

IN THE MATTER OF LICENSE NO. R-26320 MERCHANT MARINER'S DOCUMENT
NO. Z-275 252 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Joseph S. NEWBROUGH

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1902

Joseph S. NEWBROUGH

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 3 June 1970, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for six months outright upon finding him guilty of misconduct. The specifications found proved allege that while serving as First Assistant Radio Officer on board the SS PRESIDENT CLEVELAND under authority of the document and license captioned, Appellant, while the vessel was at sea,

- (1) due to intoxication, wrongfully failed to stand a watch on 25 July 1969;
- (2) on 25 July 1969 wrongfully telephoned the Master who had retired for the evening;
- (3) on 25 July 1969 wrongfully entered and remained in the Economy class Passenger Lounge area;

- (5) on 25 July 1969 wrongfully refused to obey a lawful order of the Chief Officer to leave that area;
- (6) on 25 July 1969 wrongfully entered and remained on the Economy class Passenger Promenade Deck;
- (7) on 25 July 1969 wrongfully failed to obey a lawful order of the Chief Officer to leave that area and had to be forcibly removed;
- (8) on 25 July 1969 wrongfully possessed in his room intoxicating beverages;
- (9) on 25 July 1969 wrongfully refused to obey a lawful order of the Master to leave the passageway outside the Master's Office and had to be forcibly escorted to his room;
- (10) on 25 July 1969 wrongfully attempted to leave his room contrary to the Master's direct order;
- (11) on 25 July 1969 (Meridian Day) wrongfully disobeyed the Master's direct order to remain in the ship's hospital;
- (12) on 25 July 1969 (Meridian Day) wrongfully entered the radioroom and grabbed the controls over the Chief Radio Officer's objection;
- (13) on 25 July 1969 (Meridian Day) wrongfully disobeyed the Master's direct order to leave the radioroom and had to be forcibly removed to the brig;
- (14) on 25 July 1969 (Meridian Day) threatened the Master; and
- (15) on 25 July 1969 (Meridian Day) failed to perform his duties due to intoxication.

On the first day of the hearing, Appellant was represented by professional counsel and did not appear. Counsel entered a plea of not guilty to the charge and each specification. After a continuance, Appellant appeared with counsel and entered a plea of

guilty to the charge and all specifications.

The Investigating Officer introduced in evidence the official logbook of the SS PRESIDENT CLEVELAND and testimony by the ship's Master, Surgeon, Chief Officer, Second Assistant Radio Officer and Assistant Purser.

In defense, Appellant offered in evidence testimony by the Appellant and the Third Assistant Radio Officer.

On 3 June 1970, the Examiner rendered a written decision in which he concluded that the charge and all specifications had been proved. The Examiner then served a written order on Appellant suspending all documents, issued to Appellant, for a period of six months outright in compliance with a prior order of six months suspension on 12 months' probation, entered 3 July 1968 and served on Appellant on 6 August 1968 concerning misconduct on the SS SANTA ANNA.

The entire decision was served on 8 July 1970. Appeal was timely filed on 22 March 1971 in view of circumstances surrounding the service.

FINDINGS OF FACT

On 25 July and 25 July (Meridian Day) 1969, Appellant was serving as First Assistant Radio Officer on board the SS PRESIDENT CLEVELAND and acting under authority of his license and document while the ship was at sea.

On the dates and the places in question, Appellant performed acts or failed to perform as set out above in the specifications found proved.

Further findings of fact are unnecessary in view of the purely procedural basis for appeal.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that:

- (1) the order of 3 July became effective upon mailing to Appellant's attorney on 3 July 1968 and thus, the conduct alleged in this case (SS PRESIDENT CLEVELAND) occurred after the termination of the probation period, in the prior case (SS SANTA ANNA) and;
- (2) If there is a doubt as to the actual date of service it should be resolved in favor of avoiding a forfeiture, i.e., the six month suspension.

APPEARANCE: Darwin P Riordan by Jay A. Darwin.

OPINION

I

In prior case No. P-620-68, the Administrative Law Judge ordered Appellant's seaman's documents suspended for six months on 12 month's probation. Appellant neither appeared at the hearing nor supplied a proper mailing address. Thus, the Administrative Law Judge mailed the order and receipt to the attorney who had represented Appellant at the hearing. This was mailed on 3 July 1968. The order and receipt were under a letter from the Administrative Law Judge requesting transmittal to Appellant. This was evidently accomplished, because the receipt was signed and returned by Appellant dated 6 August 1968.

It is clear that an administrative law judge's order is effective only upon service, but Appellant questions what actually constitutes service. The answer, however, is quite apparent in view of the regulations issued pursuant to 46 U.S.C. 239 and the very reason for the requirement of service.

The purpose of service is notice--in the instant case, notice of placement on probation. The purpose of probation, which is the encouragement of proper conduct and performance of duties, cannot be well served if the man involved does not know he is, in fact, on

probation. Thus, a period of probation will generally not run until the man involved has actual notice of the administrative law judge's order. This he is presumed to have only when the order has been served upon him. It is recognized that the sea-going trades are of such a nature that the administrative law judge will not always be in the best position to locate the subject of an order. The regulations provide for this contingency, but only in a very narrow manner.

Thus, 46 CFR 137.20-175(c) calls for delivery of the Administrative Law Judge's written decision to the "person charged or his authorized representative" (emphasis supplied). While this provides for a form of constructive notice, the definition of "authorized representative" is tightly drawn. 46 CFR 137.20-175(d) limits this term to "any person who has been authorized, as shown by the hearing record, to receive service and take an appeal on behalf of the person charged," (emphasis supplied). This requires a statement on the record by the person charged to the effect that a named individual other than himself is authorized by him to receive service and take an appeal on his behalf. The purpose of this provision is to ensure that the person charged realizes that the order may be delivered to someone other than himself and, thus, ensure that constructive notice will ripen into actual notice as soon as possible. Until this definition has been satisfied, service upon the party's attorney is not "permitted" within the meaning of Federal Rules of Civil Procedure 5(b).

In the instant case, Appellant was not present at the hearing and there was no authorization on the record. In fact the signing of the return receipt by the Appellant and not his attorney shows that the attorney claimed no such authorization at that time. It should also be noted that the Administrative Law Judge's letter to the attorney called for assistance in service and signature by Appellant, not for receipt by the attorney himself.

46 CFR 137.20-175(c) provides that the "signed acknowledgement...or the return receipt shall be made a part of the record and shall determine the *effective date of the decision* (emphasis supplied) including the order, unless good cause is shown why this date should not apply." When the person charged claims an earlier date of service, "good cause" would seem to be limited to

a showing of actual receipt at some earlier date. The cited regulation places the burden of proof squarely on the shoulders of the party claiming the earlier date. Appellant has introduced no evidence in this regard as to either earlier actual receipt or authorization of his attorney to receive service.

While it is true that 46 CFR 137.01-25 calls for a liberal construction of the regulations, the plain meaning of language cannot be so traversed. Appellant has not brought himself within the purview of 46 CFR 137.20-175(d) and the presence of his signature and the date, 6 August 1968, on the acknowledgement of receipt leave no doubt as to the date of service and, thus, the effective date of the order of 3 July 1968.

The effective date was 6 August 1968. The conduct alleged in the instant case, having occurred on 25 July and 25 July (Meridian Day) 1969, was clearly within the period of probation.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 3 June 1970 is AFFIRMED.

C. R. BENDER
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 29th day of December 1972.

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