

In the Matter of Merchant Mariner's Document Z-1072806 and all
other Seaman Documents

ISSUED TO: JAMES D. FAIL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1110

JAMES D. FAIL

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

By order dated 22 October 1958, Examiner of the United States
Coast Guard at San Francisco, California revoked Appellant's seaman
document upon finding him guilty of misconduct. The specification
alleges that while serving as a wiper on board the United States SS
WILD RANGER under authority of the document above described, on or
about 30 August 1958, Appellant assaulted and battered the Junior
Third Mate.

On 17 September 1958. the crew was paid off at Oakland,
California and Appellant was subpoenaed to appear for a hearing at
San Francisco on the morning of 18 September. When Appellant did
not appear as scheduled, the Examiner entered a plea of not guilty
to the charge of specification on behalf of Appellant and the
hearing was conducted in absentia. The Investigating Officer
introduced in evidence the testimony of the Junior Third Mate, the
Chief Mate and the First Assistant Engineer. The hearing was
completed on 18 September except for the rendition of the decision.

On 22 October 1958, Examiner rendered the decision in which he concluded that the charge and specification had been proved. An order was entered revoking all documents issued to Appellant. At the prior request of Appellant through the Mobile, Alabama Coast Guard office, when he surrendered his document on 23 September, the decision was forwarded to Mobile and delivered to Appellant on 24 October. Notice of appeal was timely filed in November and supplemented in January 1959. by Appellant.

FINDINGS OF FACT

On 30 August 1958, Appellant was serving as a wiper on the United States SS WILD RANGER and acting under Authority of his Merchant Mariner's Document No. Z-1072806 while the ship was in the port of Naha, Okinawa.

On this date, the Junior Third Mate, Arne Sumberg, was sitting at a table eating a meal in the Seamen's Club ashore. Appellant approached the table and, with his fist, struck the Junior Third Mate in the face knocking him to the floor. The latter's eye became swollen and his vision was blurred for several days. He did not go to a physician at the time but returned to the ship and stood his watch. There had been minor difficulties between the two seamen on one or two prior occasions.

At the time of this incident, the Chief Mate and First Assistant Engineer (the other two witnesses at the hearing) were sitting at a bar with their backs to the table where the Junior Third Mate was eating.

Appellant has no prior record since obtaining his document in April, 1956.

BASES OF APPEAL

This appeal has been taken from the order imposed order imposed by the Examiner. Appellant did not appear at the hearing because he learned that his wife was seriously ill on the night of 17 September and he left for Mobile after making unsuccessful attempts to contact the Coast Guard. Appellant reported to the Coast Guard in Mobile a few days after he arrived there.

Appellant has evidence that this was not a sneak attack from behind, as stated by the Examiner, but that he struck the Junior Third Mate while he was getting up from the table after he had refused to talk with Appellant in attempt to straighten out their prior misunderstandings.

If given another hearing, Appellant can prove that there was false testimony concerning his striking the Mate from behind. The Chief Mate and First Assistant had their backs to the scene. The Chief Mate Testified that the Mate said Appellant hit him while the Mate testified that he was told by the Chief Mate that Appellant hit him. These two versions are inconsistent.

OPINION

The record supports Appellant's contention that he left San Francisco or Oakland on the night of 17 September and reported to the Coast Guard at Mobile shortly thereafter. This was prior to the rendering of the Examiner's decision. If Appellant's statement that his wife was seriously ill was authentic, the Examiner should have been informed so as to give him the opportunity to re-open the hearing to receive Appellant's defense before the Examiner rendered his decision. Since there is no indication that these matters were considered, questionable conclusions of the Examiner have been resolved in favor of Appellant rather than remanding the case at this late date.

The Examiner's decision indicates that he ordered the revocation of Appellant's documents for two reasons: the testimony of the Chief Mate and First Assistant completely corroborated the Junior Third Mate's testimony that this was an attack from behind with absolutely no warning; as ship's officer was very seriously injured without justification.

The testimony of the three witnesses is not consistent. This is pointed out on appeal in one respect. The chief Mate admitted that he did not see the incident occur because the Junior Third Mate was at a table "behind" the Chief Mate. The latter and the First Assistant were together and, presumably, at the bar (which was mentioned several times in the testimony) since they were not sitting at the table with the Junior Third Mate, although they had

been talking with each other a few minutes earlier. If this were the case, then the First Assistant's back was turned and his testimony that he saw the Mate struck without warning cannot be correct. The accuracy of the Junior Third Mate's testimony that he had no warning of the blow is reflected upon by his other testimony, contrary to that of the Chief Mate, that the Chief Mate told him that Appellant had struck the blow. If the latter testimony by the junior Third Mate was not true, it is quite conceivable that latter, as a biased witness, was attempting to conceal the fact that he knew of Appellant's presence in order to promote the most unfavorable outcome for Appellant as a result of the hearing. And there is no apparent reason to doubt the testimony of the Chief Mate that he was told, by the Junior Third Mate, the name of the person who struck him.

As to the other reason given by the Examiner for the revocation, there is no doubt that there was absolutely no justification for this assault on a ship's officer and that it was a serious offense, regardless of the circumstance, and even though it occurred ashore. But there is some doubt that the Junior Third Mate was injured as seriously as the Examiner indicated, based only on the testimony of this officer. Contrary to his testimony as to considerable pain and suffering, he admitted that he was able to return to ship and stand his watch. There is no evidence of any fracture and no medical reports were produced.

Under all the circumstances, it is my opinion that the fairest disposition is to modify the order of revocation to and outright suspension for one year and a substantial period of probation in addition.

ORDER

The order of the Examiner dated at San Francisco, California, on 22 October 1958 is modified to provide for and outright suspension of twelve (12) months. Appellant's documents are further suspended for additional period of twelve (12) months which shall not become effective provided no charge under 46 U.S. Code 239 is found proved against Appellant for acts committed during the above period of outright suspension or for acts committed within twenty-four (24) months from the date of the termination of the above outright suspension.

As so MODIFIED, said order is AFFIRMED.

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

Dated at Washington, D. C., this 10th day of September 1959.

***** END OF DECISION NO. 1110 *****

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