IN THE MATTER OF MERCHANT MARINER'S DOCUMENT z-489206-D3 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: John A. CLOUTIER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1836

John A. CLOUTIER

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 31 October 1969, an Examiner of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's seaman's documents for twelve months upon finding him guilty of misconduct. The specifications found proved allege that while serving as a fireman/watertender on board SS GREEN BAY under authority of the document above captioned, Appellant:

(1) on 20 September 1969, at Saigon, RVN, failed to perform his duties from 0000 to 0800;

(2) on 21 September 1969, at Saigon, RVN, failed to perform his duties from 0000-0800;

(3) on 22 September 1969, at Saigon, RVN, failed to perform his duties from 0000 to 0800;

(4) on 23 September 1969, at Saigon, RVN, failed to perform his duties from 0000 to 0400;

(5) on 23 September 1969, at Saigon, RVN, failed to perform his duties from 1200-1600;

(6) on 23 September 1969, failed to join the vessel at Saigon, RVN; and

(7) on 24, 25, and 26 September 1969, failed to perform duties while the vessel was at sea.

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 GREEN BAY.

There was no defense.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of twelve months.

The entire decision was served on 28 November 1969. Appeal was timely filed on 22 December 1969, and perfected on 19 February 1970.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a fireman/watertender on board SS GREEN BAY and acting under authority of his document while the ship was in the port of Saigon, RVN. Appellant failed to perform duties and failed to join the vessel as alleged in all the specifications found proved, except the seventh.

BASES OF APPEAL

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

(1) The decision is contrary to the weight of the evidence; and

(2) The "punishment" is excessive. In support of his point, Appellant states that his pension might be jeopardized if his document is suspended for a year.

APPEARANCE: Zwerling & Zwerling, New York, N. Y., by Sidney Zwerling, Esq.

OPINION

I

In a letter perfecting Appellant's appeal it is acknowledged that "His conduct cannot be condoned..." I take this to be a withdrawal of the assertion, of little or no importance, as nakedly stated, that the decision is "contrary to the weight of the evidence," and no further comment on that matter is needed.

II

I do not accept Appellant's characterization of the suspension ordered as a "punishment," but I do review the record to determine whether the remedial order of the Examiner is excessive. Appellant's prior record is as follows:

(1) 18 September 1957, New York, failure to perform because of intoxication and possession of intoxicants aboard FLYING EAGLE, two months on nine months' probation;

(2) 22 October 1958, New York, admonished for failure to join FLYING HAWK;

(3) 14 March 1960, London, England, admonished for failure to join AMERICAN MILLER;

(4) 26 March 1963, New York, failure to perform because of intoxication and possession of intoxicants aboard ROBIN MOWBRAY, one month suspension plus two months on nine months' probation;

(5) 13 December 1966, New Orleans, warned for two failure to perform duties aboard LESLIE LYKES;

(6) 25 July 1967, Jacksonville, failure to perform because of intoxication, possession of intoxicants, and unauthorized absence, GREEN LAKE, six months plus six months on eighteen months' probation;

(7) 19 August 1967, New York, failure to perform because of intoxication, MAGNOLIA STATE, six months on eighteen months' probation;

(8) 10 March 1969, Portland, Ore., warned for failures to perform aboard ABIQUA.

There is no need to inquire into reasons why Appellant was for a time simultaneously on probation because of two different orders or how he escaped with no more than a warning on 10 March 1969. It is enough to note that Appellant was lucky. It must also be noted that the instant case marks Appellant's fifth misconduct action under R.S. 4450 in less than four years. Since an order of revocation would have been supportable the suspension order by the Examiner in this case can be considered lenient.

III

There is one point not raised by Appellant which I think deserves comment. It was found that Appellant failed to join GREEN BAY on 23 September 1969 at Saigon. The Examiner found, and the record supports this, that Appellant rejoined the vessel at Manila on 26 September 1969.

If Appellant had never rejoined the vessel, it would be unthinkable to find proved charges that he had failed to perform duties aboard the vessel each and every day from the date of his

failure to join to the end of the voyage. Similarly, failure to perform duties from the date of a proved failure to join is not a separate act of misconduct from the date of failure to join to the date of rejoining when the seaman is fortunate enough to rejoin and the master is willing to accept him. It was there fore improper to find proved the seventh specification which alleged that Appellant had failed to perform duties aboard the vessel on 24, and 26 September 1969 at sea when Appellant was not aboard the vessel because of his failure to join.

CONCLUSION

I conclude that the seventh specification found proved in this case must be dismissed, but this conclusion in no way affects my opinion as to the propriety of the Examiner's order since the remaining acts of misconduct, in light of Appellant's record, amply justify the order.

ORDER

The findings of the Examiner in this case with respect to the seventh specification found proved are SET ASIDE, and the specification is DISMISSED. The order of the Examiner, entered at Baltimore, Md., on 31 October 1969, is AFFIRMED.

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

Signed at Washington, D. C., this 26th day of March 1971.

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Lenient
Prior record considered

Failure to perform duties
Not a separate offense from date of ftj

***** END OF DECISION NO. 1836 *****

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