

IN THE MATTER OF LICENSE NO. 281932, MERCHANT MARINER'S DOCUMENT NO.
Z-471231-D3 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Holton William Conklin

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1561

Holton William Conklin

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

By order dated 13 December 1965, an Examiner of the United States Coast Guard at New York, N. Y. revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as Third Mate on board the United States SS HARBOR HILLS under authority of the documents above described, on or about 25 September 1965, Appellant:

- (1) wrongfully engaged in acts of sexual perversion with a member of the crew when the vessel was at Westport, Oregon, and
- (2) at the same time and place, used foul and abusive language to the master of the vessel.

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 introduced in evidence the testimony of three witnesses.

In defense, Appellant offered in evidence his own testimony, and two letters of recommendation.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and both specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 16 December 1965. Appeal was timely filed on 7 January 1966. Appellant perfected his appeal by filing a brief dated 7 April 1966.

FINDINGS OF FACT

On 25 September 1965, Appellant was serving as Third Mate on board the United States SS

HARBOR HILLS and acting under authority of his license and document while the ship was in the port of Westport, Oregon. This date was a Saturday and Appellant was off duty. He and an oiler, who had been discharged the day before, were drinking together for some time in Appellant's room.

Sometime that afternoon the master of the vessel learned that the oiler was on board and had been creating disturbances. The master ordered the chief mate to call a State policeman and then searched the ship for the oiler unsuccessfully. He was then advised that the oiler was in Appellant's room.

The master, the chief mate, the chief engineer, and the chief electrician went to Appellant's room. (The electrician was in attendance as a representative of the union to which the oiler belonged.) The doorway from the passageway was locked and could not be opened with a master key.

The party went outside and found that they could see into Appellant's room through the partially opened, but dogged, port. The master and the electrician looked through the aperture twice, the chief mate once. Each saw four bare legs intertwined on Appellant's bunk, visible in light coming from a doorway on the side of the room, leading into a toilet and washroom between Appellant's room and the next mate's quarters.

The party went through the other mate's quarters and into the toilet. They found that the door to Appellant's room was lashed with a nine-thread line from the knob, but the door could be opened far enough for the chief mate to insert a knife and cut the line. The party entered the room. By this time they had been joined by a State policeman.

Appellant was standing in the middle of the room, pulling on his drawers. He had no other clothing on. The oiler was on the bunk, naked.

Appellant protested the intrusion and addressed foul and abusive language to the master. The master advised him that he was discharged. Appellant immediately packed. He was paid off and he left the ship.

BASES OF APPEAL

Appellant argues seven points on appeal.

POINT I

Not one iota of evidence was introduced at the hearing setting forth what alleged acts of perversion were committed.

POINT II

The conflicting testimony of the chief mate and the electrician casts in doubt the testimony concerning the positions and movement of the legs.

POINT III

The absence of a log entry concerning the alleged acts of perversion constitutes an additional ground for reversal.

POINT IV

The facts of Case NO. 818 [Commandant's Decision on Appeal No. 818] are distinguishable from those in the instant proceeding, and the findings of the Commandant therein do not support the decision or findings of the Hearing Examiner in this case.

POINT V

The events surrounding the discharge compel a finding that the perversion charge was an afterthought he manufactured to support an otherwise unjustified discharge.

POINT VI

The person charged gave a truthful, logical and believable explanation of the incidents that occurred at the time in question.

POINT VII

The Hearing Examiner improperly found Specification Two proved.

Specifics of these Points will be discussed later in the Opinion.

APPEARANCE: Schwartz and O'Connel, of New York, N. Y., by Burton M. Epstein, Esq.

OPINION

I

As to Appellant's first point on appeal, it is to be admitted that there is no evidence as to a specific form of perverted action committed. The eyewitnesses were not privileged to such a full view of the proceedings. The question for the Examiner, and the true question on appeal, was whether the circumstances and facts observed by the witnesses were such that a reasonable man could reasonably conclude that some such act was taking place between the Appellant and another male.

In order to answer this question, there must be an answer to a more fundamental question, "Was there substantial evidence that certain facts and circumstances existed?" To accommodate my opinion to the order of presentation of points by Appellant, the assumption must be made here that

the evidence as to the facts and circumstances was credible and reliable. The question of credibility will be taken up in the places where Appellant has raised it.

We have here, then, the credible evidence of three eyewitnesses that each looked through a partially open porthole into Appellant's room. One, the master of the vessel, looked in on two separate occasions some minutes apart. One looked in twice, on but one occasion; that is, without leaving the viewing scene. One looked in once.

All three saw a tangle of bare legs on Appellant's bunk. One testified to seeing legs at least from the knees down. One testified to seeing legs up to thighs. One testified that he could not recall seeing knees but that if he had not see above the knees the legs must have been uncommonly long. Movement of the legs was observed, by one witness as regular movement, by another as convulsive.

There is evidence that several other persons, longshoremen, had looked through the porthole and were laughing.

