

In the Matter of License No. 230090 and all other Seaman Documents
Issued to: MALCOLM D. McKAY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1068

MALCOLM D. McKAY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 28 January 1958, an Examiner of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's seaman documents upon finding him guilty of misconduct. The specification alleges that while serving as Junior Second Assistant Engineer on board the United States SS ULUA under authority of the document above described, on or about 16 December 1957, Appellant assaulted and battered Purser Milton Goldstein.

At the beginning of 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 not guilty to the charge and specification.

The Investigating Officer made his opening statement and introduced in evidence, over objection, an entry in the ship's Official Logbook. The Investigating Officer rested his case after this document was received in evidence. Objections to statements

by the Chief Mate and the Purser were sustained but the two statements were later stipulated in evidence.

The Examiner reserved decision on counsel's motion to dismiss the case due to the lack of substantial evidence to make out a prima facie case. Appellant testified in his behalf. He stated that the Purser swung at Appellant and missed; Appellant swung at the Purser and then held him until the Chief Mate arrived on the scene.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner later rendered the decision in which he concluded that the charge and specification had been proved. An order was entered suspending all documents, issued to Appellant, for a period of two months outright and four months on twelve months' probation.

The decision was dated on 28 January and mailed to Appellant's address. Appeal was timely filed on 25 February and a supporting brief was submitted on 30 June.

FINDINGS OF FACT

On 16 December 1957, Appellant was serving as Junior Second Assistant Engineer on board the United States SS ULUA and acting under authority of his License No. 230090 while the ship was at sea.

About 0600 on this date, Appellant knocked loudly on the door of Purser Goldstein in retaliation for the latter's act of having slammed the door to Appellant's quarters on the previous evening. The Purser was awakened, he went to the door and engaged in brief scuffle with Appellant until the Chief Mate arrived. Neither seaman was injured except that the Purser's left arm and back were bruised to a slight extent.

An account of this incident was entered in the ship's Official Logbook. This entry was signed by the Master, the Chief Mate, the two participants and two other officers on the ship. Appellant stated, at the hearing, that he had signed the entry, at the

request of the Master, to show that the entry had been read to Appellant but that he had not been given an opportunity to reply to the logbook entry. There is no indication in the logbook that Appellant was afforded an opportunity to reply to the entry. No fine was imposed against Appellant's wages as a result of this entry.

Appellant has no prior disciplinary record during 27 years at sea.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Examiner erred in admitting the entry in the Official Logbook because Appellant was not provided with a copy of it or given an opportunity to make a counter-statement in the logbook; the Examiner erred in not granting counsel's motion to dismiss the case since the logbook entry does not constitute substantial evidence; the Examiner's decision is not supported by the evidence because the only evidence against Appellant is contained in the logbook entry.

APPEARANCES: Smith, Yarworth and Link of Baltimore, Maryland, by Bernard G. Link, Esquire, of Counsel.

OPINION

The entry in the ship's Official Logbook was admissible in evidence, as an exception to the hearsay rule, as a record made in the regular course of business within the meaning of 28 U.S.C. 1732. But it is my opinion that this entry does not make out a prima facie case against Appellant, primarily because it does not substantially comply with the requirements of 46 U.S.C. 702. The entry does not show that Appellant was given an opportunity to reply to it and it does not contain the required statement that either a copy of the entry was given to Appellant or the entry was read to him. Although Appellant admitted that the entry had been read to him, he denied that he had been given an opportunity to enter in the logbook any reply he might have. Hence, there was not substantial compliance with the statutory requirements of 46 U.S.C. 702 due to the absence of opportunity for Appellant to have his

reply, if any, entered in the logbook. See *Commandant's Appeal* No. 1057, page 2, wherein similar entries were found to be inadequate.

In view of this disposition of the logbook entry, it is not necessary to discuss other aspect of its defective nature. However, it is noted that it is indeterminable as to which of the two seamen was the initial aggressor.

The testimony of Appellant does not support the allegation that he was guilty of assault and battery. He testified that the Purser swung first and, after an exchange of blows or intended blows, Appellant held the Purser until the Chief Mate arrived and stopped the scuffle.

The Chief Mate's statement is that the two men were in "physical engagement" when he saw them. The statement of the Purser is that he was attacked and beaten by Appellant but such a statement in a letter does not constitute substantial evidence.

In the absence of better evidence, the finding and conclusion that Appellant assaulted and battered the Purser must be reversed. The charge and specification will be dismissed.

Some confusion is created by the statement in the record that anyone at Appellant's address could sign for the Examiner's decision, sent by registered mail, so as to constitute service on Appellant, and the conflicting statement that the 30-day appeal period commences to run from the time of actual notice to Appellant of the decision. The regulations provide for delivery of the decision to the person charged by the Examiner. 46 CFR 137.09-80. This indicates that actual notice of the delivery of the decision to the person charged himself is required before the decision is effective and it has been so ruled by me. Hence, if delivery is effected by registered mail, a return receipt signed by the addressee (person charged) only is required rather than the signature of anyone at his address. The only exception is when the person charged is represented by a lawyer or some other person authorized to act as the representative of the person charged for the purpose of notifying the person charged of the decision and taking an appeal on his behalf. Such authorization is to be made a matter of record at the hearing and is to include the

concurrence of both the person charged and his attorney or other designated person who is representing the person charged at the hearing.

ORDER

The charge and specification are dismissed. The order of the Examiner dated at Baltimore, Maryland, on 28 January 1958, is
VACATED

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

Dated at Washington, D.C., this 8th day of September, 1958.

***** END OF DECISION NO. 1068 *****

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