IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-491279-D3
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Lawrence Bernard KELLY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1712

Lawrence Bernard KELLY

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 19 January 1968, an Examiner of the United States Coast Guard at Long Beach, Cal. suspended Appellant's seaman's documents for nine months on eighteen months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as an AB seaman on board SS SEATRAIN NEW JERSEY under authority of the document above described, on or about 30 November 1967, Appellant wrongfully failed to perform his assigned duties between 0800 and 1700 at Vungtau, Vietnam, and, on 26 December 1967, wrongfully failed to join the vessel on its departure from Yokohama, Japan.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of guilty to the charge and each specification.

The Investigating Officer introduced in evidence certain voyage records of SEATRAIN NEW JERSEY.

In defense, Appellant offered evidence in extenuation.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications had been proved by plea. The Examiner then entered an order suspending all documents issued to Appellant for a period of nine months plus nine months on eighteen months' probation.

The entire decision was served on 22 January 1968. Appeal was timely filed 29 January 1968, and perfected on 15 April 1968.

FINDINGS OF FACT

On all dates in question, Appellant was serving as AB seaman on SS SEATRAIN NEW JERSEY and acting under authority of his document.

On 30 November 1967, Appellant wrongfully failed to perform his duties aboard the vessel at Vungtau, Vietnam, from 0800 to 1700.

On 26 December 1967, Appellant wrongfully failed to join the vessel at Yokohama, Japan.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The appeal is directed only to the findings on the first specification.

It is urged that Appellant did not properly understand his right to counsel at the hearing. Presumably it follows from this the entire proceedings should be set aside.

The only specific attack is upon the findings on the first specification. As to this it is said that:

(1) Appellant was not represented by counsel because of ignorance;

(2) The voyage records introduced into evidence on the first specification were not sufficient to support a *prima facie* case;

(3) The Examiner, *sua sponte*, should have changed the plea of "guilty" to "not guilty" on seeing that the evidence did not constitute a *prima facie* case.

The relief asked is that portions of the Examiner's decision which are based upon the matters in the first specification should be reversed and "the decision accordingly changed." This plea for relief is construed to mean that the first specification should be dismissed and that the Examiner's order should be amended, by reduction in terms, to reflect a finding of "proved" on only the second specification.

APPEARANCE: Bodle, Fogle, Julber and Reinhardt, Long Beach, Cal. by David N. Rakov, Esq.

OPINION

I

Between 1960 and 1967, the year of the instant hearing, there had been six earlier actions under R.S. 4450 against Appellant's document. They had ranged from admonition, through suspension on probation, to outright suspension. The last of these actions had taken place in January 1966. On occasion, after finding fifteen specification of misconduct proved, the Examiner gave only a suspension of six months plus six months on twelve months' probation. The date of this order was 3 January 1966.

It is seen that the first act of misconduct in the instant case escaped being a violation of probation by only about four months, the second only by five months. Even if the Examiner's findings should have to be set aside as to the first specification his Order would not be touched because as a seventh action against Appellant's document in less than eight years it would still have to be considered lenient.

Insofar as the specific relief asked by Appellant is

concerned, this would dispose of the matter. But Appellant's argument, possibly unwittingly, goes to the validity of the entire proceeding. If the finding of "proved" as to the first specification should be set aside, as Appellant now asserts, because of right to counsel was not properly explained to or understood by him, then proceedings as to both specifications should be set aside. It is therefore appropriate to discuss and resolve the issue raised by Appellant in terms applicable to the entire hearing and not just in terms of reversing the findings on the first specification.

II

Appellant states that the log entries produced were insufficient to establish a *prima facie* case. Whether they did or not need not be decided here. *Arguendo*, for Appellant, it may be assumed that they did not, although if the issue were presented I might hold that they did.

There was no requirements after the plea of "guilty" to the specification alleging "failure to perform" that any evidence be adduced. The Investigating Officer gratuitously introduced documentary evidence from the ship's voyage records. Possibly this was to give the Examiner some collateral information as to the background or circumstances of the event. Possibly this practice in the case of a "guilty" plea should not be encouraged, especially if it adds nothing of great significance to the record and if it misleads appellants into thinking that rights are other than what they are and correct procedures other than what they now are.

Appellant asserts that the record does not show that witnesses were available to be called in support of the specification. The implication is that if the log book entry had been rejected as establishing a *prima facie* case the specification would have been dismissed.

This is idle speculation. If it were true that a live witness were not immediately available, there are always the possibilities of postponement to obtain a witness or the taking of testimony by deposition.

III

Appellant's brief implies that Appellant's proceeding without counsel was uninformed act. It is said:

> "The transcript reflects that appellant was told once that he had the right to have counsel. However, immediately thereafter, he was told `Do I gather from the fact that you are not represented by counsel that you wish to represent yourself?' Appellant then replied, `Oh, Oh, did you - - I'm sorry.' The examiner then stated, `Yes. I said, Do I gather from the fact that you're not represented by counsel that you wish to represent yourself?' (Transcript, page 3, lines 14-16). Appellant replied, `Well, I was advised to ask for a postponement until I got a lawyer, but I decided against it. I decided to just go ahead with it and represent myself.' (Transcript, page 3, lines 17-19).
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> "In Page 3 of the Transcript it can be seen from this brief conversation that appellant probably did not hear the first admonition offered by the hearing examiner. His reply illustrates that. All the examiner repeated after that was the fact that he gathered the appellant wished to represent himself. Appellant indicated that he had previously advised to ask for a postponement and had decided against it. However, this obviously was some previous advice. Every indication is that he did not hear the hearing examiner's admonition. Of course, the hearing examiner uttered the proper statements as to appellant's rights before commencing with the hearing but implicit in the requirement that the rights be given is a requirement that appellant hear and understand them."

This says that Appellant was advised only once of his right to counsel, when the Examiner spoke to him at R-3. However, at R-7 the Investigating Officer's statement, uncontradicted, was that at the time of service of charges he informed Appellant of his rights. The "rights," of course, include the right to counsel. Appellant's own statement, quoted by his counsel on appeal, admits that before hearing he had known of his right to counsel, of his right to ask for a postponement to obtain counsel, and his personal decision not to do so. The probability that the Investigating Officer, with

knowledge of Appellant's extensive prior record, was the one who advised him to ask for a postponement need not be explored.

Appellant was not denied information as to his right to counsel nor denied opportunity to obtain counsel had he descried one. Ingenuity of argument on appeal that a certain counsel, had he been present for hearing, might have entered a different plea or succeeded in delaying proceedings while additional evidence was obtained, is not sufficient to negate the effect of an informed "guilty" plea in these proceedings.

ORDER

The order of the Examiner dated at Long Beach, Cal., on 19 January 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.

INDEX (KELLY)

Counsel

right to, effectively explained to person charged

Guilty plea

Prima facie case not needed

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