

In the Matter of Merchant Mariner's Document No. Z-674063 and all
other Licenses, Certificates and Documents
Issued to: ARTURO MELENDEZ

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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ARTURO MELENDEZ

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 27 July 1955, an Examiner of the United States Coast Guard at New York, New York suspended Merchant Mariner's Document No. Z-674063 issued to Arturo Melendez upon finding him guilty of misconduct based upon three specifications alleging in substance that while serving glory hole steward on board the American SS UNITED STATES under authority of the document above described, on or about 13 July 1955, while said vessel was in the port of Le Havre, France, he wrongfully had alcoholic liquor in his possession; he directed threatening and abusive language towards a fellow crew member, Master-at-Arms M. W. Rozelle; and he assaulted and battered a fellow crew member, Master-at-Arms R. H. Hood. The Examiner concluded that the two other specifications were not proved.

At the hearing, 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. Appellant was represented by

counsel of his own choice and he entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of two ship's officers and three masters-at-arms including the two referred to in the above specification. At subsequent times during the hearing, a certified copy of the Official Logbook entry pertaining to these three related incidents was introduced in evidence as were statements (attached to the log entry): by the above five witnesses. Another statement attached to the log entry was also received in evidence. This was a statement by Second Officer Boucher who did not testify at the hearing. These statements were taken during the Master's investigation at sea on 14 July 1955.

In defense, Appellant offered in evidence the testimony of three members of the crew who witnessed the events immediately prior to the alleged assault and battery upon Hood. Appellant also testified under oath and submitted a certified copy of the entry in the Official Logbook relating the injuries received by him on the date of the alleged offenses.

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 decision and concluded that the charge and three specifications had been proved. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-674063, and all other licenses, certificates, and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of six months - two months outright suspension and four months suspension on probation until twelve months after the termination of the outright suspension.

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

FINDINGS OF FACT

On 13 July 1955, Appellant was serving as glory hole steward on board the American SS UNITED STATES and acting under authority of his Merchant Mariner's Document No. Z-674063 while the ship was

in the port of Le Havre, France, preparing to get underway at 2400.

At about 2345 on this date, Appellant returned on board by way of the crew gangway leading to the after upper deck in the vicinity of a passenger area. Appellant had three bottles of beer in his pockets. There were regulations posted on the ship prohibiting the crew from taking beer on board although beer was sold to the crew on board the ship. Appellant showed his crew pass to Master-at-Arms Gallager who was on watch at the gangway. The latter permitted to go on board without comment about the beer.

Two additional Masters-at-Arms, Rozelle and Hood, were on duty a few feet inboard of the crew gangway. When Rozelle saw Appellant's bottles of beer, Rozelle told Appellant to get rid of the beer. Appellant threw one bottle over the side and continued to walk towards the ladder leading to his quarters on the main deck ("B" deck) which was the next deck below. Rozelle stopped Appellant before he reached the ladder and told him to get rid of the rest of the beer. A brief but loud argument followed during the course of which Appellant threatened to "take care" of Rozelle when they got to New York. A group of passengers gathered about the scene. Third Officer Schretzman, in charge of the gangway watch, quieted the disturbance by ordering Appellant to throw the other two bottles of beer over the side and to produce his crew pass. Appellant obeyed, without comment, the order concerning the beer but he seemed to be unable to locate his crew pass. Third Officer Schretzman then ordered Appellant to go to his quarters.

In the meanwhile, Second Officer Brooks observed the incident from his docking station. He was on the starboard wing of the after docking bridge, one deck above the crew gangway, supervising the singling up of the after lines. Second Officer Brooks called to Master-at-Arms Hood and ordered him to take Appellant below at about the same time the Third Officer ordered Appellant to go below to his quarters. Appellant went down the ladder to "B" deck followed by Hood as well as Rozelle. Appellant the Third Officer did not hear the order issued to Hood by the Second Officer and the Third Officer did not object when both Hood and Rozelle volunteered to escort Appellant to "B" deck. No words were exchange as the three men went down the ladder.

At the bottom of the ladder, the argument was continued -

presumably with respect to Appellant's failure to surrender his crew pass. Rozelle or Hood grabbed Appellant's left wrist and twisted his arm up behind his back. Appellant was then either thrown to the deck on his back or knocked to the deck by the blows of the two Masters-at-Arms. Rozelle put a knee on Appellant's chest or stomach and both hands around Appellant's neck in a strangle hold. Hood forcefully kicked Appellant before he went above to get an officer. When another Second Officer, Mr. Boucher, reached the scene, Rozelle was still choking Appellant. The Second Officer ordered Rozelle to release Appellant; Appellant struck Hood a blow when freed. Second Officer Boucher immediately prevented any further fighting by ordering the Masters-at-Arms not to touch Appellant and by ordering Appellant to go to his quarters.

A short time later, Appellant reported to a ship's surgeon for a medical examination. It was determined that Appellant's dental plate had been damaged; he had been bruised and had suffered abrasions on his forehead, arms and back; the active movement of his left wrist and fingers was limited to fifty per cent of normal; his left shoulder was strained; and his spine was in a painful, tender condition. Appellant was given an off duty slip and codeine to relieve the pain from his injuries. Appellant stated, without contradiction, that he did not work for the balance of this voyage which was completed on 18 July 1955.

Hood claimed to have been injured but did not submit any evidence of the medical treatment which he testified he received as a result of this incident.

There is no record of prior disciplinary action having been taken against Appellant during his ten years at sea.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the ultimate findings that the three specifications were proved are inconsistent with order findings made by the Examiner and against the weight of the evidence.

