IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-817953-D5
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Felipe P. CRUZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1814

Felipe P. CRUZ

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 16 October 1968, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for six months outright plus three months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a fireman/watertender on board SS SANTA MERCEDES under authority of the document above describe, on or about 16 August 1967, Appellant, at Guayaquil, Ecuador:

(1) assaulted and battered one Manuel Moreira, another crewmember, and

(2) created a disturbance aboard the vessel by using loud language to local police officers who had been called to the vessel.

At the hearing, Appellant did not appear. The Examiner

entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of SANTA MERCEDES.

There was no defense.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and 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 plus three months on twelve months' probation.

The entire decision was served on 6 January 1969. Appeal was timely filed on 9 January 1969. Although Appellant had until 24 March 1969 to perfect his appeal, only the grounds stated in the initial notice have been reiterated.

FINDINGS OF FACT

On 25 September 1967, Appellant was serving as a fireman/watertender on board SS SANTA MERCEDES and acting under authority of his document while the ship was in the port of Guayaquil, Ecuador.

On that date, Appellant assaulted and battered Manuel Moreira another member of the crew. Appellant admitted to the master that he had struck Moreira, and explained that several days earlier at Callao, Peru, Moreira had struck him, although he had not reported the fact.

When local police came aboard the vessel, after complaint, Appellant used "loud language with local police aboard the vessel."

Appellant was removed from the vessel by Guayaquil police. Moreira was removed from the vessel to a hospital "in a coma and incoherent [sic] condition."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

The original notice of appeal in this case was filed by an attorney. The attorney announced, by letter of 7 January 1969, that the bases of appeal "will be based on our allegation that Mr. Cruz was tried 'in absentia' without there being proper grounds for such a trial.

All further communication has been from Appellant himself. Since the time has long run for the attorney to perfect the appeal the matter is considered ready for decision.

Appellant has personally urged the following points:

(1) that the Assistant Chief Purser of the vessel "logged" him, as a result of prejudice;

(2) that the charges against him lodged by the Guayaquil police were dismissed;

(3) that the person he is alleged to have assaulted and battered assaulted and battered him some days earlier, although Appellant had not reported this earlier matter to anyone; and

(4) since Appellant rejoined the same vessel, in the United States, eight days after the offense, and has sailed on that vessel regularly since then, no action to suspend his document is appropriate.

APPEARANCE: Abraham E. Freedman, New York, N. Y., by Stanley B. Gruber, Esq. (on notice of appeal); Appellant, *pro se*, on appeal.

OPINION

I

Although Appellant's counsel effectively withdrew from this case by failure to perfect the appeal, a brief look may be taken of the anticipated grounds stated in the notice of appeal filed.

There is no error, *per se*, in holding a hearing in *absentia*. Notice and opportunity to be heard are essential *in* administrative proceedings but actual appearance is not a necessary condition.

There is sworn testimony in this case that the notice of hearing was properly served. There is no evidence, nor is it urged by Appellant himself, that he made any effort to show good cause why the hearing should not have proceeded on the scheduled date. In fact, there is sworn testimony on the record, not disputed by Appellant, that he declared on the date of service of the notice that he would not appear.

Under 46 CFR 137.20-25, the Examiner properly conducted the hearing in *absentia*.

II

Appellant's claim that the assistant chief purser of the vessel "logged" him is without foundation and without merit. The record shows that the pertinent log entry was made by the master and witnessed by the chief engineer in substantial compliance with 46 U.S.C. 702.

III

The fact that charges placed by the Guayaquil police were dismissed is of no relevance. Whether a criminal complaint, in a foreign court or a domestic court, is followed by dismissal or conviction, an action to suspend or revoke under the governing statute here may be undertaken and sustained.

IV

Even if the victim of the assault and battery in this case had assaulted and battered Appellant some days earlier, there is no hint of "self-defense" in this case. What might have happened days before is irrelevant, even if it had been proved at the hearing, which was not.

V

The fact that Appellant, after having been removed from the vessel at Guayaquil, rejoined it in time for the payoff, and has since sailed on the same vessel, does not nullify the instant proceedings. For the misconduct alleged, charges may be preferred within three years. 46 CFR 137.05-23. The charges here were preferred thirteen months after the offense, and the action is sustainable.

Appellant's service since the offense may be considered, however, in connection with other factors, in reviewing the propriety of the order.

VI

Prompted by Appellant's assertions on appeal, I take official notice that from the date he rejoined SANTA MERCEDES to the date of this consideration he has served aboard the same vessel, without recorded complaint, for 19 voyages, and had, at the time of initial decision in this case, so served for 11 voyages.

The Investigating Officer in this case argued for revocation of Appellant's document because, although there was no evidence of the injury done to the victim, it must have been serious since the victim was taken to a hospital in a "coma" and in an "incoherent condition." The Examiner tacitly, but properly it seems, rejected this because no evidence had been introduced to supplement this somewhat inconsistent description to show the extent of injuries.

The Examiner apparently applied the principles of 46 CFR 137.20-165 in framing his order in this case. Ordinarily, a suspension of six months order would be appropriate because there was an assault and battery. In this case, however, while there is

an admitted assault and battery, there is absolutely no evidence of the circumstances of the basic misconduct.

The delay in bringing this matter to hearing is not explained although the record establishes that Appellant was interviewed by the Investigating Officer eight days after the misconduct occurred. Appellant's service from the date of that interview has not been subject to complaint or criticism.

The purpose of these proceedings is not penal. It is remedial. An order of suspension made soon after an assault and battery would be remedial. An order of revocation for an assault and battery with resulting serious injury would also be remedial even if some time had elapsed before the hearing.

In this case, the question seems to be whether Appellant has such propensities or proclivities that a suspension will serve remedial purposes. On the record presented here, including Appellant's subsequent service aboard the same vessel, it seems that an outright suspension would be purely a punishment and would serve no remedial purpose.

CONCLUSION

I conclude that the order should be amended to remit the entire suspension on probation. To effectuate the remaining intent of the Examiner, the total suspension will be ordered, and the same placed on probation for the total period covered by the Examiner.

ORDER

The findings of the Examiner made at New York, N. Y., on 16 October 1968, are AFFIRMED. The order of the Examiner, entered at the same time and place is MODIFIED, to provide that Appellant's documents are suspended for a period of nine months. However, the suspension will be deferred and Appellant is placed on probation for a period of eighteen months from the date of service of the decision. If this probation is violated, any examiner who finds charges under R.S. 4450 proved, for acts committed within the period of probation will include in his order a provision making effective the entire suspension deferred herewith.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C. this 25th day of August, 1970.

Hearings
In absentia, authorized

Log entry
Substantial compliance

Hearings
Dismissal criminal complaint, not relevant to action to suspect or revoke documents or license

Self-defense
Not proved
Right to retaliate after illegal assault

Appeals
Modification of Examiner's order

***** END OF DECISION NO. 1814 *****

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