IN THE MATTER OF LICENSE NO. 344076 MERCHANT MARINER'S DOCUMENT
Z-14747 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: William R. WILLS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1710

William R. WILLS

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 November 1967, an Examiner of the United States Coast Guard at New Orleans, La., suspended Appellant's seaman's documents for two months upon finding him guilty of misconduct. The specification found proved alleges that while serving as a third mate on board SS NORMAN LYKES under authority of the document and license above described, on or about 31 December 1967, Appellant wrongfully failed to perform his regularly assigned watch duties from 2000 to 2400, at sea, because of intoxication.

At the hearing, Appellant was represented by professional counsel but did not appear in person. Appellant's counsel entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of SS NORMAN LYKES.

In defense, Appellant's counsel offered in evidence a deposition taken from Appellant on written interrogatories.

After 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 two months.

The entire decision was served on 22 November 1967. Appeal was timely filed on 6 December 1967. No further supporting documents have been filed since that time.

FINDINGS OF FACT

On 31 December 1966, Appellant was serving as a third mate on board the SS NORMAN LYKES and acting under authority of his license and document while the ship was at sea.

At 2000 on the date in question, Appellant reported to the bridge to assume the watch in an intoxicated condition. The master ordered Appellant to his quarters, where the master found, in Appellant's locker a case full of empty beer bottles of a Japanese brand.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the evidence does not support the finding that Appellant was under the influence of intoxicants because:

(1) There is no evidence that anyone saw Appellant partake of any alcoholic beverage, nor

(2) That anyone noticed odors of alcoholic beverage on Appellant's breath.

APPEARANCE: Kierr and Gainsburgh, New Orleans, La., by Eldon E. Fallon, of council.

OPINION

I

The bases for appeal *in* this case are entirely without merit. Just recently (Decision on Appeal No. 1700), it was pointed out that failure to supply one or another of the details of evidence admissible from lay witnesses to support an opinion of intoxication does not invalidate other evidence of intoxication and preclude a finding that intoxication existed.

In this case there was an immediate determination made by the master that Appellant was intoxicated when he reported for his 2000-2400 sea watch on 31 December 1966. When a proper log entry was made at noon the next day (apparently after Appellant had successfully stood his 0800-1200 watch), and was read to Appellant, his answer was "No comment." He did not deny the allegation of the master.

But his own testimony as received by the Examiner belies the bases of appeal, because Appellant expressly admitted having drunk five bottles of San Miguel (a Philippine beer) on board the vessel that day and at least two bottles of Japanese beer ashore in a hotel. With this defense it is irrelevant that there is no evidence that "anyone saw Mr. Wills partake of any alcoholic beverage nor.... that anyone noticed odors of alcoholic beverage on Mr. Will's breath."

Although the log entry alone would have sufficed to support the Examiner's findings against the urgings of the appeal, Appellant's own testimony renders the bases of his appeal useless.

II

While the bases of appeal here must be rejected, it must not be allowed that all of the procedures undertaken in this case are approvable.

Appellant did not appear at the time and place given in the notice for hearing, presumably, from the record, because the ship

to which he was on that date articled was leaving a shipyard two hours after the scheduled opening of the hearing. A counsel appeared for him, but Appellant never appeared before the Examiner at any stage of the proceedings. Fortunately, somewhat as in the case in Decision on Appeal No. 1677, the lack of authorization for counsel to act was cured by Appellant's reference to his counsel in the "deposition" taken at Yokohama two months later.

When it appeared that Appellant might be available within the next day or two to testify at New Orleans in his own behalf, and that the Examiner would be absent from that city for two days, the Examiner gave leave to take Appellant's testimony by deposition on written interrogatories, and for the record compiled to be submitted to him on the third day later, or to take Appellant's deposition at a foreign port if his ship departed too soon to permit action at New Orleans.

In the colloquy concerned with the taking of Appellant's testimony at New Orleans, during the absence of the Examiner but before Appellant's departure from that city, the Investigating Officer asked a question, and was answered, thus:

"INVESTIGATING OFFICER: Could we have the power of subpoena for this man?

