

In the Matter of License No. 117920 Merchant Mariner's
Document No. Z-145812
Issued to: WALTER E. SHUTTLEWORTH

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

616

WALTER E. SHUTTLEWORTH

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 18 July, 1952, an Examiner of the United States Coast Guard at New York City revoked License No. 117920 and Merchant Mariner's Document No. Z-145812 issued to Walter E. Shuttleworth upon finding him guilty of misconduct based upon nine specifications alleging in substance that while serving under the authority of his license as Master on board the American SS OMEGA from 27 October, 1951, to 24 December, 1951, and as Chief Mate of the American SS TAGALAM from 21 January, 1952, to 9 February, 1952, he did:

First Specification: on or about 27 October, 1951, wrongfully threaten to have Chief Engineer Martin "done away with" so that he would not "get by Ceuta."

Second Specification: on or about 18 November, 1951, use obscene and abusive language toward Chief Engineer Martin while

the ship was in the port of Trieste.

Fourth Specification: during the voyage which terminated about 24 December, 1951, wrongfully give drinks of alcoholic liquor to Boatswain Thoraton.

Fifth Specification: during the voyage which terminated about 24 December, 1951, wrongfully consume alcoholic liquor in the wheelhouse in the presence of Chief Mate Braca, the helmsman, and other persons.

Sixth Specification: on or about 22 December, 1951, in the port of Baltimore, Maryland, wrongfully threaten to "break in" Chief Engineer Wells' head.

Seventh Specification: on or about 22 December, 1951, use obscene and abusive language toward Chief Engineer Wells.

Eighth Specification: on or about 24 December, 1951, at Baltimore, Maryland, use obscene and abusive language toward Chief Mate Braca.

Eleventh Specification: on or about 9 February, 1952, at Point a Pierre, Trinidad, assault the Master of the vessel, Frank R. Johnson, by striking him on the back of the neck and kicking him.

Thirteenth Specification: on or about 9 February, 1952, wrongfully order the Master to get off the vessel.

The Examiner dismissed four other specifications under the charge of misconduct and one specification under the charge of incompetence.

At the time of service of the charges and specifications, 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. Due to illness, Appellant was not present at the beginning of the hearing but he was represented by an attorney of his own selection who entered a plea of "not guilty" to the charge and each specification proffered against Appellant.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of the Chief Engineer, Chief Mate, Third Mate and Purser, all of whom were on board the OMEGA; and that of the Master Frank R. Johnson, of the TAGALAM. After repeated failures in attempting to obtain the testimony of a Mr. Wells who was promoted from First Assistant Engineer to Chief Engineer when the former Chief Engineer left the OMEGA and was hospitalized at Trieste on 21 November, 1951, a voluntary, binding stipulation was entered into as to the testimony which would have been given by Chief Engineer Wells if he had appeared as the Investigating Officer's witness.

In defense, counsel for Appellant made an opening statement before recalling the Purser of the OMEGA as Appellant's witness and obtaining Appellant's sworn testimony in his own behalf. Counsel also submitted several documentary exhibits.

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 above nine specifications. He then entered the order revoking Appellant's License No. 117920, Merchant Mariner's Document No. Z-145812, and all other licenses, certificates of service 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 the Examiner failed to: properly evaluate the testimony; arrive at proper conclusions of law; properly apply the rules of evidence; properly apply the law of the case to the facts; rest his decision upon reliable and substantial evidence; impose a reasonable punishment; and dismiss legally insufficient specifications. Argument on the following points has been

submitted:

POINT I

THE COAST GUARD DID NOT MEET ITS BURDEN OF PROVING SHUTTLEWORTH GUILTY BEYOND A REASONABLE DOUBT.

POINT II

THE CREDIBILITY OF THE WITNESSES FOR THE GOVERNMENT WAS NOT SUCH AS TO ESTABLISH THE GUILT OF THE PERSON CHARGED BEYOND A REASONABLE DOUBT.

POINT III

A MATTER OF LAW THE EVIDENCE SUBMITTED IN SUPPORT OF THE VARIOUS SPECIFICATIONS WAS INSUFFICIENT.

POINT IV

THE OPINION BELOW [SHOWS THAT THE EXAMINER REJECTED THE TESTIMONY OF THE PERSON CHARGED WITHOUT REASON.]

POINT V

PUNISHMENT IMPOSED DID NOT MEET THE OFFENSES ALLEGED IN THAT IT WAS TOO SEVERE.

APPEARANCES: Messrs. Macklin, Speer, Hanan and McKernan, of New York City, by Martin J. McHugh, Esquire, of Counsel.

