IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1203556-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Charles Martin MINSTER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1909

Charles Martin MINSTER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 21 March 1971, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended appellant's seaman's documents for six months on 12 months' probation upon finding him guilty of misconduct. the specification found proved alleges that while serving as a wiper on board the United States SS GREEN LAKE under authority of the document above described, on or about 21 January 1971, appellant did wrongfully embezzle certain stores of the said vessel while said vessel was in the port of Kaohsiung, Taiwan.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence certain documents and the testimony of two witnesses.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then entered an order suspending all documents, issued to Appellant, for a period of six months on 12 months' probation.

The entire decision was served on 8 April 1971. Appeal was timely filed on 6 May 1971.

FINDINGS OF FACT

On 21 January 1971, Appellant was serving as a wiper on board the United States SS GREEN LAKE and acting under authority of his document while the ship was in the port of Kaohsiung, Taiwan.

At approximately 1430 hours, on the above date, the Appellant, who was then working in the engine room of the SS GREEN LAKE, was approached by a Formosan who inquired whether there was any scrap to be disposed of. Appellant, without authority, delivered to the Formosan, in two five gallon buckets, certain damaged and scrap material to which Appellant had access including a starter motor for the emergency generator, bellows for the water control units, and brass and copper scrap. The Formosan removed the buckets with the material therein from the ship. The buckets and the material were not recovered.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge, did:

(1) commit errors of substantive law;

(2) commit errors of procedural rules and regulations as set forth in the Administrative Procedure Act and Title 5 U.S.C.A.; and

(3) abuse his discretion by misapplication of the above

mandates.

The contentions enumerated above are based on the further contention that none of the elements required by law to establish the offense of embezzlement were proved or supported by substantial evidence.

APPEARANCE: O'Keefe, O'Keefe and Berrigan, New Orleans, La., by Kendall Vick, Esq.

OPINION

The Appellant was charged with misconduct. The specification found proved by the Administrative Law Judge alleges that on or about 21 January 1971 the Appellant wrongfully embezzled certain stores of the SS GREEN LAKE while the vessel was in the port of Kaoshiung, Taiwan. Appellant contends that "none of the elements required by law to establish the offense of embezzlement were proved or supported by substantial evidence." Suspension and revocation proceedings conducted pursuant to section 4450 of the Revised Statutes are not criminal proceedings. They are remedial proceedings and their function is to promote safety of life and property at sea by maintaining standards of competence and conduct on the part of licensed or certificated persons. In determining whether certain behavior amounts to misconduct criminal law standards do not govern. "Misconduct" refers to

> "...human behavior which violates some formal, duly established rule, such as the common law, the general maritime law, a ship's regulation or order, or shipping articles. In the absence of such a rule, `misconduct' is human behavior which a reasonable person would consider to constitute a failure to conform to the standard of conduct which is required in the light of all the existing circumstances." (46 CFR 137.05-20)

Nevertheless, I perceive no reason to ascribe to the word "embezzle" any definition which disregards its generally accepted connotations. No useful purpose is served by including within the scope of the term "embezzlement" behavior which does not amount to embezzlement as the term is generally understood. the record does not support a finding that the Appellant's misconduct amounted to

embezzlement. No evidence has been introduced to show that the property in question was intrusted to the possession of the appellant. With regard to the Appellant's relationship to the property in question the record reflects, at most, that the property was generally stored in the machine shop and that the Appellant had access to the property. Mere access to an employer's property does not render a wrongful appropriation of that property by an employee an embezzlement. The term embezzlement is applicable to cases of furtive and fraudulent appropriation of property coming into the possession of persons by virtue of their employment. In the instant case the Appellant did not come into possession of the property by virtue of his employment. Rather, the Appellant merely had access to the property by virtue of his employment. This is insufficient to establish the necessary relationship to the property to support a finding of embezzlement.

