

In the Matter of License No. 121497 Merchant Mariner's
Document No. Z-191318-D1
Issued to: JOHN OLIVER O'HARA

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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JOHN OLIVER O'HARA

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 22 April, 1952, an Examiner of the United States Coast Guard at Seattle, Washington, suspended License No. 121497 and Merchant Mariner's Document No. Z-191318-D1 issued to John Oliver O'Hara upon finding him guilty of misconduct based upon two specifications alleging in substance that while serving as First Assistant Engineer on board the American SS ENID VICTORY under authority of the documents above described, on or about 24 March, 1952, while said vessel was in the port of Pusan, Korea, he (1) unlawfully attacked a crew member by throwing a jar of jam in his face; and (2) kicked said crew member about the face and shoulders.

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. Because of his daughter's illness in San Francisco, Appellant was not present at the hearing, but was represented by the Business Agent of the Marine Engineers Beneficial Association, who appeared without preparation other than a telephone conversation with Appellant on whose instructions he entered a plea of "not guilty" to the charge and each specification.

The hearing was held on the day before it was scheduled and the Investigating Officer introduced in evidence the testimony of the complainant, Williams, to the event; one Franklin, as an observer at a late stage; and excerpts from the Official Log of the vessel.

In defense, Appellant's counsel recalled the complainant, Williams, for further cross-examination.

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 specifications and entered the order suspending Appellant's License No. 121497 and Merchant Mariner's Document No. Z-191318-D1 and all other licenses, certificates of service and documents held by this Appellant for a period of three months.

From that order, this appeal has been taken.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 24 March, 1952, Appellant was serving as First Assistant Engineer on board the American SS ENID VICTORY and acting under authority of his License and Merchant Mariner's Document as described above.

Said vessel was then in the port of Pusan, Korea. At about 0830, on that date, Appellant appeared in the crew's mess and vehemently criticized the Chief Steward concerning the food supplied to the Officers' Mess.

A messman, Williams, interjected himself into the discussion and was told by Appellant to mind his own business; but after Appellant left the crew's mess pursued the matter further as Appellant was going up a ladder, and as a result was struck in the face with a jar of jam thrown by Appellant.

The testimony is confused respecting subsequent events, but it is clear that in the altercation that ensued both men sustained physical injury.

OPINION

I am not satisfied the record before me contains the legal requirements recognized as "due process of law," to support the Examiner's decision.

The hearing was convened on 21 April, 1952, in Appellant's absence and after the Investigating Officer had been notified on 19 April by Appellant that he wanted to go to San Francisco as soon as possible because of his daughter's serious illness. The Investigating Officer informed Appellant that he would have to appear as directed or the proceedings would be conducted "in absentia." Thus, Appellant obtained the services of the above counsel to appear for and to represent him at the hearing. There is no showing in the record why the hearing was not postponed until a later date.

The second specification contains allegations that Appellant kicked Williams at the time of the assault alleged in the first specification. The latter was the only specification served upon Appellant prior to the hearing. The kicking is a substantive matter which was first offered by the Investigating Officer as an amendment to the original specification at the beginning of the hearing. The Examiner recognized that this amendment would enlarge the degree of the assault and he rejected the amendment because it had not been personally served upon Appellant. Nevertheless, there was testimony taken concerning the kicking and after the completion of the presentation of evidence by both parties, the Investigating Officer moved that the second specification be entered on the ground that it conformed to the evidence submitted. Over objection by counsel for Appellant,

the Examiner admitted the second specification.

As a result of Appellant's involuntary absence from the hearing and the manner in which the second specification was introduced into the record without his knowledge, I feel that Appellant was deprived of his right to a fair hearing as required by the "due process" clause of the United States Constitution.

Appellant was not personally served with a copy of the second specification either before the commencement of the hearing as specified in 46 C.F.R. 137.05-15 or at any time before the conclusion of the hearing as required by 46 C.F.R. 137.09-28(c) when the new specification pertains to matters of substance. Due to the involuntary manner in which Appellant was practically compelled to obtain counsel to represent him at the hearing as an alternative to an "in absentia" proceeding, it cannot fairly be said that Appellant received constructive notice through his counsel of the allegations contained in the second specification and that Appellant was bound by his counsel's failure to act on the Examiner's suggestion that a motion for a continuance would be favorably entertained at the time the second specification was admitted. Therefore, Appellant was substantially prejudiced when he was not given personal notice of all the issues involved and, consequently, he was not afforded a reasonable opportunity to prepare his defense, offer evidence and examine the opposition with respect to the allegations contained in the second specification. Although the latter refers to the same incident as the original specification with which Appellant was served, it contains matters of substance which are not mentioned in the limited allegations of the first specification. This does not comply with the fair hearing requirements of the "due process" clause which are reflected in the Coast Guard regulations referred to above.

It follows that Appellant was also deprived of his right to a fair hearing with respect to the first specification. Although he was served with this specification before the hearing commenced, the hearing was convened in his absence despite his timely action in contacting the Investigating Officer. Therefore, Appellant was not confronted with the witnesses nor was he able to consult with his counsel during the course of the hearing as to the cross-examination of witnesses or the introduction of Appellant's testimony and other evidence in his own behalf. Appellant's only defense was a short statement made by himself which was attached to the excerpt from the Official Log of the ship.

The testimony of Franklin is not persuasive since it is self-contradictory and also disagrees with the other evidence as to several points. The testimony of Williams and the statement of the Appellant are diametrically opposed as to which of them was the aggressor; and the Examiner gave greater credibility to the testimony of Williams. Ordinarily, I would accept the judgment of the Examiner based upon his personal observation of the witnesses. But in this case, I cannot arrive at a satisfactory conclusion because Appellant was not given a fair chance to appear and testify in his own behalf. Consideration was given to remanding the case for a new hearing before a different Examiner; but due to the delay involved and the probable inability to produce witnesses whose testimony would be necessary to arrive at a fair determination of the issues involved, it is believed to be expedient that the case be dismissed.

ORDER

The Order of the Examiner dated at Seattle, Washington, on 22 April, 1952, is VACATED, SET ASIDE and REVERSED. The charge against Appellant is DISMISSED.

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

Dated at Washington, D. C., this 12th day of September, 1952.