FINDING OF FACT

On a voyage covering the dates of 27 October, 1951, to 24 December, 1951, Appellant was serving as Master on board the American SS OMEGA, a Liberty ship, and acting under authority of his License No. 117920.

On or about 27 October, 1951, while the ship was enroute from the Port of New York to Trieste via Ceuta, Spanish Morocco, Appellant threatened Chief Engineer Martin with words to the effect

that he could be "done away with" and that he would not "get by Ceuta." This statement was made in the presence of the Purser and resulted from Appellant's dissatisfaction with the Chief Engineer's handling of the fuel and water supplies for the ship.

On 18 November, 1951, two days after the OMEGA had arrived at Trieste, Appellant directed obscene and abusive language towards Chief Engineer Martin during the course of one of the many heated discussions between the two men. At this particular time, Appellant was angry because the Chief Engineer had not yet submitted a list of necessary repairs. First Assistant Engineer Wells was present during this discussion. The work list was made up the following day and given to Appellant. The Chief Engineer was hospitalized on 21 November at Trieste and the First Assistant Engineer was promoted to the position of Chief Engineer.

Upon one occasion while the ship was underway on the return leg of the voyage, Appellant drank alcoholic liquor in the wheelhouse and in the presence of Chief Mate Braca and the helmsman. Braca refused to take a drink but Boatswain Thoraton accepted at least one drink of the alcoholic beverage which was offered to him by Appellant.

The OMEGA reached the port of Baltimore, Maryland, on 22 December, 1951. On this date, Appellant addressed Chief Engineer Wells in an obscene and abusive manner while threatening to "break in" his head if he was ever caught in Brooklyn by Appellant. Appellant's home was in Brooklyn, New York. Differences had arisen between Appellant and the Chief Engineer as a result of certain overtime claims by the latter.

On the following morning of 23 December, 1951, while the ship was still in the port of Baltimore, Appellant came on board and greeted Chief Mate Braca with vulgar and abusive language in the presence of a visitor who accompanied Appellant. Until this time, Appellant had not directed this type of language toward the Chief Mate. Appellant was relieved of his command and left the ship later on the same day.

On 8 and 9 February, 1951, Appellant was serving as Chief Mate of the American SS TAGALAM and acting under the authority of his License No. 117920 during the course of a foreign voyage which had

commenced early in January, 1951. Appellant had complained to the Master, Frank R. Johnson, that he was suffering from hemorrhoids; and on 8 February, 1951, after the ship arrived at Point a Pierre, Trinidad, Appellant obtained a doctor's written statement that Appellant should be hospitalized for medical treatment. Appellant went to the American Consul's office and demanded that the Master discharge him on the basis of the doctor's statement. The Master told Appellant to return to the ship and the matter would be straightened out on board. Both men returned to the ship. Later, when the Master was about to descend a stairway on the pier, at which the ship was docked, in order to go ashore, Appellant attacked the Master from behind by seizing his neck and violently kicking him. The Master was freed from Appellant's grip when several persons held him. After this, the Master returned to the ship with the local police and went to Appellant's quarters. During this interview, Appellant ordered the Master to get off the ship. Appellant was in the process of turning over the command to another Master but he had not yet been relieved. The Master had not received any injuries except bruises and there was no police action taken against Appellant but he was discharged for hospitalization on 9 February.

Appellant is 46 years of age, married, and has been going to sea for approximately 30 years. The OMEGA was his first command. He is more than six feet tall and weighs about 230 pounds.

Appellant's prior record consists of a two months' probationary suspension in 1944 for striking the Purser of the ship; another two months' probationary suspension in 1945 for assaulting a crew member; and an outright suspension for six months in 1946 coupled with an eighteen months' probationary suspension for five years for assaulting a crew member and failing to maintain a proper lookout while standing watch.

OPINION

Numerous points have been raised on appeal but almost all of the hinge upon the fundamental issue as to whether the Examiner acted erroneously in rejecting a substantial part of Appellant's testimony in favor of the testimony which was given by the Investigating Officer's witnesses. I do not think that any error

was committed in this respect.

First, I would like to point out that the degree of evidence required, in order to find that an offense has been "proved" in these administrative, remedial proceedings, is "reliable, probative and substantial evidence" rather than proof of guilt "beyond a reasonable doubt." This is clearly stated in both the Administrative Procedure Act and the regulations pertaining to these proceedings (46 C.F.R. 137.21-5) which are neither criminal prosecutions nor penal actions.

