IN THE MATTER OF LICENSE NO. 384256 MERCHANT MARINER'S DOCUMENT AND ALL OTHER SEAMAN'S DOCUMENTS NO. Z-71879
Issued to: Douglas S. DuBOIS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1866

Douglas S. DuBOIS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 of Federal Regulations 137.30-1.

By order dated 14 April 1970 and amended on 17 April 1970, an Examiner of the United states Coast Guard at New York, N.y., suspended Appellant's seaman's documents for two months on nine months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as second mate on board SS AMES VICTORY under authority of the document and license above captioned, on or about 17 October 1969, Appellant, at Subic Bay, P.R.,

(1) failed to perform his duties from 0400 to 0800;

(2) failed to perform his duties from 1600 to 2000; and

(3) failed to join the vessel at 2000.

At the hearing, Appellant was represented twice by professional counsel, both of whom withdrew from the case. Appellant then proceeded 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 AMES VICTORY and the testimony of the master of the vessel.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications has been proved. The Examiner then entered and order suspending all documents for a period of two months on nine months' probation. (Linking of this order to an earlier order will be discussed below in the OPINION.)

The entire decision was served on 17 April 1970. Appeal was timely filed on 1 May 1970. Although Appellant had until 1 October 1970 to supplement his appeal he has not done so.

FINDINGS OF FACT

On 17 October 1969, Appellant was serving as second mate on board the SS AMES VICTORY and acting under authority of his license and document.

On 17 October 1969, at Subic Bay, Appellant failed to return to the ship from shore in time to stand his 0400-0800 watch. Appellant did return to the vessel at 0800 but left again at 1015 and failed to stand his 1600-2000 watch. When the vessel sailed on schedule at 2000, Appellant failed to join, having been absent without authority and without lawful excuse for the proceeding four hours.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that since a hearing held at San Francisco, resulting in an order of suspension on *pro*bation, had been held on 9 February 1968, at which time he had been told that a decision would be sent to him in about two weeks, and since the decision was not issued until 22 January 1970 [and served upon him, according to the Examiner in the instant case, on 2 February 1970], it is unfair to institute that period of probation on 2 February 1970 and to

require that a new period of nine months' probation begin on that date a year later.

APPEARANCE: Appellant, pro se.

OPINION

I

Since Appellant's challenge on appeal is only to the propriety of the Examiner's order there is no reason to state the results of analysis of the record other than to say that no error of the Examiner prejudicial to Appellant as to findings of fact is apparent.

Appellant's only objection is to the formulation of the Examiner's order. It is to the order, the means by which it was arrived at, and its final formulation that I direct my attention, considering also certain statements made by Appellant, both at hearing and on appeal.

II

After properly making his findings in open hearing, the Examiner sought to ascertain Appellant's prior record. The following colloquy appears, beginning at R-111, line 6:

> "EXAMINER... I will now inquire as to any prior record.
>
> INVESTIGATING OFFICER: The Decision and Order was 22 January 1970.
> EXAMINER: Off the record.
>
> (Off the record discussion).
>
> EXAMINER: I will read the message from Headquarters regarding Mr. Dubois. It is dated January 22, 1970 and it states as follows: Douglas S. Dubois z-71879. Suspended (strike that out). I am looking at the wrong---negative other than pending misconduct SS CAPE EDMONT. Coast Guard MIO San Francisco is requested to

advise your office of Saigon case dated 20 November '67 SS CAPE EDMONT. Now Mr. Roussel, did you receive any information with regard to the matter of the CAPE EDMOND?

INVESTIGATING OFFICER: Yes we did.

EXAMINER: What is it?

INVESTIGATING OFFICER: The Decision and Order--I don't have the results of the "d & o". All I know is the date of it. I can find out the results.

EXAMINER: All right then, Mr. Dubois, were you served with the Order, the Decision in the San Francisco case?

RESPONDENT: I was just served with it here, by Mr. Rouseel, after this hearing had started.

