IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-947185-D3 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert B. ARNOLD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1837

Robert B. ARNOLD

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 10 March 1970, an Examiner of the United States Coast guard at Boston, Massachusetts suspended Appellant's seaman's documents for three months plus six months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as an able seaman on board SS MARYLAND TRADER under authority of the document above captioned, Appellant on 3 March 1970, failed to join MARYLAND TRADER at Ponce, Puerto Rico.

At the hearing, Appellant elected to act as his own counsel. The Examiner entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of MARYLAND TRADER.

In defense, Appellant offered in evidence his own testimony.

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

The entire decision was served on 24 March 1970. Appeal was timely filed on 9 April 1970 and perfected on 25 June 1970.

FINDINGS OF FACT

On 3 March 1970, Appellant was serving as a able seaman on board SS MARYLAND TRADER and acting under authority of his document while the ship was in the port of Ponce, Puerto Rico. On that day Appellant failed to join the vessel.

BASES OF APPEAL

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

(1) Appellant has been denied due process by the disclosure to the Examiner of his prior record; and

(2) the order is cruel and unusual punishment.

OPINION

I

Appellant's first point needs little discussion. His prior record was made known to the Examiner at the appropriate time, after findings had been entered, for the purpose of formulating a proper order. 46 CFR 137.20-160. To say that an examiner should not know a person's prior record for that purpose is akin to saying that a judge in a criminal trial should not know the record of a defendant who has been found guilty by a jury before he determines an appropriate sentence.

Appellant urges that whatever his prior record he had already "suffered the consequences of his prior bad conduct" and deserved to be treated equally with one who had committed the same misconduct but who had no prior record. This is patently unrealistic.

The Table at 46 CFR 137.20-165, "Scale of Average Orders," is a realistic recognition of the method of dealing with repeating offenders. It might be added that not only was Appellant's record properly introduced in this case but, apparently through inadvertence, the Examiner failed to note that Appellant was actually on probation when the misconduct in the instant case occurred, and Appellant's suspension should have been six months longer than what was actually ordered. It is obvious, of course, that the only way a violation of probation can be made known to an examiner is by disclosure of prior record.

II

When Appellant argues that the order is a "cruel and unusual punishment" under the Eight Amendment he is speaking the wrong language, that of criminal law standards. In administrative procedure the characterization which would allege impropriety of an examiner's order is "arbitrary or capricious."

That the order in this case was not arbitrary or capricious is most easily demonstrated by recalling that the minimum suspension that should have been ordered was six months, not three.

ORDER

The order of the Examiner dated at Boston, Massachusetts on 10 March 1970, is AFFIRMED.

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

Signed at Washington, D. C., this 16th day of april 1971.

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