UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-815975-D2 LICENSE NO. 443693
Issued to: Ed*win* SYBIAK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2083

Edwin SYBIAK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 13 February 1975, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts suspended Appellant's seaman documents for 12 months outright upon finding him guilty of misconduct. The specifications found proved allege that while serving as a Third Mate on board the SS TRENTON under authority of the document and license above captioned, on or about 20 January 1975, Appellant (1) wrongfully failed to perform his duties by reason of being under the influence of liquor; and (2) wrongfully failed to perform his duties by departing his station to wit: the engine order telegraph which was the duly appointed station.

The hearing was held pursuant to the in *absentia* regulations. A plea of not guilty to the charge and each specification was entered by the Judge.

The Investigat*in*g Officer introduced in evidence the testimony of LCDR Larry J. Balok with respect to what transpired on 24 January 1975 when the charge and specifications were preferred. At

the completion of LCDR Balok's testimony, the Administrative Law Judge determined that the hearing could proceed in *absentia*. The Investigating Officer then introduced portions of the ship's log and the testimony of Richard G. Connelly, the ship's master.

No evidence was offered by Appellant.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and two specifications had been proved. On 13 February 1975 he entered an order suspending all documents issued to Appellant for a period of 12 months outright.

The entire decision and order was served on 8 January 1976. Appeal was timely filed on 20 January 1976.

FINDINGS OF FACT

On 20 January 1975, Appellant was serv*in*g as a Third Mate on board the SS TRENTON and acting under authority of his license and document while the ship was underway departing Newark Bay, New Jersey. When Appellant came to the bridge to stand his watch at the engine order telegraph, the Master observed that Appellant appeared to be intoxicated. His speech was slurred, his walk unbalanced, and his actions and talk were incoherent. After a few moments the Master also observed that Appellant had left his station to commence a non-ship related conversation with the tug pilot. At this time the vessel was maneuvering in close waters and was readying to go through a bridge opening. The Master thereupon called Appellant into the Chart Room to talk with him and was able to confirm that Appellant was in fact intoxicated. The Master ordered Appellant to go below, and two other officers divided the remainder of Appellant's watch.

For the offenses enumerated above, Appellant was logged. Appellant was also fined and discharged for cause when the vessel arrived in San Juan, Puerto Rico on 24 January 1975.

Appellant was apprised of the nature of the charge and

specifications against him on 24 January 1975 by LCDR Larry G. Balok, USCG. Appellant was further advised of his rights and of the time and place of the hearing. Appellant looked over Balok's shoulder as the charge sheet was drafted, denying each specification. Appellant further stated that he would have his lawyer change the location of the hearing from San Juan to New York. Before the charge sheet could be formally served upon him, however, Appellant excused himself form the Master's cabin where the charges were drafted, stating he would return in a few minutes to sign the sheet. Instead, Appellant left the ship and was not heard from by the commencement of the hearing. The hearing was held in *absentia*.

Appellant's prior record shows that on 6 March 1951 he was admonished for inattention to duty; on 31 May 1959 he was suspended for three months on twelve months' probation for misconduct, including failure to perform duties and two specifications of intoxication; and on 27 July 1965 he was suspended for one month followed by two months on twelve months' probation for failure to perform and disobeying a lawful order.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Adm*in*istrative Law Judge. It is contended that the facts in this case do not justify an in *absentia* hearing, and that the Administrative Law Judge committed reversible error by soliciting irrelevant and prejudicial testimony from the Master of the SS TRENTON both prior and subsequent to making findings of fact.

APPEARANCE: Marvin Schwartz, P.C., New York, New York.

OPINION

I

Appellant's first contention is that the facts of this case do

not justify a hear*in*g in *absentia*. Appellant, *in* a verification appended to his application for issuance of a temporary license and document pending appeal, states that he was never notified that charges were being preferred against him or that any hearing would take place. Appellant further denies that he looked over the shoulder of LCDR Balok as Balok drafted the charge sheet, denying the charges as they were written out. Finally, Appellant denies that he stated he would have his lawyer change the location of the hearing from San Juan to New York. Appellant argues in his brief on appeal that these denials are significant in that they distinguish this case from Commandant's Decision on Appeal 1202 (PRALDO). In PRALDO the Commandant held that a hearing in *absentia* was justified where the charge sheet was prepared and PRALDO was *in*formed of the hearing date, but where no actual service was made because Praldo jumped out of his chair and left the room as the charges were being read to him. Although Praldo did not deny that these events occurred as stated, his failure to interpose a denial on appeal is not the reason that the Commandant affirmed the hearing in *absentia*. The Commandant held that so long as an *in*dividual has knowledge of the charges against him and notice of the hearing, he should not be permitted to avoid jurisdiction by physically frustrating attempts to formalize actual service of the charge sheet. As in PRALDO, Appellant did not sign the charge sheet, but, nonetheless, he was actually apprised of the charge and specifications, he was advised of his rights, and was informed of the date and location of the hearing. The testimony of LCDR Balok, corroborated by the testimony of Captain Connelly, provides substantial evidence of a reliable and probative nature upon which to support a finding that the events of 24 January 1975 occurred as stated.

Appellant also cites Commandant's Decision on Appeal 1923(ADAMS) for the proposition that a hearing in *absentia* may not be held where there is no proof on the record that the individual charged was provided with notice. Although that proposition is correct, ADAMS is distinguishable from the present case because in ADAMS the Investigating Officer did not testify *under oath* as to the circumstances surrounding the attempted service. It was for that technicality alo*n*e that *the* Commandant was obliged to hold that there was no proof of service on the *record*. Here, on the other hand, both LCDR

Balok and Captain Connelly testified under oath. I therefore conclude that there was sufficient justification to proceed in *absentia*.

II

Appellant's second contention is that the Judge committed reversible error by soliciting irrelevant and prejudicial testimony from Captain Connelly both prior and subsequent to making findings of fact. On the contrary, 46 CFR 5.20-90(a) permits the Judge to question a witness at any time he is on the stand. Even if some of the Judge's questions can be considered leading, no reversible error was committed. Appellant cites to Commandant's Decision on Appeal 1218 (NOMIKOS) for the proposition that the Judge's findings must be reversed. In NOMIKOS, the Commandant held that the answers to certain prejudicial and leading questions had to be stricken from the record and disregarded in framing a decision and order. Under the particular facts of the NOMIKOS case when these answers were stricken, no substantial evidence remained to support a finding of proved, and the charge was dismissed. In Appellant's case, however, both specifications were properly recorded in the ship's log in substantial compliance with 46 USC 702. 46 CFR 5.20-107(b) provides that such log entries shall constitute prima facie evidence of the facts therein recited. Therefore, unlike NOMIKOS, even if all the answers to those questions suggested to be objectionable by Appellant were stricken, substantial evidence would still exist to support both specifications. Furthermore, considering the nature and seriousness of the offenses found proved, the Judge's order was reasonable and will not be disturbed.

CONCLUSION

Appellant received due and adequate notice of the charge and specifications and of the date and place of the hearing. It was therefore proper for the hearing to be conducted in *absentia* when Appellant chose not to appear.

With respect to the merits of the charge and specifications, there was substantial evidence of a reliable and probative nature to support findings of proved. No reversible error was committed.

ORDER

The order of the Administrative Law Judge date at Boston, Massachusetts on 13 February 1975, is AFFIRMED.

E. L. PERRY
Vice Admiral, United States Coast Guard
Vice Commandant

Signed at Washington, D.C. this 28th day of October 1976.

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***** END OF DECISION NO. 2083 *****

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