EXAMINER: Mr. Roussel, is this the Decision and the Opinion?

INVESTIGATING OFFICER: The "d & o" was served here, right.

RESPONDENT: I have it, but I don't have it with me.

EXAMINER: You are still under oath, because you were sworn in before. I ask you this-Mr. Roussel, you don't have a copy of that?

INVESTIGATING OFFICER: We don't have a copy.

EXAMINER: With regard to the CAPE EDMONT, when was the Hearing held in San Francisco?

RESPONDENT: We paid off there about, it was either the 7th, or the 8th of February '68, and the Hearing was held within a week after that. Within three or four days, something like that.

EXAMINER: Held in February 1968, is that right?

RESPONDENT: Yes

EXAMINER: What was the charge and what was the charges against you? What was proved against you?

RESPONDENT: I don't--I would have to look at it. The charges were, assault charges, a failure to join, and I forget what it was. Anyway, it was those two that were included.

EXAMINER: What was the order? What did it call for?

RESPONDENT? It said, if within a year after this was presented to me, these findings, if an occasion arose, for misconduct aboard ship within a year later that, my license would be suspended for three months.

EXAMINER: In other word, what you are saying is that it was three months on twelve months probation.

RESPONDENT: Yes. After receiving the Decision

EXAMINER: When was the Order served on him Mr. Roussel?

INVESTIGATING OFFICER: I think it was the second date of the Hearing. The second session. Probably the 4th of March.

EXAMINER: Is that correct, that it didn't call for any outright suspension, but three months on twelve months probation?

INVESTIGATING OFFICER: To the best of my knowledge, that's what I think it was.

EXAMINER: And the service was made here in New York?

INVESTIGATING OFFICER: Yes sir.

> EXAMINER: Well then, obviously, there is no violation of probation."

From this it may properly be inferred that an order dated 22 January 1970 was served upon Appellant on or about 1 March 1970. This order specified a suspension of three months on twelve months probation. The Examiner correctly saw that the probation period imposed upon Appellant could not have commenced before the date of service of the earlier decision and order upon Appellant, and that thus the misconduct in the instant case could not have violated a probation upon which Appellant had not yet been placed. Still, while the Examiner says in his written decision, "The San Francisco order is dated 22 January 1970 and was served on respondent on 2 February |970," the entire import of the transcribed record quoted above is that the "San Francisco order" was served on Appellant on "probably" or "I am told" 4 March 1970. While the Examiner's statement in his Opinion unquestionably redounds to Appellant's credit by about one month, nothing in the record on open hearing supports the statement that 2 February 1970 was the date of service of the "San Francisco order."

Further, while Appellant admitted, under oath, that the earlier case had dealt with "assault charges," a failure to join, and I forget what it was. Anyway, it was those two that was included," the record is devoid of any well founded statement by the Examiner as to what the earlier misconduct found proved was, and is absolutely devoid of any showing by the Investigating Officer, who himself served the San Francisco order on Appellant (to his recollection on 4 March 1970 and according to the Examiner's later unsupported statement on 2 February |970) of what the substance of the prior record was. This was the situation on 14 April 1970, although the instant hearing had been in progress since 2 February 1970.

Why the prior record of Appellant was not properly producible before the Examiner in open hearing on 14 April 1970, when he called for it, is nowhere adequately explained.

III

It is as to his "prior record" that Appellant thrusts home.

He states on appeal, as he stated on the record of hearing in the instant case, that his San Francisco hearing was held in one day. The Examiner, he said, advised him that a written decision would be issued in about two weeks, but he never received a decision until it was served on him in New York in 1970.

The decision, found by the Examiner to have been served on 2 February |970, was not issued until 22 January |970. No reason appears for this delay in the record of this case.

The Examiner's order in the instant case was tailored so as to provide only for a suspension on probation with the period of probation commencing on the day immediately following the last day of probation from the San Francisco order.

