IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-419933-D3
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Willard D. MOORE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1864

Willard D. MOORE

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 6 May 1970, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's document for three months on 12 month's probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as an AB seaman on board SS AMERICAN SCOUT under authority of the document above captioned Appellant:

(1) on 2 and 3 April 1970, when the vessel was at Cat Lai, RVN, wrongfully failed to perform assigned duties;

(2) on 3 April 1970, wrongfully failed to join the vessel at Cat Lai, RVN;

(3) on 6 April 1970, at Vung Tau, RVN, failed to perform duties because of intoxication; and

(4) on 13 April 1970, at sea, failed to perform duties because of intoxication.

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 AMERICAN SCOUT.

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 three months on 12 months' probation.

The entire decision was served on 6 May 1970. Appeal was timely filed on 13 May 1970. Although Appellant had until 12 August 1970 to add to his original notice, he has not done so.

FINDINGS OF FACT

On all dates in question, Appellant was serving as an AB seaman on board SS AMERICAN SCOUT and acting under authority of his document. No further findings of fact are required.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Specific bases of appeal need not be set out.

APPEARANCE: Appellant,*pro se.*

OPINION

I

Each of the specifications found proved in this case was supported only by official log book entries. The Examiner said,

"Each entry was read to the man as soon as he was available after the offense was committed..." If this were so there would be found substantial compliance with the statutes such as to constitute the entries "*prima facie* evidence of the facts therein recited" (46 CFR 137.20-107) and thus, automatically, substantial evidence upon which findings could be based.

I do not see, however, that all the entries were in fact read to Appellant as soon as he was available after the offense was committed. The entry as to 2 April 1970 was not read to Appellant until 8 April 1970. The entry of 3 April 1970 was also not read to Appellant until 8 April 1970. This entry, incidentally, deals only with absence from the vessel and failure to perform duties; it does not record a failure to join on 3 April 1970. An entry for 6 April 1970 records that Appellant was unable to perform his duties on that date because of intoxication. This too was read to Appellant on 8 April 1970.

An entry date 7 April 1970 records that on 3 April 1970 Appellant was not available to perform his duties and that his "international certificate of vaccination card was landed with the agent who in turn gave it to Willard D. Moore in order to travel from Cat Lai to Vung Tau RVN." The entry also records that "on reporting to the ship 6 April 1970 Moore stated that he had lost his shot card in a local bar in Vung Tau." The master reprimanded Appellant because of the extra expense he had caused for replacing his "shot card." This entry was also read to Appellant on 8 April 1970.

It could be surmised from these recitals that Appellant was absent from the vessel without authority at Cat Lai on 2 and 3 April 1970, that he was still absent and failed to join at sailing time on 3 April, that his "shot card" was sent to the agent, and that he was transported to the ship's next port where he rejoined on 6 April in an intoxicated condition, declaring that he had lost the immunization certificate. It is clear that if Appellant was continuously absent from the vessel on 2 and 3 April 1970, failing to join on the latter date (although "failure to join" was not recorded as such) nothing could have been read to him, nor could copies of the entries have been given to him, nor could he had been afforded the opportunity to reply to the entries unless and until he might rejoin the vessel. If it is assumed that he rejoined the

vessel on 6 April 1970 in an intoxicated condition it can be seen that the procedural formalities could not be completed until Appellant had "sobered up."

But the log entries are completely silent as to why no procedures, other than the recorded" reprimand," took place on 7 April 1970. Appellant was not recorded as having been incapacitated or absent without authority on 7 April 1970 and no good reason is shown why the accumulated log entries were not presented to Appellant until 8 April 1970.

On this basis alone, that the log entries do not account for the failure to comply with the law on 7 April 1970, I must hold that these entries were not made in substantial compliance with the law and therefore do not constitute prima facie evidence of the facts recited.

Two considerations which require some discussions arise from this holding. One is purely a question of law, the rules of evidence, and administrative procedure. The other is a practical matter of interest to investigating officers, examiners, and most especially, masters of vessels.

II

The legal consideration is this: failure of the master to record offenses in substantial compliance with 46 U.S.C. 702 deprives entries of the preferred status given them under 46 CFR 137.20-107. It does not, however, render the entries inadmissible in evidence. The failure affects only the weight that should be accorded to the evidence. The failure affects only the weight that should be accorded to the evidence. A statutorily defective entry is still admissible in evidence as an entry made in the regular course of business, under 28 U.S.C. 1732.

The precise question that I perceive, and that I do not find discussed in the authorities, is whether evidence that is admissible as (as most scholars phrase it) an exception to the "`hearsay` rule" remains "hearsay" after it has been admitted in evidence, such that no finding may be based upon it alone (as based on "hearsay alone") or, because of its admissibility into evidence, despite the rule, has been stripped of its character of "mere

hearsay" and has become evidence of such nature as to constitute "substantial evidence" upon which findings in an administrative proceeding may be based.

