IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-1232312
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Roger EVANS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1719

Roger EVANS

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 30 October 1967, an Examiner of the United States Coast Guard at Long Beach, Cal. suspended Appellant's seaman's documents for one month outright plus six months on twelve month's probation upon finding him guilty of misconduct. The specifications found proved alleged that while serving as a crew messman on board SS BRAZIL VICTORY under authority of the document above described, Appellant:

(1) on or about 21 September 1967 at Saigon, S. Vietnam, wrongfully disobeyed a direct order to clean his assigned duty station;

(2) on the same date wrongfully failed to perform his assigned duties from 1000 through the remainder of the day;

(3) on or about 22 September 1967 wrongfully disobeyed a direct order of the master to clean his assigned duty spaces;

(5) on or about 23 September 1967, at Newport, S. Vietnam, wrongfully failed to perform his duties;

(6) on 24 September 1967, at Newport, S. Vietnam, wrongfully failed to perform duties from 0600 to 0710: and

(7) on 22 September 1967, at Saigon, disobeyed a direct order of the master to put out a cigarette and stand while an Official Log Book entry was read to him.

The fourth specification, which alleged that Appellant had disobeyed a direct order of the master to remain on board during normal working hours on 22 September 1967, at Saigon, was found "not proved."

At the hearing, Appellant was represented by non-professional counsel. Appellant entered a plea of not guilty to the charge and the second, fifth and sixth specifications, and pleaded not guilty to the first, third, fourth, and seventh specifications.

The Investigating Officer introduced into evidence certain voyage records of BRAZIL VICTORY.

In defense, Appellant offered no evidence, but his counsel made a plea in mitigation, pointing out than this was Appellant's first voyage as a merchant seaman.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and above mentioned specifications had been proved. The Examiner then served a written order on Appellant suspending all documents issued to him, for a period of one month outright plus six months on twelve months' probation.

The entire decision was served on 6 November 1967. Appeal was timely filed on 27 November 1967, and was perfected on 8 January 1968.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a crew messman on board SS BRAZIL VICTORY and acting under authority of his document.

Appellant's regular working hours were 0600-1000, 1100-1300, and 1600-1800.

On 21 September 1967, when the vessel was at Saigon, the master made an inspection of the sailors' messroom, an area assigned to Appellant for cleaning. At 0900 the master found the area, as he had often before, in an extremely unsanitary condition. Appellant had already stopped work.

The master instructed the Chief Steward to pass to Appellant his order to have the area thoroughly and properly cleaned by 1700. The Chief Steward passed the order to Appellant, who made a vulgar and contemptuous reply and left the ship. Appellant did no more work that day.

Some time before 1300 on the next day, Appellant was called before the master for reading of the "logging". He was drinking a "beer" and smoking. When the master told him there was to be no drinking or smoking, Appellant finished drinking the beer but refused to put out his cigarette. He also refused to stand for the reading of the log entry. He was dismissed, but about a half hour later, the log reading was accomplished. Appellant was noisy, but offered no reply and refused to sign the log.

At about 1300 that day, the master ordered Appellant to turn to for the evening meal, to be abroad during regular working hours, and to keep the crew mess clean. Appellant left the ship and did not return that day or the next. He returned aboard at Newport at 0710 on 24 September.

When "logged" on this occasion, although he signed the log, his reply to the reading was, "No comment, sir."

Appellant left the ship by mutual consent at Los Angeles on 24 October 1967.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is principally urged that Appellant's failure to have professional counsel at his hearing was a fault requiring reversal. More specifically it is said that:

(1) Appellant was misled by union into belief that his counsel was a professional lawyer;

(2) Factual matters of illness would have been introduced in evidence if Appellant had had proper counsel;

(3) Appellant was instructed by a Coast guard officer to sign the second Official Log Book entry read to him, thereby admitting "guilt";

(4) Appellant did not know the meaning of a plea of "guilty", and professional counsel would have advised a plea of "not guilty" to all specifications.

