IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. BK-294295-D1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Leonard WASKASKI

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1861

Leonard WASKASKI

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 28 January 1969, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for four months outright plus four 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 RUTGERS VICTORY under authority of the document above captioned, Appellant:

(1) on 13 July 1968, at Subic Bay, P.R., failed to obey an order of the chief engineer to go below and stand his watch;

(2) on 19 July 1968, at "Jung Taw, R.V.N." [sic] failed to stand his assigned watch from 1600 to 2400; and

(3) on 15 July 1968, at sea, failed to stand his assigned watch from 0400 to 0800.

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

The Investigating Officer introduced in evidence voyage records of RUTGERS VICTORY and the deposition of a witness. Appellant offered no evidence in defense since he did not appear after the first session of the hearing although given adequate notice.

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 four months outright plus four months on twelve months' probation.

The entire decision was served on 12 November 1969. Appeal was timely filed on 12 November 1969. Although Appellant had until 12 January 1970 to add to his appeal, he has not done so.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a fireman/watertender on board SS RUTGERS VICTORY and acting under authority of his document.

On 13 July 1968, when the vessel was at Subic Bay, P. R., Appellant failed to obey a lawful order of the chief engineer to go below and stand his watch. Appellant declared that he would not and that he was going ashore. He did, in fact, go ashore. His reply to the master when the pertinent log entry was read to him was, "I paid another man to stand by."

On 15 July 1968, at sea, Appellant failed to stand his assigned watch from 0400 to 0800. When charged with this by the master Appellant had "no comment."

On 19 July 1968, at Vung Tau, R.V.N., Appellant failed to stand his assigned watch from 1600 to 2400. His reply to the master on the recording of this offense was "no comment."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that appellant paid someone to stand his watches when he failed to do so, and that the order is too severe.

APPEARANCE: Appellant, *pro se.*

OPINION

I

One minor matter, not raised by Appellant, may be mentioned here. The specification as found proved referred to "Jung, Taw, R.V.N." The evidence accepted by the Examiner, and the specific findings of the Examiner, place the location as "Vung Tau." My findings reflect the evidence and the specific findings of the Examiner.

Since the function of the specification is notice as to the issues so that a person appearing before an examiner can identify the matter with which he is charged, identification of place is ordinarily not of essence. It was not, here, because the date was ascertainable and there was no possibility that the nature of the misconduct would be changed by a more correct identification of the place at which the offense occurred. The error of spelling and punctuation *in* the specification as found proved are not only not fatal but can be corrected at any stage of proceedings.

II

One other matter not raised by the appeal may be mentioned here because of the proper disposition of the matter. In some cases, it has been noted, unnecessary delays in initial proceedings have occurred by reasons of the steps taken by examiners, or the steps which examiners have found themselves unable to take, when a person charged absents himself from a hearing after he has responded to the first notice and has not returned. The record here clearly shows that Appellant was given timely notice as to when proceedings would take place, that no indefinite adjournments

were granted, and that the Examiner correctly treated the proceeding as one in *absentia, when Appellant failed to appear on* notice. Whether the question would be different if Appellant had been represented by counsel who could not locate his client I need not discuss here.

III

Turning to Appellant's argument that he paid someone else to stand by for him when he failed to stand his watches, I note first that the only reference to a "stand-by" was in Appellant's reply to the log entry as to the offense at Subic Bay. A general statement on appeal that there was a "paid stand-by" for all occasions cannot be accepted at all. Narrowed to the occasion of 13 July 1968, the argument is unacceptable, on its face, for two reasons.

The rule that a log-book entry made in substantial compliance with the statutes constitutes *prima facie* evidence of the facts recited therein (46 CFR 137.20-107(b) does not elevate a "seaman's reply" to the level of either *prima facie* or substantial evidence of the facts recited in the reply. The regulation means only that the record made of a seaman's reply is *prima facie* evidence of the fact that he made that reply and nothing else. The "seaman's reply" with respect to the offense of 13 July 1968 is not then evidence at all within the contemplation of 46 CFR 137.20-107(b). It is, however, evidence which may be considered by an Examiner.

In this case the Examiner obviously refused to give any weight to that piece of evidence. The Examiner's unspoken reasoning was simple and eminently supportable...No one, not even Appellant, had appeared before him to testify or give evidence that appellant had "paid a stand-by" on even the one occasion on which Appellant had mentioned the matter while the records were being made aboard the vessel.