Appellant's only offense with respect to the beer was to take it on board a ship, contrary to the ship's regulations, where beer was sold to the members of the crew. If it was wrongful to have

alcohol on board, then the steamship company was also at fault.

The language Appellant directed towards Rozelle did not put him *in* fear of harm or have any effect on the passengers.

The finding that Appellant assaulted and battered Hood is not consistent with the finding that Appellant did not assault and batter Rozelle. The disinterested witnesses Black and Mack testified that Appellant was kicked and otherwise beaten by the two Masters-at-Arms. The Examiner's rejection of testimony by Rozelle and Hood (that Appellant assaulted and battered Rozelle) cast serious doubt upon all their testimony. The striking of Hood by Appellant was not an isolated incident but part of a sequence of events which must be consider *in toto*. Appellant should not be punished for striking Hood who moments before had kicked, punched and otherwise battered Appellant. He was in a severe state of shock and in pain when he struck Hood. If Appellant is punished, this would sanction the use of unnecessary force by ship's petty officers.

In conclusion, it is submitted that the order is excessive since Appellant was found guilty of less serious offenses than those with which he was originally charged. Rozelle and Hood should have been charged with assault and battery upon Appellant. It is respectfully requested that the findings of the Examiner be reversed.

APPEARANCES: Mr. William L. Standard of New York City By Lester E. Fetell, Esquire, of Counsel.

OPINION

It is my opinion that there is some merit Appellant's contention that the Examiner's ultimate findings and conclusions as to the proof of the three specifications are not consistent with the evidentiary findings of fact made by the Examiner. These evidentiary findings of an Examiner, based on his judgment as to the credibility of witnesses whom he observed, will not be disturbed on appeal unless such findings are clearly erroneous. But secondary or derivative findings or inference, which rest upon the basic and underlying evidentiary findings, will not be accepted

when the derivative inferences are not rational. *American Tobacco Co. V. The Katingo Hadjipatera* (C.S. 2, 1951) 194 F. 2d 449.

The ultimate finding that Appellant wrongfully had alcoholic liquor in his possession on board the ship must be reversed and the specification dismissed. Although the taking of beer on board was prohibited, it is also true that the members of the crew were permitted to purchase beer on the ship. Hence, the mere possession of beer on board cannot be considered to have been wrongful. Appellant should have been charged with a violation of the prohibition against taking beer on board the ship.

The Examiner did not make any specification as to the extent to which he considered that Appellant directed threatening and abusive language towards Rozelle. The Examiner did state that since he did not believe the testimony of Rozelle and Hood that Rozelle did not hold Appellant's neck in a choking position when they later reached the bottom of the ladder, the Examiner equally doubted that the language used by Appellant was as Hood and Rozelle testified it was. The Examiner indicated that he accepted the version of Second Officer Brooks that Appellant told Rozelle, in a threatening manner, that he would be "taken care of" in New York. This was similar to the testimony of Third Officer Schretzman and constituted an abuse of the position of authority of Master-at-Arms Rozelle whose official capacity while on duty was to assist in maintaining discipline and order on board the ship. Therefore, this infraction of discipline was an act of misconduct committed by Appellant. The commission of this act in the presence of passengers was not conducive towards instilling confidence in the passengers as to the degree of discipline which they could expect on the ship.

The opening comments in this opinion were directed mainly towards the conclusion that the specification alleging assault and battery upon Hood was proved. The Examiner specifically rejected the testimony of the two Masters-at-Arms that Appellant started the fight at the bottom of the ladder by striking Rozelle and that Rozelle did not get a strangle hold on Appellant. Both Masters-at-Arms testified that Appellant was restrained by Rozelle placing his knee on Appellant's chest and his (Rozelle's) hands on Appellant's shoulders. But the extent of the restraint, as testified to by Rozelle and Hood, is refuted by the Statement of

Second Officer Boucher, the testimony of Appellant, Black, Mack and James, and the log entry pertaining to Appellant's medical examination after the fight.

The evidence is clear that Appellant was choked, kicked and severely beaten by the two Masters-at-Arms. Consequently, there is no doubt that the actions of the two Masters-at-Arms grossly exceeded the force that was necessary for them to use in the execution of their duties. For these reasons, it is my opinion that Appellant should not have been found guilty of the offense of assault and battery upon Hood for striking him as soon as Appellant was released by Rozelle. Under the circumstances Appellant should not be blamed for striking a man who had just kicked Appellant while he was being held on the deck by another seaman. This is different from those cases where there has been an intervening period after the termination of an initial assault. It has been held that where a person has been assaulted without cause, he may immediately retaliate within reasonable limits. 5 *Corpus Juris* 748. The latter theory seems to have appropriate application in this case.

Moreover, the evidence indicates that the fight started as a result of Rozelle asking Appellant for his crew pass. Not only did Second Officer Brooks not testify that he had issued any order to get Appellant's crew pass, but Rozell admitted that he understood that the order of Mr. Brooks to escort Appellant below was given to Hood.

The ultimate finding of fact and conclusion that Appellant assaulted and battered Hood is reversed and the specification is dismissed.

The order will be modified in view of the dismissal of two of the three specifications.

ORDER

The Order of the Examiner dated at New York, New York, on 27 July 1955, is modified to directing an admonition against Appellant. In accordance with 46 CFR 137.09-75(d), Appellant is advised that this admonition will be made a matter of official

record.

As so MODIFIED, said Order if AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 7th day of February, 1956.

***** END OF DECISION NO. 858 *****

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