The three eyewitnesses who testified all entered Appellant's room from a side door. The first to enter first saw Appellant naked, picking up his drawers from the deck, preliminary to putting them on. The second first saw Appellant with one foot in his drawers attempting to get the second foot in. The third saw Appellant with his drawers "at half mast," pulling them up.

All three saw the other person, an oiler who had been discharged the previous day, naked on Appellant's bunk.

There is also evidence that the principal entrance to Appellant's room, from the passageway, was so closed as to resist effort to open the door with a master key. Likewise there is evidence that the side door used by the witnesses, a door leading to a toilet and washroom shared by Appellant with the occupant of the next room, was lashed by nine-thread line so that it could be opened only an inch or less, necessitating the cutting of the line by a witness with a knife in order to gain access.

The porthole, it may be said, was so covered and the cover dogged as to permit the minimum of opening with any secure closure.

On this statement, it must be held that a reasonable man could, and probably would, conclude that some form of unnatural sex act had been taking place between the two male occupants of Appellant's bunk. It is inescapable (and it is admitted by Appellant, although that the fact is irrelevant just now) that Appellant was the possessor of two of the legs in the bunk.

It is also held that under such observed facts and circumstances it need not be spelled out just which one of several possible forms of activity may have been taking place.

In his argument under this Point I, Appellant refers to the "vagueness" of the Examiner's opinion in stating that perverted acts were "being attempted or done," or "being attempted or

committed." It is said that this "either - or" opinion of the Examiner "is not even a finding of guilty on the specification charged, which was that acts of perversion were committed."

To this, it might be replied that the Examiner used this "either - or" language only in his opinion; his finding is a straightforward one -- that Appellant "wrongfully did engage in acts of sexual perversion with" another person.

But I need not rely upon this subtle distinction to uphold the Examiner's action under Appellant's attack on these grounds.

The Examiner may well have had in mind in using the "either - or" language in his opinion a criminal law distinction between "attempts" and consummated acts. Such a consideration may be important, under a criminal indictment, when non-consensual acts are involved and the essence of the crime may be determined by whether "penetration," of whatever kind, may have been achieved.

What is charged in this case is an act of misconduct which, without regard to criminal law, is an offense under R.S. 4450 even if consensual. If it were necessary it could be said that certain attempts to commit consensual acts of this kind are misconduct under R.S. 4450. In such case I could substitute "attempt to" for the Examiner's "did" and still have adequate reason to sustain his ultimate action.

But I need not. The acts in this case described by the witnesses are found proved by the Examiner were acts of sexual perversion, in and of themselves, even if "unconsummated" to the satisfaction of the parties.

Appellant's Point I should therefore be rejected.

II

Appellant's Point II calls for rejection of the testimony of two of the three eyewitnesses because of alleged discrepancies about the "positions and movement of the legs."

When the total substance of the testimony of witnesses is in agreement there is no reason to reject the testimony of either or both by reason of difference of the language used to describe the action seen. Moreover, this is primarily the function of the Examiner, to resolve collateral and peripheral discrepancies in testimony. When an Examiner has done so without arbitrary or capricious action there is no reason to disturb his findings.

III

Appellant's Point III raises no real issue at all. The absence of a log book entry as to the acts in question is not a reason to reverse the Examiner.

An entry in the Official Log-Book in this case would have been nugatory. Appellant was discharged and left the ship immediately. He had been paid off in full, with no deductions for misconduct.

While a properly made Official Log-Book entry may be, as Appellant points out in his brief on appeal, admissible in evidence and prima facie evidence of the facts recited in the entry, there was no statutory requirement that such an entry be made in this case.

In fact, had such an entry been made and had it been sought to introduce it in evidence, objection would have undoubtedly have been made that Appellant had been discharged and had left the ship before the entry had been written.

Appellant's Point III has no merit.

IV

Appellant's Point IV may be conceded. Findings of fact by me in one case do not bind or control the findings of fact of an Examiner in another case.

If the principle of law involved is appropriate, however, it is binding. Insofar as the Examiner's decision in the instant case recognizes a principle of law that circumstantial evidence of an act of perversion is sufficient, the Examiner is correct. As to matters of fact, the Examiner is in no way bound by me, and I am, insofar as his findings are based upon reliable, probative, and substantial evidence, and are not arbitrary and capricious, bound by his findings.

As far as my findings of fact in the cited case are concerned, Appellant's Point IV on appeal is irrelevant.

V

Appellant's Point V goes to credibility of witnesses. It suggests that the idea of a "perversion" charge was set up later to justify Appellant's discharge from the vessel by the master. Appellant uses the word "afterthought."

