

In The Matter of Merchant Mariner's Document No. Z-902338-D3 and
all other Seaman Documents

Issued to: DAVID E. EMERICK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1437

DAVID E. EMERICK

This appeal has been taken in accordance Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 15 February 1963, an Examiner of the United States Coast Guard at Baltimore, Maryland revoked Appellant's seaman documents upon finding him guilty of misconduct. The three specifications found proved allege that while serving as Second Cook on board the United States SS MERMAID under authority of the document above described, on 8 October 1962, Appellant assaulted and battered the Second Mate and the Third Mate by kicking each one of them; Appellant assaulted the Chief Mate by pushing him.

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

The Investigating Officer introduce in evidence the testimony of all three mates alleged to have been assaulted.

In defense, Appellant offered in evidence certain photographic exhibits, his own testimony and the testimony of a steward named Duff who was not serving on the ship on the date of the alleged offenses.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and three specifications had been proved.

FINDINGS OF FACT

On October 1962, Appellant was serving as Second Cook on board the United States SS MERMAID and acting under authority of his document while the ship was in the port of San Juan, Puerto Rico.

About 1330 on this date, Appellant was angry and talking in a very loud voice while discussing his job with a union patrolman in the presence of the Boatswain. The Chief Mate and Third Mate were nearby on the main deck. The Second Mate left his room and told Appellant to be quiet. Appellant, a muscular seaman who is six feet tall and 30 years of age, moved toward the Second Mate, a much smaller and older person, kicked the Second Mate in the seat of his pants as he stepped over the coaming to return to his room, and followed the Mate. The Chief and Third Mates, seeing this, went to the Second Mate's room.

Upon entering the room, the Chief Mate saw that Appellant was threatening to attack the Second Mate. When the Chief Mate told Appellant to leave the room, Appellant used both hands to push the Chief Mate away. The latter went to get handcuffs and soon returned with them. During the course of a futile attempt by the three mates (all 49 years of age) to put the handcuffs on both of Appellant's wrists, Appellant suffered various injuries. At this time or earlier, Appellant kicked the Third Mate very forcefully in the stomach. Appellant finally broke loose from the mates and left the room. He was later taken ashore by the local police authorities. Appellant was given medical treatment and did not return to the MERMAID for the balance of the voyage. There is no evidence that judicial action was taken against Appellant in San Juan.

Appellant has a prior record as a result of a hearing in February 1962 when he was found guilty of five offenses including an assault and battery in September 1961 and a similar offense in January 1962. On the former occasion, Appellant struck a crew member a hard blow on the head with his fist and, in the latter instance, Appellant persisted in attacking another member of the crew even after Appellant was ordered by a ship's officer to stop. At the conclusion of the hearing, the Examiner ordered Appellant's documents suspended for only two months outright plus three months on eighteen months' probation, but indicated that both offenses were serious assaults which would have resulted in a lengthy outright suspension except for Appellant's previous clear record at the time.

BASES OF APPEAL

The grounds urged by Appellant, for modifying or vacating the Examiner's order of revocation, deal primarily with attacking the credibility of the Government's three witnesses - the Chief Mate, Second Mate and Third Mate. The testimony of each mate contradicts that of the other two to such an extent that their testimony is incredible and should not have been accepted by the Examiner who relied on Appellant's prior record in deciding to reject his version that he was "worked over" (see photographs in evidence) by

the three mates after one of them struck Appellant from behind.

With respect to the issue of credibility, the Examiner's decision does not refer to the disinterested witness Duff whose testimony does not support the findings made by the Examiner.

APPEARANCE: Dorfman, Pechner, Sacks and Dorfman of Philadelphia
by Sidney J. Smolinsky, Esquire, of Counsel.

OPINION

The above findings of fact agree basically with those of the Examiner and the testimony of the three mates. Other details are not necessary since Appellant was charged only with kicking the Second and Third Mates and pushing the Chief Mate.

Appellant's version is that the Second Mate fell while returning to his room and Appellant's foot might have accidentally touched the mate's trousers; Appellant then went to the Chief Steward's room and was standing outside the room when he was hit on the head from behind and knocked unconscious; he came to in the Second Mate's room, which was nearby, while he was being severely beaten by the three mates; Appellant managed to break loose and leave the room after kicking the Third Mate and pushing the Chief Mate.

Appellant admits that he did the acts alleged but claims that the circumstances were such that these acts did not constitute offenses of assault and battery. The conflict in testimony between the version presented by Appellant and that presented by the three mates constituted an issue of credibility which was resolved against Appellant by the Examiner when he stated, in his decision, "I have accepted the testimony of the three Mates and rejected the testimony of Emerick [Appellant] as being unworthy of belief". There is no indication in the record that the Examiner relied on, or even knew about, Appellant's prior record when he reached this conclusion. As the trier of the facts who heard and observed the witnesses, the Examiner was in the best position to judge their credibility. His determinations with respect to this will be sustained unless they are clearly erroneous.

There are some discrepancies in the testimony of the mates such as what was happening in the room both when the Chief and Third Mates first reached the Second Mate's room and later when the Chief Mate returned with the handcuffs, at what point Appellant threw a drinking glass against a bulkhead, when the Third Mate was kicked by Appellant, and who followed Appellant when he left the Second Mate's room. It is my opinion that these are relatively

minor discrepancies as to the details and may be attributed to human error in recalling observations made at a disorderly scene or while the witness was excited. See Commandant's Appeal Decisions No. 924 and 1014. Consequently, these discrepancies are not sufficiently important to reject the Examiner's determinations as to credibility by concluding that the mates lied in order to conceal the fact that they had beaten Appellant under the circumstances which he testified it occurred. As found, the record shows that Appellant was injured but the fact that he admitted being able to break away from the three mates both discredits his testimony that he was being given a severe beating, and supports the inference that the mates "worked over" Appellant with less than sufficient force to subdue him.

The testimony of seaman Duff is not significant since he was not present or even a member of the crew at the time of this incident. When the Examiner accepted the testimony to the three mates, he indirectly rejected any hearsay testimony to the contrary given by Duff.

It seems much more significant that no apparent attempt was made by Appellant to obtain the testimony of the Boatswain or the union patrolman as to whether Appellant deliberately kicked the Second Mate after he told Appellant to be quiet. Near the end of the hearing, counsel for Appellant indicated that the defense might want to call another witness but nothing more was said about it.

Since Appellant's prior record includes two offenses of assault and battery, both of which were classified as "serious" by the Examiner who conducted the hearing in February 1962, the present order of revocation is not considered to be excessive.

ORDER

The order of the Examiner dated at Baltimore, Maryland on 15 February 1963, is AFFIRMED.

E.J. ROLAND
Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 16th day of December 1963.