

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-1165532-D2
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert H. STORMER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1714

Robert H. STORMER

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 3 March 1967, an Examiner of the United States Coast Guard at San Francisco, Cal., suspended Appellant's seaman's documents for two months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a wiper on board the United States SS ANNISTON VICTORY under authority of the document above described, on or about 21 November 1966, Appellant wrongfully absented himself from the vessel and his duties at Subic Bay, P. R., and on 22 November 1966, at sea, wrongfully failed to perform his assigned duties. The first specification, as found proved by the Examiner, was limited to failure to perform duties after 1345, with no finding that Appellant was, during the period of non-performance of duty, actually absent from the vessel.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of ANNISTON VICTORY and the testimony of the Chief Engineer.

In defense, Appellant offered in evidence his own testimony, and that of the other wiper aboard the vessel.

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

The entire decision was served on 20 July 1967. Appeal was timely filed on 16 August 1967 and was perfected on 15 April 1968.

FINDINGS OF FACT

On 21 and 22 November 1966, Appellant was serving as a wiper on board SS ANNISTON VICTORY and acting under authority of his document.

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 Examiner's findings.

APPEARANCE: Appellant, *pro se*.

OPINION

I

With respect to the occurrences of 21 November 1966, the Examiner found that while the specification alleged wrongful absence from the vessel and duties for the entire day the failure to perform duties could be found only from 1345 on. He found that Appellant was prevented by storm conditions from returning to the

ship through no fault of his own, but that Appellant had wrongfully failed to turn to after his return to the ship at 1345.

There is no basis in the record for this precise finding of time. The evidence *against* Appellant was that *he* returned to the ship at 1410. Also, Appellant testified that he did turn to on his return to the vessel, but neither matter is crucial in consideration of this case. The Examiner theorized that a seaman who is "logged" a day's pay before the day is over does not shed his responsibility to work the rest of the day. Whether the fact that 46 U.S.C. 701 authorizes a forfeiture of two days' pay per day of non-performance need not be considered here, nor need consideration be given to the Examiner's theory as a whole. (It must be noted that no question of failure to obey a lawful order is involved here.)

The fact is, and this is not affected by Appellant's assertion that he did turn to after he returned to the ship, there is not a shred of evidence that he failed to turn to after he came back. The only evidence produced was the Official Log Book Entry. This entry is dated 21 November 1966 and the only times recorded therein are the hours 0800-1410. There is no assertion in this entry that Appellant did not turn to after he returned to the vessel.

In the absence of any ship's record of activity, or the lack of it, after 1410, and in the absence of any live testimony that Appellant failed to turn to after coming aboard, the distinction made by the Examiner, whatever theory is involved, does not support a finding that from 1345, 1410, or any other hour after his return to the ship, Appellant failed to perform any duties.

II

As to the alleged failure to perform duties on 22 November 1966 the evidence is no more substantial. The log entry here was not without live testimony support; the Chief Engineer testified as an eyewitness to Appellant's dereliction of failure to perform duties.

It may be made clear, at this point, that the evidence is uncontroverted that Appellant's duties on the day in question were to complete his "sanitary duties" (cleaning of engineroom personnel quarters) between 0800 and 1000. There is also uncontroverted evidence that the wipers' "break" came from 0945 to 1020.

It is a reasonable inference from this that Appellant could not, at his peril, commence his break between 0945 and 1000 unless his "sanitary duties" had been completed.

It is also uncomfortably clear that the sole evidence against Appellant in this matter was that he was found asleep in his bunk at some time between 0800 and 1010. This he has seized upon in his appeal, while pointing out some discrepancies in the evidence against him.

The log entry made by the master asserts that the master himself saw Appellant asleep in his room "while on duty" at 0955. The log entry states that the master himself was "checking on" Appellant. It records that the master reported to the Chief Engineer thereupon went and made a personal check upon Appellant.

The live testimony of the Chief Engineer was that he had received a report from the first assistant that Appellant was not at work. The Chief then testified that he went and found Appellant asleep in his bunk, before break, and that he reported this fact to the Master with the avowed intention of having Appellant logged. On cross-examination, the Chief pinpointed the time at which he found Appellant asleep as 1010.

The discrepancies in this testimony shock the conscience of the reviewer, and undermine the statutory validity of the log entry.

First, the testimony of the Chief, as eyewitness, places the sleeping of Appellant during the "break" period. Discrepancy between the live testimony of the one witness and that of the voyage records need not bind an examiner to reject all of the relevant testimony. But here, the admission in the live testimony that Appellant's sole dereliction was that of sleeping during a "break", leaves the sole evidence against Appellant on this point

that of the log entry. In evaluating the weight of the log entry it is of no matter that the Master says that he observed the sleeping Appellant at 0955 and reported the fact to the Chief Engineer, while the Chief Engineer testified that the first assistant reported the sleeping in to him and he advised the Master some time after 1010.

The log entry itself is so deficient as not even to allege that Appellant failed to perform any duties. It says merely that the Master saw Appellant asleep when he should have been "on duty."

An allegation that a watchstander failed to perform duties could be supported by evidence that he was found asleep during his watch period. But Appellant was not a watchstander, and there is ample evidence that his "sanitary duties" merely had to be completed by a certain hour. On the date in question the hour was 1000. Since the log entry does not assert that the duties had not been completed by 1000 but only that Appellant had been found asleep at 0955, the entry does not constitute evidence that Appellant had failed to perform any duties at all.

CONCLUSION

The evidence does not support the findings of the Examiner.

ORDER

The order of the Examiner dated at San Francisco, Cal., on 3 March 1967, is VACATED. The findings are SET ASIDE. The charges are DISMISSED.

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

Signed at Washington, D. C., this 8th day of July 1968.

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