"EXAMINER: Sure, you can subpoena him in here if you want. If it's convenient--if you've got time.

"MR. FALLON: Well, that's the problem, Mr. . If he's on the vessel--if he would have to miss the voyage.

"EXAMINER: Oh, no, no, no, no, no, not to take him off the ship....." (R-8)

An arrangement was made to reconvene three day thence, Thursday, 29 June 1967, at which time the Examiner was to receive either the deposition of Appellant or the testimony of Appellant directly. The record is silent until 10 October 1967, at which time a "deposition" of Appellant, taken at Yokohoma, Japan, on 14 August 1967, was received in evidence.

III

As has been mentioned, the acceptance of a "counsel" for a non-appearing person charged is not in question here because Appellant later ratified the assumed authority. Whether a person charged may fail to appear at all, but only send a "counsel," without forfeiting appearance, and permitting proceedings in *absentia* to occur, is not decided here. The Examiner did proceed and the record presented on appeal shows no evidence of prejudice to Appellant.

What could be troublesome here is the theory that the testimony of a person charged may be taken by deposition and may be compelled by subpoena.

I think that the Examiner's "Oh, no, no, no, no, no, not take him off the ship....," quoted above, is an implicit repudiation of his earlier statement that the person charged was amenable to a subpoena to testify in the first place. If Appellant has been amenable to a subpoena to leave the vessel and appear at the Custom House, New Orleans, he would have been amenable to a subpoena which reasonably would "take him off the ship."

The fact is that a person charged is never a compellable witness in his own hearing (46 CFR 137.20-45(a) Item 4). He could not have been amenable to a subpoena to appear at the custom House, New Orleans, even if he h*ad* been there during the absence of the Examiner from that city, for the purpose of taking a deposition. He would not have been amenable to a subpoena to testify even after the Examiner returned to that city so as to testify in person.

Also on this point, it is noteworthy that the record does not reflect that the hearing reconvened on Thursday, 29 June 1967, whether for presentation of Appellant's "deposition", or appearance of Appellant before the Examiner to testify in person, or for other arrangements to be made.

The exhibit offered for Appellant on 10 October 1967 shows that his testimony was taken at Yokohoma, Japan, on 14 August 1967, pursuant to an "order" appears in the record. How a person charged could be "ordered" to appear for answers to interrogatories propounded by a counsel not yet authorized to appear for him I do

not know. Here again, Appellant's certification of his counsel during the interrogatories amounts to a waiver of his privilege not to testify.

More fundamentally, I do not think that the regulations at 46 CFR 137 permit that a person charged may be permitted to testify, in his complete absence from the hearing, by deposition. There can be no question that he cannot be compelled to testify, even if his counsel of record authorized his testimony under such conditions if he chooses not to testify.

Deposition testimony is authorized under 46 CFR 137.20-140.

I do not think that the word "witness" in this regulation contemplates a "person charged" as a "witness." For one important thing, the section declares that the order to take the deposition of a witness should be accompanied by a subpoena. Since, as pointed out before, a person charged is not amenable to a subpoena ad *testificandum*, it is clear that he is not within the intent of 46 CFR 137.20-140 for the taking of depositions.

There is no authority, there is no precedent, and there is no good reason to take the testimony of a person charged by deposition on written interrogatories. Stipulations that testimony already given by the person charged in a former proceeding will be received in evidence are easily understandable. But the taking of testimony of the person charged by deposition in a proceeding before an examiner cannot be understood.

The procedure adopted in this case permitted the person charged all the advantages of non-appearance at the hearing (continued and undisturbed sailing), required the Coast Guard to locate the person charged at a place where a "deposition" could be taken, and permitted him to testify outside the presence of the Examiner.

CONCLUSION

The Examiner's findings are supported by reliable, probative, and substantial evidence.

ORDER

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

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

Signed at Washington, D. C., this 21st day of May 1968.

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