IN THE MATTER OF LICENSE NO. 360903 MERCHANT MARINER'S DOCUMENT Z-775611-D3 AND ALL OTHER SEAMAN'S DOCUMENT
Issued to: James N. BRYANT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1704

James N. BRYANT

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 14 April 1967, and Examiner of the United States Coast Guard at New Orleans, La., suspended Appellant's seaman documents for six months outright plus six months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as Third Mate on board the United States SS ANADARKO VICTORY under authority of the document and license above described, on or about 4 April 1967, Appellant assaulted and battered with his fists a fellow crew-member, one Bartley M. Dyer.

At the hearing, Appellant did not appear. The Examiner entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of the witness Bartley M. Dyer and voyage records of ANADARKO VICTORY.

The Examiner introduced into evidence a letter relative to the failure of Appellant to appear for hearing.

Since Appellant did not appear for hearing, there was no defense.

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

The entire decision was served on 20 April 1967. Appeal was timely filed on 27 April 1967. Appeal was finally perfected on 26 December 1967.

On 4 April 1967, Appellant was serving as a Third Mate on board the United States SS ANADARKO VICTORY and acting under authority of his license and document while the ship was in the port of New Orleans, La.

On the afternoon of 4 April 1967, ordinary seaman Bartley Dyer was preparing to leave the ship. He went to the crew mess and read minutes of Union meetings. Without Dyer's knowledge, Appellant entered the messroom. When Dyer started to leave, and became aware of Appellant's presence, Appellant moved so as to block the door way. Dyer backed off.

Some Union newsletters were within Appellant's reach. He picked some up and read them. Appellant then grabbed Dyer's T-shirt and said, "You are the prig (?) (R-15, D-2) that started this."

Appellant then struck Dyer in the face with his fists several times. Dyer's head hit a bulkhead and he fell to the deck. Another crewmember entered and stopped the battery.

Appellant was, in Dyer's opinion, intoxicated at the time.

BASES OF APPEAL

This appeal has been taken from the order imposed by the

Examiner. The first notice of appeal, filed by counsel identified below asserted as follows:

(1) The decision is against the weight of the evidence;
(2) The decision is contrary to the regulations and law governing the case;
(3) Appellant could not attend the hearing because of illness;
(4) Appellant was without benefit of attorney at hearing

On 23 May 1967, Appellant addressed a letter in the nature of supplemental appeal, a copy of which he provided to his counsel of record. The communication to the counsel indicated a desire for further consultation with his attorney. The substance of these documents as setting forth grounds for appeal is:

(5) The Examiner was erroneously prejudiced by consideration of Appellant's prior record which contained an erroneous finding in 1958 that Appellant had deserted a vessel, which erroneous finding had prejudiced Appellant not only in the instant case but also in another at Portsmouth, Va., 1963, in which he had been found guilty of misconduct as a result of which his Merchant Mariner's Document had been suspended for three months.

There is material in these letters attacking the validity of the finding of desertion in 1958, on the merits, and material purporting to impugn the testimony of the witness in the instant case.

Appellant has personally submitted a statement of the Master of the SS GLOBE TRAVELER containing a commendatory statement as to Appellant's service aboard his vessel from 20 May to 19 September 1967.

The final document submitted on appeal is dated 25 October 1967, but was not received until 26 December 1967. It attacks the motives and the credibility of the witness Dyer who testified at the hearing.

APPEARANCE: (1) Ross Diamond, Jr. Esq., Mobile, Ala., and
(2) Appellant, *pro se*

OPINION

I

From what can be seen above under "BASES OF APPEAL", it is difficult to see whether Appellant is dealing with an attorney or not. From the original filing of notice of appeal, nothing has been heard from the attorney. Since 23 May 1967, Appellant has dealt directly with the Agency, and since that date no reference to the attorney has been made. Efforts will be made to cope with all the confusions injected into the record.

The first basis for appeal urged by the attorney is that the decision "is against the weight of the evidence". As a general rule this is scarcely an adequate "basis for appeal". Since an Examiner's findings need be based only upon reliable, probative, and substantive evidence, and since the Examiner is primarily responsible for assigning "weight" to the evidence, it cannot be said that an Examiner's decision is "against the weight of the evidence" unless it be found that the assignment of "weight" is so arbitrary and capricious as to necessitate a finding that there was no "substantial" evidence to support it. In this case, the grounds for appeal are doubly weak. There was substantial evidence against Appellant and there was no evidence *in* his favor. The problem of weight of evidence is therefore insubstantial.

III

It is also argued that the decision is contrary to "The regulations and law governing the case." No regulation or law governing the case has been cited. This ground for appeal is completely without merit.

IV

It is next stated that Appellant could not attend the hearing because of illness. The record shows that Appellant was served with charges at New Orleans on 5 April 1967, for hearing at 1400 on

the next day in the same city. Appellant did not appear.

