IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-656126-D4 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: James Johnson

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1693

James Johnson

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 7 April 1967, an Examiner of the United States Coast Guard at New York, N. Y. suspended Appellant's seaman's documents for 2 months outright plus 2 months on 9 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a messman on board the United States SS U. S. BUILDER under authority of the document above described, Appellant:

(1) On 20 January 1967, wrongfully created a disturbance aboard the vessel at Sattahip, Thailand,

(2) at the same time and place, wrongfully possessed intoxicating liquor aboard the ship,

(3) from 20 through 25 January 1967, wrongfully failed to perform duties at Sattahip, Thailand, and

(4) on 12 March 1967, failed to perform duties at Nordenheim, Germany.

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 U. S. BUILDER and the testimony of the chief mate ot the vessel.

Since Appellant did not appear, there was no defense offered.

At the end of the hearing, the Examiner rendered a 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 two months outright plus two months on nine months' probation.

The entire decision was served on 11 April 1967. Appeal was timely filed on 14 April 1967.

Appellant canceled his appeal on 16 June 1967, but immediately moved to reinstated it and appointed an attorney to act for him. No further perfection of the appeal has been offered.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a messman on board the United States SS U. S. BUILDER and acting under authority of his document.

On 20 January 1967, Appellant became intoxicated from drinking aboard ship. Eventually he became dangerous. The master had him confined in a room about 1600. About seven hours later, with authorization of the master, Appellant was removed from the ship by local police and American Military Authorities. He returned to the ship late on 25 January 1967.

On 12 March 1967, Appellant wrongfully failed to perform his duties when the ship was at Nordenheim, Germany.

BASES OF APPEAL

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

(1) The "sixth" specification "was not referred to under the conclusions of law and therefore should be found as not *pro*ved."

(2) (a) Since Appellant was ill when the charges were *se*rved at New York, and he knew that he would require hospitalization at San Francisco, the hearing should have been held at San Francisco, and

(b) Appellant was denied the right of confrontation with one Montgomery, an alleged assault upon whom was the cause of his incarceration at Nordenheim, Germany, and

(3) The "fifth" specification should not have been found proved because on the "dates" in question, Appellant was in jail ashore on orders of the master.

APPEARANCE: Appellant, pro se. Appellant has, however, nominated Darwin, Rosenthal & Leff of San Francisco, Calif., to accept notices for him.

OPINION

I

As to Appellant's first po*in*t, there was no "sixth" specification in the charge. The last numbered specification is the fifth, the one dealing with the failure to perform duties at Nordenheim, Germany. The Examiner specifically made a "Conclusion of Law" with respect to the "fifth" specification. While

nomenclature of parts of decisions seems to be different among different Examiner, the "Conclusion of Law" referred to here is actually a statement that the fifth specification was found proved.

The assumption must be that Appellant erroneously believed that there was a "sixth" specification. Since the "fifth " was the last specification, and since the Examiner expressly found it proved, there is nothing to consider on appeal on this point.

II

Appellant cannot make a naked assertion on appeal that there should have been a transfer of his case for hearing to San Francisco. The investigating officer testified under oath about the service of charges upon Appellant, including recitation of the possibility of in *absentia* proceedings. Appellant does not even offer an affidavit to support his assertion of ill health. He does not even allege that he asserted his desire to transfer proceedings at the time of service of charges. He states only that he knew that he would have to go to San Francisco (home) and that he went.

Raised for the first time on appeal, this argument has no merit.

Appellant also argues that he was denied due process because he was denied the right to confront witnesses on the question of whether he had assaulted one Montgomery by the holding of the hearing at New York in his absence. The irrelevancy of this argument may most simply be expressed by the statement that Appellant was not found to have assaulted one Montgomery, had not been charged with a specification alleging that he had assaulted Montgomery, and was not found by the Examiner to have committed an offense with which he had not been charged.

III

Appellant's third point is more difficult to resolve. The evidence shows that after the disturbance created on 20 January 1967, during Appellant's period of intoxication, he was first confined in a room aboard the ship for his own safety and the safety of others, at about 1600. About seven hours later, with

specific authorization from the master, local police and American Military authorities removed Appellant from the vessel. It appears that Appellant returned to the ship on 25 January, but too late to perform any duties. It is to be inferred from the testimony of the chief mate that Appellant was in the custody of the shoreside authorities during the period of his absence.

Appellant then served aboard the vessel to the end of the voyage on 30 March 1967.

There is no doubt that if a crewmember of a ship is detained by shoreside authorities for actions committed ashore, his absence from the vessel is without authority. He may be "logged" for the penalties allowed, and he may be found absent without authority in proceeding under R.S.4450.
Such is not the case here.

The absence from the vessel was authorized by the master, even if it, the action, was taken because of Appellant's own misconduct. The question then is whether, during an authorized absence, Appellant confined aboard ship for the same period. The question of absencce withoutt authority would immediately disappear: the only possible question wou,ld be whether the failure to perform during the period was wrongful. It is difficult to see that it could be so held. Under the circumstances of this case, it seems that restraint of Appellant was appropriate only durinig the time of recovery. It would have to be assummed, then, that during the remaining period of restraint (absent a showing of a refusal to work) there would be a seaman ready and willing to go to work , with performance prevented only by the restraint which wolud be seen to be unreasonable. There could not be found a wrongful failure to perform duties.

Here the restraint was by shoereside authorities but under authorization of the master. If there were evidence that Appellant had been convicted by local authorities of a breach of the peace aboard the ship, and been sentinced to four or five days in jail, the picture would be different. Even though the removal from the hip might have been authorized, the dentention for the purpose of serving a sentence would not have been.

Not only is there no evidence of such a conviction and legally enforced restraint, the record is singularly silent as to why 25 January was the date of Appellant's return to the ship. There could be speculation that it was sailing day and that the master wanted him back. It is possible that local authorities no longer wanted Appellant on their hands.

It seems unavoidable, however, that absent proof of conviction, under the circumstances of this case, there could have been no finding that Appellant was absent from the vessel without authority, had he been so charged, nor can there be a finding that he wrongfully failed to perform his duties on the dates of restraint.

This opinion, of course, has no bearing upon any question of wages earned by performance of duties.

Nor does this line of thinking reach to the first date, 20 January 1967, on which Appellant was alleged to have failed to perform duties. On that date he was drunk aboard ship and had to be confined aboard ship. The failure to perform on 20 January 1967 was wrongful. The others alleged in this specification were not.

CONCLUSION

The findings of the Examiner that Appellant wrongfully failed to perform duties during the period 20 through 25 January 1967, must be modified. No reason, however, appears to disturb the Examiner's order.

ORDER

The findings of the Examiner that Appellant wrongfully failed to perform duties during the period 20 through 25 January 1967, are MODIFIED to a finding that Appellant wrongfully failed to perform duties on 20 January 1967.

As MODIFIED, the findings and order of the Examiner, entered

at New York, N. Y., on 7 April 1967, are AFFIRMED.

W.J. SMITH
Admiral, U. S. Coast Guard

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