Under the doctrine of *Kuhn v. Civil Aeronautics Board* 183 F. 2d 839 (C.A.D.C. 1950), defective specifications may be cured by amending the specification to conforms to the proof as long as the issue was raised on the record and litigated. The instant case, however, is not one in which it is appropriate to invoke the *Kuhn* doctrine. the court in *Kuhn* stated:

> "If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern."

The specification herein cannot be amended at this stage to reflect the actual misconduct on the Appellant's part. The actual notice given to the Appellant by the wording of the specification and the conduct of the hearing related only to embezzlement. Even if the issues intended to be litigated encompassed any other offense to which the Appellant's behavior may have amounted the record is devoid of recognition of this by the Appellant or of any attempt to so inform the Appellant. At least two occasions presented themselves at the hearing at which, if the issue were intended to encompass some offense other than embezzlement, notice thereof could have been given to the Appellant. Prior to the arraignment, Appellant's counsel, when asked if he had any objections to the

form of the charge and the specification, indicated his confusion with regard to the specification, indicated his confusion with regard to the specification of embezzlement and the possible relationship to 46 U.S.C. 701, which provides for punishment for various offenses including embezzlement of vessel stores or cargo. (R-4). He stated his understanding that the hearing would proceed on the basis of 46 U.S.C. 701 with regard to what elements would need to be shown to establish embezzlement. At this point in the hearing no statement or explanation as to the scope of the issues was given to the Appellant thus reinforcing the appellant's understanding that only the question of embezzlement was at issue. It should be noted that embezzlement is not a common law crime. In criminal law the elements of embezzlement in a particular case are governed by the specific statute which applies. Federal embezzlement statutes, state embezzlement statutes, and judicial decisions construing such statutes may be referred to for guidance as to what must be shown to establish embezzlement as misconduct in suspension and revocation proceedings conducted pursuant to R.S. 4450 where the particular statute is properly applicable to the misconduct charged and the respondent is given notice of the particular statute prohibiting the behavior which forms the basis of the charge of misconduct. Since the Appellant's conduct which forms the basis of the specification of embezzlement occurred outside of the jurisdiction of any state but within the special maritime and territorial jurisdiction of the United States federal law applies. The only embezzlement statute referred to in the instant proceedings was 46 U.S.C. 701. With respect to the element of embezzlement 46 U.S.C. 701 is silent. Judicial decisions relating to the embezzlement portion of 46 U.S.C. 701 do not discuss what must be shown to establish embezzlement thereunder. It is inappropriate to decision here, for the first time, what must be shown to establish embezzlement under 46 U.S.C. 701. Suffice it to say that embezzlement was not herein established absent a showing of intrustment and absent any reference in the proceedings and notice to the Appellant of an applicable statute which dispenses with the necessity of showing an intrustment to establish embezzlement. If applicable statutes and pertinent judicial decision fail to provide information as to what must be shown to establish embezzlement then consideration should be given to wording of amending the specification to reflect more specifically the alleged behavior of the respondent which is charged as misconduct rather that to merely allege that he "embezzled" certain property. At the conclusion of the investigating officer's

presentation of evidence Appellant's counsel made, in effect, a motion to dismiss based on a failure of the evidence presented by the investigating officer to establish a case of embezzlement. (R-55, 56). The record does not reflect any direct decision or deferral of decision by the Administrative Law Judge, although it may be inferred that his direction to counsel to proceed with the defense amounted to a denial of the motion. If the issues were intended to extend to some offense other than embezzlement, this was an appropriate occasion so to advise the Appellant and provide him with actual notice thereof. As I previously stated, no evidence was introduced to prove that the property in question was intrusted to the possession of the Appellant. Therefore, a case of embezzlement was not established by the necessary evidence on proper notice.

In view of the error in finding the specification proved and the inappropriateness of applying the *Kuhn* doctrine in the instant case the decision of the Administrative Law Judge is set aside.

CONCLUSION

The specification alleging embezzlement was not proved.

ORDER

The order of the Administrative Law Judge dated at New Orleans, La., on 21 March 1971, is VACATED.

C.R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 27th day of February 1973

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