It is further apparent that even if Appellant had paid for a stand-by, a fact which might, if the stand-by had been approved by proper authority, have constituted a defense to the offenses to which he replied, "No comment," when logged, there is no defense to the allegation that he failed to obey an order of the chief

engineer. As to that offense, the one occasion in which at the time Appellant argued that he had in fact paid for a stand-by he could not refuse to obey an order of an officer placed over him to do his duty. It could be that had that officer authorized Appellant to hire a substitute for the watch in question there would be a defense. Appellant does not so argue, and the only inference from the record is that the chief engineer, who gave the order for Appellant to stand his watch, was no party to any agreement that Appellant was excused from performing his duties because he had hired a "stand-by."

IV

> Since thee was talk on the record in this case that Appellant had not been fined by the master for certain offenses, with, consequently no deductions from his pay, and the intimation on appeal is that Appellant should be excused in this proceeding because of the fact, I wish to make a point very clear at this time. A decision by a master not to levy a forfeiture of pay for an act of misconduct, whether the decision was prompted by a collective bargaining agreement or by proof that the wrong doer had in fact later paid the person called on to perform the duties which the wrong doer was supposed to perform, does not exonerate a seaman from his failure to obey order or his failure to perform his proper duties when he is investigated under the suspension and revocation statute and regulations.

Before leaving the question of failure to perform duties, I must note another point made by Appellant in justification of his actions. He argues that his refusal and failures to perform duties should be excused because he had performed so much overtime work that he needed time off. I must note that under 46 U.S.C. 673 a seaman on a seagoing ship cannot be required to work more than eight hours a day, with certain exceptions which Appellant does not, and the record does not, drawn into question. If Appellant worked so much overtime that he actually, as he asserts on appeal, needed a watch off, for rest, I cannot overlook the fact that he did not retire to his quarters, but, instead, left the ship. Without engaging in details, I cannot fail to take official notice of the fact that overtime is usually paid for at premium rates.

If an appellant were to argue hardship because he had been

required to work overtime under the conditions allowed under 46 U.S.C. 673, I might be inclined to listen to a complaint. When the argument is only, as it can be found to be in this case in the absence of evidence that the overtime work was required against Appellant's will, that Appellant undertook so much voluntary overtime work carrying premium pay that he became too tired to attend to his assigned duties, I can have no sympathy for him, especially when what he did was not merely to fail to work but to disobey an order to turn to.

VI

Appellant also complains that the order of suspension is excessive. In his appellate papers he urges that his entire suspension ordered should be placed on probation: He argues that "this is the first time I ever had my [papers] taken," and that if he were placed on probation, "I'll never get a log any more."

The record shows that on 22 September 1967 Appellant was formally "warned" that a repetition of acts cognizable under R.S. 4450 would result in an action to suspend or revoke his document under 46 CFR 137. On 3 January 1968, because of failures to perform duties, at least once because of intoxication, and for three unauthorized absences from SS MORMACELM, Appellant's document was ordered suspended for three months on twelve months' probation. The acts of misconduct found proved in the instant case occurred within seven months of the order in the MORMACELM case, during the time in which Appellant was on probation.

Three of the months of effective suspension ordered by the Examiner in the instant case were necessitated by his finding of a violation of the probation ordered on 3 January 1968. The fourth month of effective suspension ordered by the Examiner was specifically ascribed to the misconduct proved in the instant case. There was an automatic suspension order required of the Examiner by virtue of the violation of probation granted in the earlier order. The Examiner's addition of one more month of outright suspension for the offenses in the instant case is not only supportable but can be considered as almost required, in view of the fact that appellant had been involved in three offenses cognizable under 46 CFR 137 within a period of less than two years.

A request to be placed on probation on a promise that a person will not again commit a misconduct during the period of probation has a most hollow ring when the acts under consideration were themselves violative of a probationary order. The Examiner's order of additional suspension on probation must therefore also be considered reasonable.

CONCLUSION

The Examiner's ultimate finding as to the first specification found proved must be modified on this final review.

ORDER

The Examiner's ultimate findings are MODIFIED to reflect that the misconduct in the first specification found proved occurred at Vung Tau, R.V.N. As MODIFIED, the findings of the Examiner, and the order of the Examiner entered at New York, New York, on 28 January 1969, are AFFIRMED.

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

Signed at Washington, D. C., this 12th day of October 1971.

INDEX

***** END OF DECISION NO. 1861 *****

Top