After such study as could be made, I am convinced that an entry made in the regular course of business and admissible in court proceedings as an "exception to the `hearsay' rule" is no longer "hearsay" under the rule of administrative law such that it cannot be the predicate of findings without other support. Stated otherwise(with the *caveat* that pure hearsay is not inadmissible in administrative proceedings), if evidence is admissible in a court as an exception to the "hearsay" rule it is not, for purposes of making findings in an administrative proceeding, "hearsay alone" such that supportable findings cannot be based upon the evidence. If the evidence is admissible in a court, and is of such a nature that a reasonable man could accept it as the predicate for his thoughts, conclusions, and actions, it is substantial evidence for an administrative finding and is not "hearsay alone."

If this were all that was involved in the instant case I would have no hesitancy in affirming the Examiner's findings since they were based on substantial evidence even if the documentary evidence was not "prima facie evidence of the facts therein recited," as the statement is made at 46 CFR 137.20-107.

III

In reaching the conclusion expressed above I am strongly mindful of the practice of admiralty courts. A log entry, not even required to be made by statute, can demolish the testimony of a half dozen witnesses who say that speed of a vessel was not increased to x revolutions when the engine log recorded that it was. The engine log may have been admitted into evidence as an exception to the hearsay rule, but once admitted its impact is as if it were not hearsay at all. I cannot find in civil court proceedings any justification for holding that evidence admissible in a civil court proceeding may not be "substantial evidence" required under the laws of administrative procedure.

IV

What most disturbs me in this case is the internal evidence of non-compliance with the statutes, so that I am forced to doubt that

the official log entries were made in the regular course of business at all. With respect to the entries considered thus far it is noted that each was signed by the master and chief mate. The chief mate signed as witness, but the question appears, "as witness to what?" The failure to comply with the requirements of 46 U.S.C. 702 was not limited to the failure to read the entries to the person logged at the first possible opportunity.

Many masters do not recognize, as the master in this case did not, that section 702 calls for two distinct steps in the "logging" process. The first is the making of the entry, the signing, and the witnessing. The second is the recording of the fact that a copy of the log entry has been provided to the offender or that the entry has been distinctly and audibly read to the offender, and of the seaman's reply if any. This record must also be signed and witnessed. The log entries in this case were not so framed.

I do not hold here that when the making of the entry and the record of providing a copy or reading the entry and of the seaman's reply are contemporaneous one signature of the maker and of the witness will not comply substantially with the statute. I do hold that when the actions occur at different times, as in this case, even for good reason, there must be separate entries and signatures for the two transactions.

The manner in which the signing by the maker and the witness occurred in this case leaves suspect the timely nature of the entries. It cannot be said that the mate's signature was affixed at the time each entry was made, so as to establish the timeliness of the entry, when the mate's d signature is also to be used to affirm the reading of the entry and the recording of the seaman's reply on a later date.

On the internal evidence of these entries it cannot be held, without more, that these were records kept in the regular course of business.If they were not, although admissible in evidence in an administrative proceeding, they are not exceptions to the hearsay rule. Findings based upon them are findings based on hearsay alone and are not permissible in these proceedings.

V

A final question remains. With respect to the evidence used to support the findings on the fourth specification found proved, the failure to perform duties because of intoxication at sea on 13 April 1970, an explanation is given in the log entry itself that "because of the traffic in the Luzon Straits and adverse weather conditions the above log was read and made known to him April 14, 1970..."

The writing itself imports that the entry was made on 13 April 1970 but was not read to Appellant until 14 April 1970 because of traffic and weather conditions. The signing by the maker and the witness leaves open the possibility that it was not only the reading of the log entry that was postponed until the next day, but the making of the entry itself.

Traffic conditions or weather could easily prevent a master from making necessary entries in his official log book. If such prevention occurs, the fact should be recorded and an entry made on 14 April 1970 should not purport to have been made on 13 April.

The taint found in IV above extends to the log entry discussed here because while either a delay in making the entry or a delay in reading it to the seaman is explainable, the entry in question leaves open the question, by reason of having only one set of signatures to the recording of two separate transactions, whether the entry was made in the regular course of business so as to be an exception to the hearsay rule.

CONCLUSION

I conclude that all the official log entries involved in this case were so made that they must be held not be have been made in substantial compliance with 46 U.S.C. 702 and such as to constitute prima facie evidence of the facts recited, and that the internal evidence is not such as to raise them to the dignity of records made in the regular course of business as exceptions to the hearsay rule. The log entries here, controlled as they are by statute, are different from "deck" and "engine" logs in which records are presumed to be made contemporaneously with the event. Without some supporting evidence, the log entries in this case cannot be accepted as entries made in the regular course of business. They are therefore not brought out of the category of hearsay. Findings

based on such evidence are based on "hearsay alone" and such findings cannot be supported in an administrative proceeding.

ORDER

The order of the Examiner dated at San Francisco, California, on 6 May 1970, is VACATED. The charges are DISMISSED.

C.R. BENDER
Admiral, U.S. Coast Guard Commandant

Signed at Washington, D.C., this 10th day of January 1972.

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***** END OF DECISION NO. 1864 *****

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