APPEARANCE: Neighborhood Legal Assistance Foundation, San Francisco, Cal., by Herbert Donaldson, Chief Counsel, and David I. Clayton, Senior Staff Counsel.

OPINION

I

The first and most important point to be considered is that Appellant claims to have believed that his union would provide an attorney for him at hearing but that the union representative was not in fact an attorney.

The record shows clearly that Appellant had been advised that he could have a lawyer as counsel, by both the Investigating Officer who served the charges and by the Examiner at the outset of the hearing. The Examiner specifically noted, in Appellant's presence, that the union representative was "not a professional counsel" and thereupon elaborated upon his explanations. R-8 Later, the Examiner stated directly to Appellant, "Mr. H[ ]

is not a lawyer," and again gave extra explanation of his procedure. R-11

Here, there is not alleged a denial of right to counsel by the Coast Guard, or a failure of the Coast Guard to advise Appellant of his right to have lawyer-counsel. It is said that Appellant "thought" his union would provide a lawyer.

What dealings seaman may have with their unions are, under normal condition, outside the province of the Coast Guard. But if Appellant urges here that his union failed him, the record is conclusive that the Coast Guard examiner hearing the case twice made pointed reference to the fact that counsel was not a professional lawyer and both times expanded upon his explanations for that reason.

No valid basis for reversal on appeal is shown here.

II

It follows, then, that all contentions of Appellant that he would have introduced other factual matters known to him at the time of the hearing if he had not been misled by the union and if he had had a lawyer available, must be rejected.

It may be noted that the belated claim of Appellant is that he would have proved "illness" as the cause of his actions from 21 through 24 September 1967, and he supports this by assertion that after the termination of the voyage he was subjected to extraction of 18 teeth and was still, as of 5 January 1968, under treatment at U.S.P.H.S. Hospital, San Francisco.

Even if "illness" could have been, and had been, submitted to the Examiner as a "defense" at hearing, it is believed that the defense would have had to be rejected anyway, since the voyage records indicate that Appellant had no apparent problems with performance of his duties from 24 September 1967 to his departure from the ship on 24 October 1967 at Los Angeles.

III

Appellant's brief makes a point of stating that at the time of

his second "logging" there was a Coast Guard officer present, who "informed Evans that he had to sign, thus indicating his guilt." There is nothing in the record to support this assertion, but it must be made clear that the act of signing a log entry by a seaman is not an acknowledgement of "guilt". The signature is merely a "receipt" that the log entry has been read to him and a copy provided. In connection with a "logging" an admission of "guilt" by a seaman could not be inferred from his signature alone, but from a direct admission recorded when he is given his opportunity to reply or when he fails to make a reply and later, in a proceeding such as this, advances a defense that would have been the basis for a natural or instinctive reply to the charges made against him in the log entry.

The traditions of the sea, and the statutes themselves (46 U.S.C. 201-203, 701-702), have vested the master with the authority if an initial magistrate. The "logging" is the seaman's first opportunity to be "heard."

Appellant's brief provides a copy of a "master's certificate" dated 24 October 1967, the date on which Appellant signed off the articles. The seaman's complaint of symptoms for which he requested treatment is specified to be "general check up."

"Illness" is the kind of defense that a seaman would ordinarily urge at his "logging" hearing before the master. This supports the view expressed in II, above, that introduction of evidence of later illness before the Examiner at the hearing would scarcely have influenced a finding based upon a contemporaneously made legal record in which "illness" was not urged.

It is emphasized, however, that the import of the two log entries used here is not affected by the fact that Appellant signed one and not the other.

IV

It is also urged that Appellant did not understand the meaning and effect of his "guilty" pleas, and that had he had professional counsel at hearing he would have pleaded "not guilty" to all specifications.

The record shows that before the Examiner called for pleas to

the specifications he very carefully explained to Appellant the meaning and effect of a plea of "guilty". R-4. When the first specification was read to Appellant, he said plainly, "Sir, I cannot plead guilty." R-6. At the same place, the record shows that as to the second specification, after the Examiner again explained that the plea must be "guilty" or "not guilty", the Examiner said:

"Now, if you don't feel that you're guilty, I suggest you enter a plea of not guilty."

