

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1005413-D1 AND
ALL OTHER SEAMAN DOCUMENTS
Issued to: Armando C. BERRIOS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1534

Armando C. BERRIOS

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 14 April 1965, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman documents for four months outright plus three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a tourist-class headwaiter on board the United States SS CONSTITUTION under authority of the document above described, on or about 4 July 1963, Appellant wrongfully entered a passenger's stateroom.

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 a passenger named Miss Mulloy, depositions of two male passengers, and entries in the Official Logbook for the voyage.

In defense, Appellant offered in evidence testimony of two crew members, his own testimony, a copy of a report and three letters of appreciation from former passengers.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending Appellant's documents as indicated above.

FINDINGS OF FACT

On 4 July 1963, Appellant was serving as a tourist-class headwaiter on board the SS CONSTITUTION and acting under authority of his document while the ship was at sea.

In celebration of the holiday, student passengers were having a party. Miss Diane Mulloy, then 20 years old and a tourist-class passenger occupying (with three older women) room 529 on "C" deck, left the party about 2100 and escorted by a male student, Mr. William M. Lehman, Jr., went to his room, 552, also on "C" deck, which he shared with three other men, none of whom were present at this time. Miss Mulloy and Mr. Lehman were in room 552 about 30 minutes when Appellant knocked on the door and offered them some wine which was accepted. Appellant went into the room and drank some wine. About this time, Mr. Henry Frohsin, who was one of the other three occupants of room 552, returned to his room with one or more passengers. Shortly thereafter, they all left.

Between 2200 and 2400, Miss Mulloy began to feel ill and Mr. Lehman brought her back to room 552 to rest. He returned to the party while Miss Mulloy slept. When she awoke, Appellant was sitting on the foot of the upper berth in which she was lying, his feet dangling over the side. She was frightened when she saw him and immediately started to cry. Appellant tried to calm her, touching her shoulder and back. However, Miss Mulloy continued crying until Mr. Lehman returned accompanied by Mr. Frohsin. They found Appellant sitting on the bunk beside Miss Mulloy who was still crying. Mr. Lehman succeeded in quieting Miss Mulloy and learned that Appellant had not harmed her. Appellant then left the room with Mr. Frohsin.

Thereafter, Miss Mulloy did not want to cause trouble by

reporting the events of 4 July, but she was afraid to go to the tourist-class dining room where Appellant was headwaiter. She did not eat a meal for two days. Mr. Lehman, concerned for her welfare, went to one of the ship's officers and requested that she be transferred to another dining room. During the discussion as to why this change was desired, the events in which Appellant was involved were disclosed.

The prior disciplinary record of the Appellant consists of an admonition on 2 January 1962 for failure to join; two months' suspension from 31 May 1962 and thereafter for four months on twelve months' probation for assaulting a chief steward.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the alleged offense was not reported until after Appellant, in his position as headwaiter, had reported to his superior, on 8 July 1963, the inappropriate conduct of Messrs. Lehman and Frohsin in the dining room. Appellant was asleep in his room during the time of the alleged offense and he produced two alibi witnesses at the hearing. One witness, Mr. Bonifacio Otero, engine messman, testified to observing Appellant asleep in his bunk sometime between 2230 and 2300 on the date in question. The other witness, Mr. Robert Portela, chief steward yeoman, shared room CB-69 with Appellant and two others. He testified that Appellant's usual practice was to be in the room for the night by 2200 although he could not recall whether the accused followed this routine on the night in question.

The Examiner did not rely on the foregoing testimony but on the depositions of Messrs. Lehman and Frohsin. It is Appellant's contention that the Examiner abused his discretion by admitting and relying on such depositions which were in direct conflict with the testimony of witnesses who were present at the hearing and subject to cross-examination.

In addition, it is urged that the evidence relied upon was obtained without the opportunity for the Examiner or Appellant to question or confront the witnesses. It is the Appellant's position that such lack of confrontation was unconstitutional. Therefore, it is requested that the Examiner's decision and findings of fact

be reversed.

