

In the Matter of Merchant Mariner's Document No. Z-622167 and all
other Seaman's Documents
Issued to: CHARLES I. WHEATLEY

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1490

CHARLES I. WHEATLEY

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 27 May 1964, an Examiner of the United States Coast Guard at New York, New York, admonished Appellant upon finding him guilty of misconduct. The specification found proved alleges that while serving as a hospital attendant on board the United States SS CONSTITUTION under authority of the document above described, on or about 17 November 1963, Appellant wrongfully entered the stateroom of a female passenger, one Ida Naccarato.

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

The Investigating Officer introduced in evidence the testimony of two witnesses, entries of the Official Log Book of CONSTITUTION, and the deposition of the female passenger.

In defense, Appellant offered in evidence the testimony of

seven witnesses and his own testimony.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification has been proved. The Examiner entered an order admonishing Appellant.

The entire decision was served on 29 May 1964. Appeal was timely filed on 9 June 1964.

FINDINGS OF FACT

On 17 November 1963, Appellant was serving as a hospital attendant on board the United States SS CONSTITUTION and acting under authority of his document while the ship was at sea, en route from New York to Casablanca.

At 0800, Appellant reported to work at the ship's hospital. He left the hospital to feed a patient in the isolation ward and then, accompanied by the master-at-arms, to feed another in the brig. He returned to the hospital about 0915. From this time until shortly before 1000 he was not under the supervision or direct observation of his superiors.

At some time between 0915 and 0930, Mrs. Ida Naccarato and her five year old daughter were asleep in their room with the door locked. During this time Appellant entered the room without knocking. A light was turned on, and Mrs. Naccarato recognized Appellant as a hospital employee. The child began to cry. At Mrs. Naccarato's order Appellant left the room. Almost immediately Bedroom Steward Frank R. Miller appeared at the door.

Mrs. Naccarato complainingly asked whether hospital employees could enter a room without knocking. Miller went to Tourist Class Chief Steward Martin Kraal and told him of the complaint. Kraal sent an assistant, who spoke fluent Italian, with Miller to see Mrs. Naccarato, who spoke no english. The assistant took the passenger to Mr. Kraal, who in turn took her to the purser's office. There she was interviewed by an assistant purser, Neal De Beni, who also spoke Italian.

De Beni took down a complaint in Italian and then translated it into English. The complaint declared that a hospital attendant who wore glasses had previously entered her room and had again not later than ten o'clock that morning.

Report was made to the Staff Captain, Harold E. Coffman. At about 1100 Captain Coffman made a point of stopping Appellant in a passageway and examining his keys. No stateroom key was found. (Aboard CONSTITUTION hospital attendants are not supposed to have keys. Bedroom stewards do carry masters for the rooms they service.)

At about 1400 Appellant was sent to the Tourist Purser's office on a pretext. Mrs. Naccarato observed him pass and later declared that he was the man.

Later that evening the Staff Captain arranged a "line-up" of crew members dressed in similar uniforms, some of whom wore glasses. Again the passenger identified Appellant. Appellant was in fact the only hospital attendant who wore glasses.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that because of conflicts in the testimony of government and defense witnesses and because of inconsistencies in the testimony of Mrs. Naccarato, the issue of identification should have been resolved in favor of Appellant.

APPEARANCE: Bernard Rolnick, Esquire, New York, New York

OPINION

In the Bill of Exceptions filed on appeal, Appellant succinctly states, "The ultimate issue that had to be decided by the Hearing Examiner was one of credibility, and solely credibility." This is undeniably true, and the issue was resolved against Appellant by the Examiner. Since it is the province of the Examiner to determine credibility, his findings should not be disturbed unless there is not substantial evidence on which to base them.

Several points are made in the record of hearing and in the appellate documents concerning the matters in which credibility of Mrs. Naccarato's testimony are:

(1) witnesses account for the presence of Appellant elsewhere at the time specified in the original complaint;

(2) Mrs. Naccarato's testimony about time, in deposition, differs from that given in her statement on the ship;

(3) Mrs. Naccarato identified the intruder as a "male nurse;" there was a male nurse on the ship, but Appellant was a hospital attendant.

(4) Mrs. Naccarato identified Appellant in her deposition as one who had on an earlier voyage administered immunizations to herself and her daughter; and who sent an assistant to interview her.

This testimony would tend to discredit any claim that Miller was on the scene at 1000 and to place the initial complaint in the afternoon.

On later dates appeared other witnesses. One, for the Investigating Officer testified that she could not account for Appellant's movements from about 0915 to about 1000 although she was the nurse on duty. Other witnesses for Appellant give evidence to confirm the alibi for 1000 - 1020 and to establish the chain of events in the complaint and identification process.

