

In the Matter of Merchant Mariner's Document No. Z-304956 and all
other Seaman Documents
Issued to: ANDREW M. BROWN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

990

ANDREW M. BROWN

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 5 February 1957, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while serving as a fireman-watertender on board the American SS FRANK LYKES under authority of the document above described, on or about 1 January 1957, Appellant assaulted and battered a member of the crew, John A. Graffagnini; Appellant wrongfully created a disturbance on the same date.

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 of not guilty to the charges and each specification. Appellant and the seaman allegedly assaulted, Graffagnini, took the witness stand.

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 then announced the decision in which he concluded that the charge and two specifications had been proved. An order was entered suspending all documents, issued to Appellant, for a period of nine months.

The decision was served on 25 February 1957 and notice of appeal was timely filed.

FINDINGS OF FACT

On 1 January 1957, Appellant was serving as a fireman-watertender on board the American SS FRANK LYKES and acting under authority of his Merchant Mariner's Document No. Z-304956 while the ship was in the port of Los Angeles, California.

At approximately 0800 on this date, Appellant entered the messroom for breakfast. Among those present was the ship's union delegate. Appellant was the engine department union delegate. Shortly thereafter, utilityman Graffagnini left the galley where he had been working, entered the messroom and sat down with the ship's union delegate, opposite Appellant, to discuss union conditions on board the ship. Appellant objected to Graffagnini's complaints and started an argument with him. They exchanged foul and insulting words. Appellant stood up, reached across the table and grabbed the front of Graffagnini's coat, just below his throat, as he was getting up. Appellant then pushed Graffagnini down into a chair. Graffagnini had made no threatening gesture toward Appellant before he grabbed the utilityman. Further physical contact between the two seamen was prevented when the Third Mate entered and ordered both men to go to their rooms.

A short time later, another encounter occurred between Appellant and Graffagnini. Appellant was seriously cut with a knife held by Graffagnini.

Appellant's prior record consists of a six months' suspension on twelve months' probation, in June 1956, for assaulting and battering a seaman in a fist fight on this same ship. That six months' suspension was included in the nine months' suspension ordered in the present case since the offense of 1 January 1957 was

within the twelve-month period of probation.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the evidence failed to prove the specifications; and the Examiner erred in considering statements offered in evidence in the proceeding against Graffagnini. Therefore, it is urged that the specification should be dismissed.

APPEARANCE ON APPEAL: Raymond H. Kierr, Esquire, of New Orleans, Louisiana, by Samuel C. Gainsburgh, of Counsel.

OPINION

I agree that the specification alleging the wrongful creation of a disturbance should be dismissed. The Examiner found that this specification did not refer to the messroom incident but to the time immediately before Graffagnini injured Appellant with a knife. The Examiner reached the conclusion that his specification was proved by considering the conflicting testimony of Appellant and Graffagnini as to which of them initiated the disturbance and then by resolving the matter against Appellant because other statements favored Graffagnini's version. Appellant's contention is correct that these statements were presented in evidence in Graffagnini's case and should not have been considered in arriving at the decision in Appellant's case. It was reversible error for the Examiner to base his determination of credibility, as between Appellant and Graffagnini, on these statements which were not part of the evidence herein. In addition, the record does not show that Graffagnini was under oath when he testified. This detracts from the probative value of his testimony. For these reasons, the ultimate finding and conclusion that this specification was proved are reversed. The specification is dismissed.

Neither of the above two factors - the statements and the unsworn testimony - has any material bearing on the proof of the more serious specification alleging assault and battery. My findings of fact are based on the testimony of Appellant. He admitted that he stood up first and that Graffagnini was just getting to his feet when he was grabbed by Appellant. (Graffagnini

stated that he was still sitting down.) Appellant stated that Graffagnini had not made any threatening gestures toward Appellant and that he did not know of any reason to fear Graffagnini at that point. Appellant testified that it was only after he grabbed the utilityman that he reached for his pocket and Appellant thought the other man had a knife. There is no evidence that Graffagnini actually had a knife in his possession in the messroom. One of the mess tables was between the two men at the time of this incident.

In view of this testimony of the Appellant, there is no basis for claiming that he acted in self-defense on the theory that one person may strike first where the danger of attack from another is imminent.

Appellant's conduct was not justified by the foul language exchanged by the two men. It has repeatedly been stated that "mere words, no matter how abusive, insulting, vexatious, or threatening they may be, will not justify an assault or battery." 6 *corpus Juris Secundum* 943; *Eagleston v. United States* (C.A. 9, 1949), 172 F2d 194. In the latter case, even the person charged with assault agreed that this is a sound legal proposition.

For these reasons, it is my opinion that the specification alleging assault and battery has been proved by substantial evidence. The Examiner properly included the prior six months' probationary suspension in his order of nine months' suspension. Nevertheless, the order will be modified to eliminate any suspension in addition to this six months' period in view of the relatively minor nature of the assault and battery under consideration.

ORDER

The order of the Examiner dated at Long Beach, California, on 5 February 1957 is modified to provide for a suspension of six months outright.

As so modified, said order is

AFFIRMED.

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

Commandant

Dated at Washington, D. C., this 22nd day of November, 1957.

***** END OF DECISION NO. 990 *****

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