In the Matter of Merchant Mariner's Document NO. Z-48428 and all other Licenses and Documents
Issued to: LEOPOLD A. DURANT

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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LEOPOLD A. DURANT

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.

By order dated 23 May 1955, an Examiner of the United States Coast Guard at San Francisco, California, suspended Merchant Mariners Document No. Z-48428 issued to Leopold A. Durant upon finding him guilty of misconduct based upon one specification alleging in substance that while serving as Chief Steward on board the American SS WILLIAM LUCKENBACH under authority of the document above described, on or about 18 January 1955, while said vessel was at sea he assaulted and battered by striking with his hand another member of the crew, William Johnson, Assistant Cook.

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. He entered a plea of "not guilty" to the charge and specification preferred against him.

Thereupon, the Investigating Officer made his opening

statement and introduced in evidence the testimony of three witnesses and a purser's report of personal injury to a crew member.

In defense, Appellant offered in evidence, on stipulation with the Investigating Officer, transcripts of sworn testimony given in a prior proceeding by him and three witnesses.

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 specification had been proved. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-48428 and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority for a period of three months.

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

FINDINGS OF FACT

On 18 January 1955, Appellant was serving as Chief Steward on board the American SS WILLIAM LUCKENBACH and acting under authority of his Merchant Mariner's Document NO. Z-48428.

About 1800 on that date, when the ship was enroute to Kobe, Japan, Appellant and William Johnson, Assistant Cook, became involved in an argument in the galley over Johnson's doing unauthorized painting. Both men were angry. Shortly after the argument there was a gathering in the Chief Mate's quarters to consult the union agreement with respect to painting.

Present in the Chief Mate's quarters were the Mate himself, Appellant, Johnson, the deck department delegate (Reid), and the steward's department delegate (Ollison). At a moment when the Mate and Reid were looking through the union agreement on the Mate's desk, and when Ollison was turned toward the door to go out of the room, Johnson and Appellant engaged in a scuffle. The Mate intervened and separated the men. Almost immediately Johnson left the room. The Mate, thinking that further trouble might develop,

followed him and found him in the Master's room. The Master ordered the Mate to take Johnson to the Purser for treatment of a cut lip. The cut required three stitches.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends:

I the evidence does not sustain the Findings;

II the Findings do not sustain the Order;

III the Order is excessive, arbitrary and unreasonable.

APPEARANCES: Gladstein, Anderson, Leonard and Sibbeett
240 Montgomery Street
San Francisco, California

by Norman Leonard

OPINION

The finding that Appellant committed assault and battery upon William Johnson is based upon the opinion of the Examiner that Johnson was not the aggressor in the scuffle in the Mate's room but that Appellant was the aggressor. The testimony of the witnesses who were present in the room, and who testified about what happened there, is none of them saw the beginning of the scuffle. Johnson's testimony concerning the scuffle is inadequate. Appellant's testimony to the effect that Johnson was the aggressor was rejected by the Examiner.

The case is presented than that a finding as to aggression must be an inference from proved facts. On the present state of the record I find insufficient evidence from which such valid inference may be drawn. The mere rejection of Appellant's version does not create evidence from which a finding of a contrary nature may be derived.

Johnson's testimony that Appellant struck him an unproved blow at another time and place was rejected also by the Examiner and cannot be the basis for a finding that Appellant was the aggressor in the scuffle in the Mate's room.

On review of this record, I am not satisfied that it is as complete as it should be.

It is noted that the testimony elicited from Johnson as to a "scuffle" in the Mate's room came only on cross-examination. The testimony of the witnesses Reid and Ollison, and of Appellant himself, was taken at a prior proceeding. It appears that little or no emphasis in the examination of these witnesses was placed upon the episode in the Mate's room, but rather the attention of the parties was focussed upon other alleged assaults. In fact, the witness Reid was precluded from giving testimony as to what occurred in the Mate's room because such testimony was considered irrelevant to the other proceeding.

The development of the evidence concerning what the Examiner ultimately considered to be the critical episode was in large part merely incidental to other issues which were at the time engaging the parties. Hence, the record is inappropriate for disposition of the charge of misconduct against Appellant.

While the order of the Examiner is not founded on substantial evidence, there appears the possibility that examination of the witness Reid as to the matters on which his testimony was cut off may be of vital significance. It is also possible that a re-examination of other witnesses with appropriate attention to the episode in the Mate's room, viewed in its proper perspective, may produce additional evidence. If evidence is not forthcoming to establish that Appellant was the aggressor in this case, either by direct testimony or by proof of circumstances from which a valid inference may be drawn, the Examiner should dismiss the charge and specification.

ORDER

The Order of the Examiner dated at San Francisco, California, on 23 May 1955 is VACATED. The ultimate finding or conclusion that

the specification was proved is REVERSED. The case is REMANDED to the Examiner for further proceedings not inconsistent herewith.

J. A. Hirshfreed
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 22nd day of May, 1956.

***** END OF DECISION NO. 894 *****

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