The deposition of Mrs. Naccarato was received in evidence and the Investigating Officer rested. The Staff Captain was recalled as a defense witness, the nurse was recalled as a rebuttal witness, and Appellant testified himself. He declared that from 0915 to just before 1000 he had been occupied on duties in the hospital and had then gone to coffee with other crew members.

The question was not raised on the record as to whether a *prima facie* case was made out although some of the arguments on appeal, if correct, would necessitate a conclusion that one was

not. I will simply discuss the six arguments on credibility in the order given above.

An alibi for the period 1000 - 1020 is no answer to an assertion that an event occurred "not later than ten o'clock" and the Examiner properly so found. (It is noted here that Miller's testimony, given early in the hearing, which would tend to place the initial complaint in the afternoon, is complete refuted even by Appellant's own other witnesses.)

There is no inconsistency between Mrs. Naccarato's initial statement that the event occurred "not later than ten o'clock" and her evidence in the deposition placing it between 0900 and 0930. As the Examiner correctly stated, the first estimate merely set a latest limit and the deposition testimony is reasonable within the bounds set.

The statement that the intruder was a "male nurse" is not on its face discrediting. A passenger might not know the distinction between a male nurse and a hospital attendant, but, from the description given, the Staff Captain immediately thought of Appellant. So, in fact, did one of Appellant's own witnesses. As it developed later, the Italian term used by the passenger could be translated as either "male nurse" or "hospital attendant."

Additional identification of Appellant was made in the deposition as the person who had administered immunizations to the passenger and her daughter on a previous voyage. While evidence was given that on this vessel hospital attendants do not administer such treatment, and that there was no record of vaccination or shots given to this passenger or her daughter, it was also shown that the hospital attendant is present at such treatments and fills out the record forms. Absence of a record in the company files does not of itself prove that the passenger did not receive immunizations and the question of what might have happened to the record if the treatment had taken place is too remote to require speculation. What is pertinent to this case is whether a possibly mistaken statement that Appellant gave immunizations to the witness and her daughter necessarily nullifies all her testimony as a matter of law. In this, I agree with the Examiner that after a lapse of time the witness might well have confused a person present as a participant in the medical activity with one who had actually

performed the service without invalidating the evidence given on the primary issue.

The question of the locked door creates, I think, no problem at all. The Examiner left it open. His opinion was:

"How the person charged got into the room if it was in fact locked cannot be resolved on this record, but the lack of resolution of this problem does not tend to invalidate the identification of the person charged by Mrs. Naccarato."

This is enough to dispose of the matter. If the Examiner is convinced by substantial evidence that Appellant was actually in the room it does not matter whether the door had been locked or unlocked. He has already evaluated the evidence and concluded that Appellant was in the room.

Appellant urges that the Examiner is bound by the Investigating Officer's witness who says that it was locked. If it was locked, and if Appellant was in the room, as the Examiner found on substantial evidence, the conclusion is still the same. Somehow Appellant obtained temporarily the use of a key or procured one who had a key to use it for him. To prove that he was in the room is not necessary to prove how he got there.

I turn now to the most interesting testimony of Bedroom Steward Miller, which, it is argued, completely discredits that of Mrs. Naccarato.

At the time this testimony was offered it appeared to have, as I have mentioned, a dual thrust, one to show that Miller was nowhere near Mrs. Naccarato's room at the time it was asserted that Appellant was there, and two to show that the complaint to Miller was not made until after 1330, at which time, for the first time in his day's routine, he arrived at Mrs. Naccarato's room.

Miller's total recall and his precision in testimony about the events of 17 November 1963 need not be compared with his total forgetfulness about his routine activities on contiguous dates.

This testimony about the time of his meeting with Mrs. Naccarato is, beyond cavila, not the truth. There is not the

slightest doubt in the world that all matters of complaint and preliminary inquiry had been completed before noon. This is established by Investigating Officer's witnesses, by Appellant's other witnesses, and by ship's records. But Miller stands committed to being the one who received the first excited complaint of the intrusion.

Far from discrediting Mrs. Naccarato, Miller's own unreliability places him on the scene as she stated and tends to confirm her. There is no need, in this case, to speculate upon other possible logical inferences from these facts.

CONCLUSION

I conclude that the issue of credibility, conceded by Appellant to be the only issue present in this case, was probably resolved by the Examiner and his findings should not be disturbed. The charge and specification were proved by reliable, probative and substantial evidence. We have here, then, a case of an unwarranted invasion of a passenger's privacy, without the shadow of excuse or mitigation.

ORDER

The findings and the order of the Examiner, entered at New York, New York, on 227 May 1964, are AFFIRMED.

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

Signed at Washington, D. C., this 19th day of February 1965.

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