

In the Matter of Merchant Mariner's Document No. Z-170985-D2  
and all other Seaman Documents  
Issued to: THOMAS J. BUSH

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1343

THOMAS J. BUSH

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

By order dated 13 September 1961, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman documents for three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as an able seaman on board the United States SS SONOMA under authority of the document above described, on 8 August 1961, Appellant assaulted and battered chief steward Fleming while the ship was at Pago Pago, American Samoa.

At the hearing, Appellant was represented by nonprofessional counsel. Appellant entered a plea of not guilty to the charge and specification.

Both parties introduced in evidence the testimony of witnesses and agreed to receive in evidence testimony which was taken before the Examiner on the day before the hearing.

This incident arose as the result of an argument about the use of the crew's messroom by native stevedores. When Appellant questioned the chief steward about this, the steward replied with foul and insulting language. Concerning what then happened, the Examiner accepted as most probable the testimony of a messman which was the only eyewitness account other than by the steward and Appellant. The messman stated that the steward was hit in the eye by Appellant with his fist after the steward had taken a stance as though prepared to fight; but the steward did not advance toward Appellant or swing at him.

Appellant testified that he blocked two blows by the steward before striking him in the eye.

OPINION

It is contended on appeal that the absence of counsel for Appellant when testimony was taken on the day before the hearing was prejudicial to Appellant; representation by nonprofessional counsel at the hearing was not adequate; and Appellant acted in self-defense when he reasonably believed that the chief steward was about to strike Appellant.

Appellant was given the opportunity to obtain counsel of his choice to represent him at the hearing. The testimony taken on the day prior to the hearing could have been, but was not, objected to at the hearing. Since this testimony was admitted in evidence by agreement and does not appear to have deprived Appellant of a fair hearing in any respect, I do not think that Appellant was prejudiced by the lack of counsel.

The Examiner accepted the statements of the messman, whose testimony was taken on the day before the hearing, as opposed to the opposite extremes presented by the two participants. There is no reason why this finding as to credibility should not stand.

The evidence indicates that the blow was delivered by Appellant as the result of the very foul and insulting language used by the chief steward rather than because of any belief by Appellant that he was in imminent danger of bodily harm. The messman's testimony is that the steward was angry and ready to fight, but that he did not move to attack Appellant.

Although provocation by words does not excuse the offense of assault and battery, this factor as well as Appellant's prior clear record for more than fifteen years were considered by the Examiner as mitigating circumstances in arriving at the lenient order which was imposed.

#### ORDER

The order of the Examiner dated at Long Beach, California, on 13 September 1961, is AFFIRMED.

D. McG. Morrison  
Vice Admiral, United States Coast Guard  
Acting Commandant

Signed at Washington, D. C., this 1st day of October 1962.