At R-15, after the witness against Appellant had testified, the Investigating Officer stated that he had received a note that a telephone call had been received from Appellant in Mobile to the effect that Appellant could not appear at 1400 on 5 April. No reference was made to "illness".

When the Investigating Officer moved for an adjournment to obtain a deposition from an absent witness, the request was granted and the hearing was adjourned to the following Monday, 10 April 1967. The Examiner's exhibit and his statement of record indicate that he took immediate steps to advise Appellant that the hearing had been adjourned until 1300 on 10 April 1967. The Examiner's exhibit indicated that on 6 April 1967 Appellant was reached by telephone at a bar in Mobile and was advised of the continuance to 10 April, because of the phone call Appellant had made on 6 April. Appellant reportedly replied, "I'll see if I can make it."

Shortly thereafter, according to the Examiner's exhibit, a telephone call to Appellant's home elicited information from his wife that arrangements had been made for Appellant to appear for hearing at New Orleans as scheduled on 6 April 1967, but that he had left home that morning at 0815 "for a shave and a haircut, and had not returned."

Both Appellant and his wife were advised of the time and date of the continuance, 1300, 10 April 1967.

This evidence is hearsay of course, although good, reliable hearsay, the kind of information that reasonable men operate in reliance upon. Even if hearsay, however, it was not a predicate for any finding of fact by the Examiner, but was used only in deciding whether to proceed further in *absentia in* a hearing which had begun in *absentia*.

The Exam*in*er here leaned over backward to help Appellant, in his efforts to communicate with him to advise him of the continuance. Once a hearing is properly begun in *absentia*, there is never a need to apprise a non-appearing party of needed continuances or adjournments. The right to further notice is

forfeited by the failure to act upon first notice.

Appellant's argument that he failed to appear for hearing because of "illness" is without merit.

V

The theory that Appellant was "without benefit of attorney" at hearing is, as a necessary consequence, also to be rejected. He had been informed on service of charges of his right to counsel at the hearing. Since he did not appear for hearing himself, he cannot now complain that he had no attorney. It may be added here that it is not a good ground for appeal, anyway, that the Appellant was "without benefit of attorney" at hearing. The grounds would have to be that he was denied proper opportunity to obtain counsel or that he had not been advised of his right to counsel. Even these grounds would be shaky when Appellant does not appear himself in response to notice.

VI

The foregoing disposes of all general grounds of appeal offered by Appellant *via* his attorney.

VII

On the matters urged by Appellant's letters, it must just be said that attacks on the witness against him are inappropriate. Even if they were in the form of affidavits, which they are not, they would not contravene an Examiner's findings made upon sworn testimony at hearing. There is no offing that "new evidence" is being presented, and there could not be because the matter of Appellant's prior dealings with the witness, Dyer, was known to Appellant before the hearing began.

Insofar as Appellant's letters attack prior findings of misconduct by Coast Guard Examiners in other hearings they have no weight at all. Decisions in these cases, whether initial decisions made by Examiners, or made by me on appeal, are not subject to collateral attack, in proceedings of this sort, once they have become final.

VIII

The last point to be discussed is Appellant's claim that knowledge of his prior record (a finding that he had deserted SS MADAKET in 1958) prejudiced the Examiner against him in this case. (Insofar as Appellant argues that this same prejudice militated against him at the hearing in Portsmouth, Va., in 1963, I consider it not at all. That decision has become final.)

Very recently I have had occasion to point out to Examiners that acceptance of "prior record" is just as much a part of the hearing as is the taking of evidence on the merits and that the Regulations under 46 CFR 137.20-160 and 137.20-175 clearly contemplates both the announcement of findings and the acceptance of prior record in open hearing. Decision on Appeal 1472 and 1686.

The situation in this case is akin to that of Decision No. 1686 with Appellant urging that the Examiner's findings were influenced by his knowledge of Appellant's prior record. There is, however, a distinction between the cases. In No. 1686 there was no reference in open hearing to the obtaining of prior record and nothing in the Examiner's decision indicated when or how he obtained it.

In this case, on the other hand, the Examiner said, at the end of the record made in open hearing: "I'll take this matter under consideration and when I reach my conclusion I will get the prior record from you." (R--32). There is a presumption that Examiner did precisely what he said he would do. This presumption is not disturbed an unsupported assertion of prejudicial knowledge before findings were made.

IX

It is gratifying to know that Appellant has, pending action on his appeal, succeeded in obtaining approbation of the Master of his ship, and it is to be hoped that the Examiner's action in this case has a beneficial effect upon Appellant.

Since this is the fifth time in eight years that Appellant has

been warned or suspended, the outright suspension ordered by the Examiner is still considered appropriate, and the further period placed on probation may have the remedial effect intended by these proceedings.

CONCLUSION

There is no reason to disturb the Examiner's findings or order.

ORDER

The order of the Examiner dated at New Orleans, La., on 14 April 1967, is AFFIRMED.

P. E. TRIMBLE
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 25th day of April 1968.

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