Thomas so he would not strike Appellant again; and Appellant cut Thomas on his left arm when he got up and swung at Appellant.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z595364-D2 and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that consideration be given to the fact that the U. S. District court placed Appellant on probation due to his otherwise clear record as a seaman for 10 years and provocation by Thomas. Appellant claims that he was not the aggressor; he believes the order is too severe under the circumstances; and he promises to avoid any such incident in the future if he is given another chance. A letter from Appellant's Probation Officer has also been submitted. He recommends that Appellant be permitted to return to work as a seaman, which is his only suitable occupation, in view of the mitigating circumstances considered by the U. S. District Court and in order to assist Appellant in making a satisfactory adjustment to his probation supervision.

Based upon my examination of the record submitted, I hereby

make the following

FINDINGS OF FACT

On 26 November 1954, Appellant was serving as a messman on board the American SS EXCHANGE and acting under authority of his Merchant Mariner's Document No. Z595364-D2 while the ship was at sea in the vicinity of Kavalla, Greece.

Between approximately 1900 and 2100 on this date, Appellant and other members of the crew were drinking brandy and beer in the room of Robert G. Thomas, the second cook. Appellant and Thomas were engaged in a scuffle pushing each other when Thomas struck Appellant on his right eye. The two men were separated and Appellant went to his room. While washing his face, Appellant looked in the mirror and observed the injury to his eye. This angered Appellant; he left his room and obtained a 12-inch bread knife from outside the pantry. Appellant returned to Thomas' room about 3 or 4 minutes after the initial scuffle and used the bread knife to cut Thomas' left arm and shoulder. Thomas left the room and received emergency medical treatment from the Purser.

The ship changed course and proceeded back to Kavalla Anchorage. Thomas was taken to the Kavalla Municipal Hospital and was unable to rejoin the ship upon her departure. The injuries inflicted by Appellant were diagnosed as a deep, horizontal cut over the left deltoid muscle and biceps down to the bone, severing the tendons, veins and blood vessels. The cut was about 10 inches in length. Thomas also received a deep, horizontal cut on the back of the left wrist which severed the tendons and veins close to the bone.

As a result of this incident, Appellant was indicted and convicted, on 10 May 1955, before the United States District Court for the Eastern District of Virginia, Newport News Division, on his plea of *nolo contendere* to the charge of assault upon Thomas with a dangerous weapon "with intent then and there to do bodily harm * * * without any just cause or excuse whatsoever." Appellant was represented before the Court by counsel. The imposition of sentence was suspended and Appellant was placed on probation for a period of 3 years.

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

OPINION

Appellant's conviction before the U. S. District Court is *res judicata* and conclusive in this administrative proceeding since both actions are based upon the same facts or acts. 46 CFR 137.15-5(a). This is true despite the fact that Appellant's conviction was based on his plea of *nolo contendere*. A finding of guilty based on a plea of *nolo contendere* is a final judgment of conviction although imposition or execution of sentence and the defendant is subjected to probation. *Korematsu v. United States* (1943), 319 U. S. 432.

Appellant's testimony indicates the deliberate and vicious nature of his attack upon Thomas. There was no element of self-defense in Appellant's conduct as shown by his testimony that there was an interval of 3 or 4 minutes before he returned to Thomas' room with the large knife. This lapse of time is substantiated by the fact that Appellant did several things during the intervening time: he went to his room; he washed his face; he went to the vicinity of the pantry to get the knife; and then he returned to Thomas' room. Consequently, Appellant was definitely the aggressor when he returned to the scene of trouble some minutes after the initial incident had come to an end, and there is no basis on which to claim that his conduct was the result of immediate provocation. This is further supported by the indictment which states that the assault was "without any just cause or excuse whatsoever."

The severity of the injuries to Thomas indicate that he might not have survived if he had not received prompt medical treatment on board the ship and been removed to a hospital shortly thereafter.

Under these circumstances, it is my opinion that it would be inconsistent with the statutory duty of the Coast Guard, to promote the safety or life and property at sea, to permit Appellant to return to work in the close confines of ships were tempers are

inclined to be shorter than in the less restricted areas ashore. In addition, it is a regulatory police of the Coast Guard to revoke a seaman's documents if he is found guilty of a serious crime of violence on shipboard or ashore. 46 CFR 137.03-5.

For these reasons, I cannot accede to Appellant's request and the recommendation of his Probation Officer regardless of the action taken by the District Court and Appellant's prior clear record at sea.

The order of the Examiner will be upheld.

ORDER

The order of the Examiner dated at New York, New York, on 15 June 1955, is AFFIRMED.

J. A. Hirshfreed
Read Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 5th day of October, 1955.

***** END OF DECISION NO. 834 *****

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