He urges the line of reasoning that the master of HARBOR HILLS was an ex-alcoholic, that he therefore had a bias against drinking aboard his vessels, that he discharged Appellant merely because Appellant had become intoxicated on board, that he later realized that this discharge could not be justified under the union agreement because Appellant had been off-duty at the time of his drinking, that to justify the discharge he fabricated the story of the acts alleged in this case, and to support his fabrication he enlisted or compelled the agreement of two other persons, -- one the chief mate, a member of the same union as Appellant and the master, another, an unlicensed engine department man, a member of a different union from that of Appellant but a member of the union to which Appellant's alleged partner in the act belonged, a person who had interested himself in the

situation only because a member of his own union was reportedly involved upon whom he might have to make report later.

The theory advanced is that these two witnesses supported the testimony of the master as to the acts purportedly observed only because they were bound by articles to serve under this master; in other words, they perjured themselves.

It is scarcely conceivable that such a theory can be seriously advanced. Had such a "frame" been conceived by the master, it would require that both a licensed person and an unlicensed person had been coerced by the master into supporting his fabrication. Since the unlicensed witness was on the scene as representative of the union to which he and Appellant's partner belonged it seems unlikely that he would give perjured testimony against Appellant to satisfy the master when the same testimony would incriminate his fellow union member.

far from the "events surrounding the discharge" compelling a finding that Appellant was framed, the issue was only fancifully conceived. Even on that latter score, the Examiner made findings supported by the evidence.

VI

Appellant's sixth point say in effect, if the Examiner is to be reversed on the merits of this argument, that his own testimony is so overwhelming that no other substantial evidence to the contrary remains in the record. So stated, that is an unusual proposition.

It may be, as Appellant argues, that his explanation of the incidents was "logical and believable." It cannot be argued on appeal, as Appellant does, that his testimony was "truthful." Whether it was or was not truthful was a matter for the Examiner to decide. A "logical" story may be concocted. Even a "believable" story may be concocted. A "truthful" narrative can only be one that is in substantial accord with the facts.

The Examiner has here found that Appellant's narrative was not in accord with the facts which he found established by other substantial, reliable, and probative evidence. It has been said so often that I need not belabor the point here that the trier of facts should not be disturbed if the requisite quantum of evidence is present. So many appellants persist in arguing that examiners' findings should be set aside on just the very issue of credibility raised here that I must comment that in this case I could go so far as to call Appellant's own testimony easily incredible.

There is no point in going over this record with a fine toothed comb. One factor of Appellant's testimony alone will suffice, and this is selected because Appellant himself has raised the specific issue. Under Point IV of his appeal, Appellant, in seeking to distinguish his case from that discussed under IV of this opinion, points out as determinative of an issue that in the earlier case (No. 818), the Appellant's "testimony" had not denied the acts alleged but had only stated that the Appellant there had denied recollection of the circumstances of the acts alleged against him.

(Appellant here urged that his plea of "not guilty" marked a distinction from the earlier case. This, of course, is not true. In the earlier case there had been a plea of "not guilty." The question in the earlier case was whether the testimony of the Appellant had denied anything. A plea is no part of testimony. A plea, by immemorial tradition, merely puts the burden on the proponent to prove his case.)

In the instant case, Appellant's brief says, ". . . the person charged in this case specifically denied such act ever took place." [Italics in original] Another point selected by Appellant for emphasis is his statement (R-108), "No, I never get that drunk that I don't know what I am doing."

On Appellant's point here, I wish to keep this discussion separate from his argument on his Point IV which I have already disposed of in Part IV of this opinion. But I must note here that the applicable argument under his Point IV is met by the testimony of Appellant at the hearing that he had, as a result of drinking, fallen asleep in his chair while his alleged companion was in his room, but that he had no recollection of anything until he was aroused by the master's knock, at which time, after he had opened the door to the master, he found that somehow he had been in the bunk with his companion.

On appeal Appellant says that his unsupported statement, "No, I never get that drunk that I don't know what I am doing," is conclusive as an evidentiary statement, taken in connection with his plea of "not guilty," that the alleged act did not take place.

The effect of the plea, I have already mentioned. The effect of the statement in evidence, no matter what emphasis may be placed upon it in the appellate brief (and no testimonial statement, as noted before, is self-enforcing as true), can only be measured against Appellant's own testimony that he did not know what had happened.

Questioned about his occupancy of the bunk with his companion, Appellant replied (R-100), "I fell asleep in the chair and had been drinking and I don't know."

By this testimony alone Appellant undermined the ingenuity of his argument on appeal, if that argument had merit to begin with.

VII

Appellant's Point VII has to do only with the specification relative to the use of foul and abusive language to the master. Considering the ultimate disposition of the principal specification in this case, little discussion is required in this decision and, understandably, little argument is proffered on appeal.

Appellant's brief says only that the Examiner had rejected Appellant's testimony as to the language he had used. The Examiner did more than that. He made an affirmative finding, predicated upon other evidence, that Appellant had so spoken to the master.

CONCLUSION

It is concluded that both specifications in this case were proved by substantial, reliable and probative evidence and were properly so found by the Examiner.

ORDER

The order of the Examiner dated at New York, New York on 13 December 1965, is AFFIRMED.

W. D. SHIELDS
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 7th day of June 1966.

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