Appellant contends, in considerable detail, that the testimony of the Investigating Officer's witnesses was not credible evidence because of inconsistencies, vacillation, prejudice, and resentment against Appellant because of reprimands by him when they did not properly perform their duties. Appellant admits that he sometimes used improper language when he was exasperated but denies that he threatened any of the crew on the OMEGA or that he attacked the Master of the TAGALAM as alleged.

The claims of inconsistency and vacillation are based upon minor points which, in many cases, are not even relevant to the allegations contained in the specifications. Any prejudice which the witnesses might have had, out of resentment or otherwise, was certainly no stronger than Appellant's contrary interest in the outcome of the hearing. Thus, these arguments are not adequate reasons why Appellant's flat denials of all the allegations should be given preference over those testifying against him. On the other hand, since the Examiner saw all except one of the witnesses and observed their demeanor which is always in evidence, his evaluation of the testimony should be accepted unless he revealed in the record that he used irrational tests of credibility. *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp. (C.C.A.2, 1949), 175 F.2d 77.*

There is no such indication that the Examiner arbitrarily rejected Appellant's testimony. The Examiner stated, several times, in his decision that his conclusions were partially based upon his observation of the manner in which Appellant and the other witnesses testified; and that Appellant's denials were rejected in favor of other evidence. In addition, the Examiner mentioned other specific reasons, with respect to each specification found proved, why he accepted the testimony of the Investigating Officer's

witnesses and the stipulated testimony as representing the true facts.

It was perfectly permissible to accept the stipulation, as to what the testimony of Chief Engineer Wells would have been if he had testified, as substantial evidence to prove the Sixth and Seventh Specifications over Appellant's denial. In *Draeger v. Bradley (1946)*, 156 F.2d 64, the court held that when counsel stipulated as to testimony which would be given by a certain person if he appeared as a witness, this stipulated testimony is credible evidence and it may be relied upon to establish facts since counsel was under no compulsion to enter into the stipulation and if he had not done so, it would have been necessary for the person to appear as a witness and he could have been fully cross-examined. As mentioned above, this stipulation was completely voluntary and it was agreed between the parties that it would be binding.

In further support of the adequacy of the evidence, there is direct evidence to establish the allegations contained in each of the nine specifications; and this direct evidence, which was testimony pertaining to every offense alleged in the nine specifications, is mutually corroborative of a general pattern of behavior by Appellant which is consistent with the offenses alleged. There is additional confirmation of this, to a limited extent, in Appellant's admissions that he sometimes used profane language when he became aggravated with his officers and that he had engaged in a scuffle with the Master of the TAGALAM after he had pushed Appellant at the time referred to in the Eleventh Specification. Consequently, there is substantial and reliable evidence to support the conclusions that Appellant used obscene, abusive and threatening language towards his officers on the OMEGA upon several occasions; that he was the aggressor in his fight with the master of the TAGALAM; and that he drank liquor in the wheelhouse of the OMEGA while she was at sea.

It is also urged that, as a matter of law, the evidence was insufficient to support the various specifications. Appellant proposes that a threat is an assault and, hence, there must be fear of immediate harm rather than at some future time as alleged in the First Specification. A threat is not necessarily an assault but "a threat is an avowed present determination or intent to injure presently or in the future." *United States v. Metzdorf (D.C.*

Montana, 1918), 252 Fed. 933. Although the Eleventh Specification alleges that Appellant assaulted the Master, it also alleges that Appellant struck and kicked him as well. Concerning the absence of specific dates in the allegations and the Examiner's decision (Fourth and Fifth Specifications), Appellant had actual notice during the course of the hearing as to the time involved and he cannot now take advantage of these highly technical deficiencies in this administrative proceeding. *Kuhn v. C.A.B.(C.C.A.D.C., 1950)*, 183 F.2d 839. Since the stipulated testimony of Chief Engineer Wells refers individually to three specific specifications (Second, Sixth and Seventh), the stipulated evidence refers to the dates alleged in the respective specifications.

Because of Appellant's prior record and the great effect which offenses of this nature are bound to have on discipline aboard ship, the order of the Examiner will be sustained. Regardless of any physical pain which Appellant was suffering, he had no justification for attacking the Master of the ship on which he, Appellant, was still serving at the time. The threatening and insulting language with which he addressed the officers under him while he was in command of the OMEGA were offenses which were only slightly less serious. Whatever the conduct of his officers was in the performance of their duties, Appellant's behavior must have made matters worse. A Master's distrust and abuse of his officers breeds lack of respect for both the Master and officers by the rest of the crew; and, consequently, it is one of the easiest ways to completely undermine the strict discipline which is required on ships.

ORDER

The order of the Examiner dated at New York City on 18 July, 1952, is AFFIRMED.

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

***** END OF DECISION NO. 616 *****

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