APPEARANCES: Abraham Freedman, Esquire, of New York City,
by Stanley Gruber and Charles Sovel, of
Counsel

OPINION

The Sixth Amendment of the Constitution provides, in part, for the right of confrontation in all criminal prosecutions. It is Appellant's position that he was deprived of this constitutional right since the Hearing Examiner's findings are primarily based on the depositions of Messrs. Lehman and Frohsin. To support his contention that he was deprived of the right to confront these two, Appellant cites: three Supreme Court decisions, chiefly, *Green v. McElroy*, 360 U.S. 474 (1959) and *Peters v. Hobby*, 349 U.S. 331 (1955); a Court of Claims decision, *Garrott v. U.S.* 340 F.2d 615 (Ct. Cl. 1965); a Court of Appeals decision, *Hyser v. Reed*, 318 F.2d 225 (D.C. 1963); and David, *Administrative Law Treatise*, sec. 7.05.

The above cases indicate that this constitutional right had been applied in a modified way to administrative proceedings, as distinguished from criminal actions which are specified in the Sixth Amendment. These cases stand for the principle that the Government may not take detrimental action in administrative proceedings unless the individual is adequately informed of the nature of the evidence, there is open presentation of adverse evidence, the individual is given the opportunity for rebuttal including the right to cross-examine witnesses, and he has the right to proffer his own witnesses and other evidence. Not one of the cases stands for the proposition that unless there is face-to-face confrontation in administrative proceedings, there is a violation of this constitutional right.

Miss Molly's testimony meets the standards set out in the cited cases. She could not appear at the hearing since she was attending school in Miami, Florida. Under the circumstances, the hearing was transferred to Miami where the Examiner presided and the Appellant was represented by counsel with full opportunity for cross-examination which he exercised.

As to the admissibility of the depositions of Messrs. Lehman and Frohsin, both were beyond the prescribed subpoena distance from the place of the hearing. Congress has seen fit to leave the admission of such depositions to the discretion of the Examiner and this is provided for in the regulations. See 5 USC 1006(b) and 46 CFR 137.20-140. Since the two men were beyond the prescribed subpoena distance and their testimonies were relevant and responsive, there was no abuse of discretion in admitting the depositions in evidence.

Appellant also contends that he was deprived of his constitutional right by not having the opportunity to confront these two witnesses. The record does not reveal that there was any ruling that the Appellant could not personally interrogate the witnesses or have a representative do so in his behalf at the places where the depositions were taken. The Appellant submitted cross-interrogatories which were answered by the witnesses. This was adequate to meet the standards of the cases cited by Appellant.

In regards to the contention that Messrs. Frohsin's and Lehman's testimony was motivated by revenge for being reported by Appellant to his superior on 8 July 1963 for their behaviour in the dining room, there was definitely no evidence that Mr. Lehman had any knowledge of this report prior to the time that he requested a different dining room for Miss Mulloy. Mr. Lehman stated that the date he talked to the ship's officer was approximately 6 July and that during the discussion the events of 4 July were revealed. Miss Mulloy said she did not enter the tourist-class dining room after the 5th. Appellant supplied corroboration of this sequence of events by admitting that Miss Mulloy came to his dining room from 1 through 4 July. His recollection was hazy as to 5 July, but he was sure she did not come after 5 July. Therefore, it can be concluded that Appellant's report dated 8 July was motivated by revenge based on the same type of reasoning the Appellant relies on in his contention. Accordingly, there is no substantial evidence that the witnesses were prejudiced in this respect.

Appellant testified that he left the dining room on the night in question at approximately 2130 when he went to get a cup of coffee, then went to his room, and was in his bunk by 2200. One witness stated that he saw the Appellant in his bunk sometime

between 2230 and 2300.

The first time Appellant was in room 552 on the evening of 4 July was approximately 2130 and the second time he was in the room was sometime between 2200 and 2400 according to testimony accepted by the Examiner. The Appellant's alibi witnesses' testimony definitely accounts for his activities for only a brief part of the time between 2200 and 2400 on 4 July. Therefore, there is a direct conflict between the testimony of the government witnesses and the alibi witnesses for only a momentary period of time.

For these reasons, I find that the Examiner did not abuse his discretion by relying on the testimony of these two witnesses taken by deposition.

Despite some confusion in the testimony, the government's three witnesses consistently testified that the Appellant was in room 552 on two occasions on 4 July. Appellant's conduct was wrongful both times. The first time, he had no right to enter a passenger's room for the purpose of socializing with passengers even if he did so by invitation. The second time, he had no authority to enter the room while Miss Mulloy was alone in the room asleep.

I therefore conclude that there is substantial evidence to support the Examiner's conclusion that Appellant was guilty of misconduct.

ORDER

The order of the Examiner dated at New York, New York, on 14 April 1965 is AFFIRMED.

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

Signed at Washington, D. C., this 16th day of December 1965

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