

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-705027-D2
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Patrick OWENS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1706

Patrick OWENS

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 16 May 1967, an Examiner of the United States Coast Guard at San Francisco, Cal., revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as an oiler on board SS METAPAN under authority of the document above described, Appellant:

- (1) wrongfully, from 19 through 23 February 1967, failed to perform duties at Qui Nhon, RVN;
- (2) wrongfully failed to stand a watch at sea on 24 February 1967;
- (3) wrongfully abandoned his watch, and the vessel, on 26 February 1967 at Saigon, RVN;

(4) wrongfully failed to perform duties on 27 and 28 February 1967 at Saigon;

(5) deserted the vessel at Saigon on 1 March 1967.

Additionally, it was found that while serving aboard SS TRANSPACIFIC as an ordinary seaman Appellant wrongfully failed to join the vessel at Vung Tau, RVN, on 31 March 1967.

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 METAPAN and TRANSPACIFIC, a record from the American Consulate at Saigon, and a medical report.

No defense was offered since Appellant did not appear for hearing.

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 revoking all documents issued to Appellant.

The entire decision was served on 29 May 1967. Appeal was filed on 26 June 1967, and matter in support of the appeal was filed on 14 August 1967, but the Examiner's order was not complied with until 12 February 1968.

FINDINGS OF FACT

On all dates in question, Appellant was serving as found by the Examiner and acting under authority of his document, and committed the acts found proved.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that since Appellant was found permanently not fit for duty after the hearing was held the matter should be remanded for further proceedings.

APPEARANCE: Bassett, Donaldson & Hofer, Seattle, Wash., by M.
 Lee Price, Esq.

OPINION

I

In this case the sole ground for appeal is that Counsel has obtained, since the hearing, a diagnosis that Appellant had suffered from paranoid schizophrenia for at least three years prior to the dates of the misconduct committed in the instant case. It is urged that the case should be remanded for the taking of medical evidence so that Appellant could be found not to have committed acts of misconduct because of his incapacity.

To do what Appellant asks for would needlessly complicate procedures. If the Examiner's order and findings were to be set aside, and the case remanded to him, Appellant would have to be charged also with Incompetence for rehearing. If this were done, the Examiner would have the option of again revoking for misconduct, revoking for both misconduct and incompetence, or dismissing the misconduct charges and revoking only for the admitted incompetence. No useful purpose would be served by following this procedure.

The material furnished by Appellant declares that he should be considered "permanently" unfit for sea duty. If these were the grounds for revocation of Appellant's document, he argues, he would be able to regain a document on proof of restored competence, while if the revocation for misconduct stands "he would undoubtedly lose his papers forever. . ."

The facts of misconduct which brought about revocation of Appellant's document were such that he could apply for a new document on or after 12 February 1969 (46 CFR 137.13-1(b)), one year after the order of the Examiner had been complied with. If the case were remanded and a new order of revocation based upon incompetency alone were entered it is doubtful that Appellant could qualify for a new document before that date.

II

At the same time, it must be pointed out that a remand to the Examiner could produce findings of both misconduct and incompetence, since "unfitness for sea duty" is not synonymous with "legal incompetence" such as to render a person not responsible for his acts. (See Decision on [Appeal No. 1677](#)) This might even postpone the date upon which an application for a new document could be filed far beyond 12 February 1969.

III

Some other considerations must be emphasized here.

As to one Official Log Book entry placed in evidence, the Examiner noted that Appellant's reply was, "I am a sick man." The Examiner noted that illness, as an asserted defense to an allegation of failure to perform duties, is a matter of affirmative defense. He said, after reference to the fact that Appellant had failed to appear for hearing and present an affirmative defense, "His mere statement in the log that he was sick is not sufficient to support such an affirmative defense."

The Examiner was entirely correct. The fact that a seaman's reply to a long entry denies its truth does not destroy the efficacy of the entry as *prima facie* evidence of the offense stated. When the matter comes to hearing, an affirmative defense must still be presented. It is true that this gives the person charged the opportunity to reinforce his affirmative defense by pointing to a prior consistent statement, but the affirmative defense must appear in the record, whether the person charged is present for hearing or not, if the *prima facie* case of the log entry is to be rebutted.

Of lesser importance is the fact that the Examiner in this case was presented with affirmative evidence that Appellant had been found fit for duty during the course of the misconduct alleged.

To remand this case to the Examiner for resolution of an issue not directly placed him (but upon which he had heard evidence), when appellant chose to absent himself from the hearing would open

the door to so many possibilities as to frustrate the hearing procedure completely.

ORDER

The order of the Examiner dated at San Francisco, Cal., on 16 May 1967, is AFFIRMED.

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

Signed at Washington, D. C., this 3rd day of July 1968.

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