Appellant complains that the San Francisco order should be considered as dead, since his term of probation would long have been served successfully if the order had been entered in timely fashion. He also complains that he has been placed on probation for twenty-one months from 2 February 1970, an excessively long period of time to be on probation.

Some unusual aspects of the situation created by the Examiner's order in the instant case must be commented on with-out thorough exploration. One is that if charges against Appellant were to be found proved for an act committed on 31 January 1971, his documents would be suspended for the three months called for by the San Francisco order plus any time thereto added by the Examiner in the new order. Assuming that the added time brought the total suspension to less than nine months (the period of probation in the instant order), Appellant would be restored to employability under his documents but would still be on probation from the instant order without having suffered suspension from the instant order itself. But then, if Appellant weathered the nine months, the instant order would have been rendered a nullity, although he had committed acts of misconduct subsequent to entry and service of the order.

Another consideration here is that making periods of probation consecutive, as was done here, could bring about an anomaly. It is true that the San Francisco order here had become final by reason of the failure to file notice of appeal within 30 days of 2

February 1970. but the probation ordered by the Examiner in the instant case cannot become effective during the pendency of this appeal. Thus, if this appeal should not have been decided by 2 February 1971, Appellant would not have been on probation from that date to the effective date of this decision despite the Examiner's specific order that Appellant would be on probation from 2 February 1971 on. The Examiner's nine months' probation would then be inoperative for an uncertain period of time since its commencement is tied to a fixed date.

This is not the place to seek resolution to all possible problems that can arise, but it can be suggested that some problems in a situation like this could be avoided by an Examiner's careful evaluation of what should be the longest suspension that should be necessarily imposed if two probationary orders should be violated and setting of his ordered probation to commence immediately and to end "thus" many months after the expiration of the earlier ordered period of probation, much as is now done in ordinary orders of suspension.

IV

I must agree, however, that an inequity has been imposed upon Appellant. While the Examiner correctly saw that the misconduct in the instant case was not a violation of probation, he chose to frame an order more lenient than those listed at 46 CFR 137.165, considering that at least the failure to join in the instant case was a repeated offense. Nevertheless, the Examiner seems to have framed an order not in accord with the general policy reflected in that section, which nowhere contemplates more than a twelve month period of probation even for offenses which merit up to six month' suspension. If it be thought that the Examiner's creation of a 21 month probation period was reasonable because of the fact that he perceived a second offense, I can say only that it would have been far more reasonable to order an outright suspension in the instant case than to create a new and ambivalent period of probation.

A modification of the Examiner's order is appropriate, primarily because of the unexplained delay in issuance of the San Francisco order. It has been suggested that the probation period of the instant order should be made concurrent with the running of the San Francisco ordered probation. This is not acceptable since'

such a formulation would render Appellant liable to a five month suspension for violation of probation, a period in excess of any suspension now allowable under the existing orders.

It seems best to me to set aside the order entered by the San Francisco Examiner and to reframe the order of the Examiner in the instant case so as to make it effective on service of this Decision rather than on 2 February 1971. This action does not prejudice Appellant in any way.

CONCLUSION

To the end indicated just above, I call up the order of the Examiner entered at San Francisco, California, on 22 January 1970, under my inherent powers under R.S. 4450 (46 U.S.C. 239), to correct an inequity too late known to have been cognizable under 46 CFR 137.35 and, in fact, not generated until 17 April 1970, the date of decision of the Examiner in the instant case, and not brought to my attention until consideration of the appeal in the instant case.

ORDER

The order (but not the findings, which shall remain in effect) of the Examiner entered at San Francisco, California, on 22 January 1970 in the case of Appellant is SET ASIDE. The order of the Examiner in the instant case is MODIFIED to provide that all seaman's document issued to Appellant are suspended for two months on nine months' probation, effective upon the date of service of this decision. The order of the Examiner entered at New York, N.Y. on 17 April 1970, as MODIFIED herein, is AFFIRMED.

C.R. BENDER
Admiral, United States guard
Commandant

Signed at Washington, D.C., this 13th day of January 1972

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