Appellant said, "I see," and consulted privately with his counsel. He then said, "guilty charge on that."

It may well be that Appellant's counsel on appeal might have managed the hearing proceedings differently, but the record is plain that Appellant was clearly advised of the meaning and effect of a plea of guilty , and exercised a choice as to what he could plead guilty to and as to what he could or should not plead guilty to. He cannot say now, on this record, that he did not know what he was doing with respect to his pleas.

V

The Examiner very carefully examined the original fourth specification, alleging disobedience of an order "to remain aboard during your normal working hours by leaving the ship and not returning during the rest of the working day." He compared it with the allegations of the original third specification which alleged failure to obey a direct order of the master to clean "assigned duty station" on the same date.

The Examiner "concluded" that Appellant wrongfully disobeyed the order alleged in the third specification and found that specification "proved." He concluded also that:

> "There was insufficient evidence to establish that the person charged ... did ... wrongfully disobey a direct order from the vessel's master to remain on board during his normal working hours by leaving the ship and not returning during the rest of the working day, as alleged in the fourth specification which is hereby found not proved and dismissed."

But in his Opinion, the Examiner said, "The disobedience of the order to perform his duties alleged in the fourth specification was not, in the opinion of the Examiner, anything more than a repetition of his failure to perform his duties on the same date. It was for this reason that the fourth specification was dismissed."

It may be noted here that there is a discrepancy between the opinion and the conclusion. The opinion actually says that the facts alleged in the specification were proved but that the specification was duplicitous of matters alleged in another specification. Thus the conclusion should not have been reached that "There was insufficient evidence to establish" the facts alleged in the fourth specification. The facts were established, and duplicitousness is the only valid reason for dismissal of the specification.

The Examiner's reasoning is possibly best set out in the record of hearing when he himself raised the question as to the fourth specification, and observed that the gravamen of the offense was actually the failure to perform duties, since the direct order had been no more than an order to do what Appellant was obligated to do anyway, and thus the disobedience to a "direct" order was only an aggravating circumstance. R11, 12.

With this reasoning I am inclined to agree, at least as it is limited to the spelling out of offenses of misconduct in these proceedings. (This is not to be construed as implying that the master's penalty powers under the fourth and fifth items of 46 U.S.C. 701 are in any way diminished by this theory.)

But looking to the first and second specifications, both of which were proved, I am also of the belief that the same theory applies.

The Examiner's findings as to these two specifications are quoted:

"On 21 September 1967 while the BRAZIL VICTORY was at Saigon, the person charged was ordered by the Master to thoroughly and properly clean the crew messroom, which the person charged had

failed to maintain in a satisfactorily sanitary condition. The person charged replied with a vulgar expression stating he was going ashore which he did at 0900, failing to perform his regularly assigned duties from 1100 to 1300 and 1600 to 1800 hours on 21 September 1967."

The evidence upon which this finding is based is the entry in the Official Log Book:

". . . At 0900 this morning, master inspected the sailors messroom and found it in an extremely unsatisfactory sanitary condition, and Evans already knocked off although his working time not up until 1000 hours. Assigned working has being [sic] 0600/1000 1100/1300 1600/1800. Chief Steward immediately passed my orders . . . to Evans that his station should be thoroughly and properly cleaned by 1700 hours, else Evans would answer to Master. Evans reply was "[**** **]" "I'm going ashore," whereupon he walked off the job and failed to turn to again this date---. . ."

This distinction may be noted here that the "direct order" specified here was not alleged to be that of the master, although evidence shows that it originated from him and was transmitted via the Chief Steward, and it was to this person, not the master that the "vulgar expression" was directed. The transmittal of the order was at about 0900, during Appellant's normal working hours (although he had already "knocked off"), and it ordered no more than that he complete his regularly assigned duties before the end of his regular working day.

If this order, or the other already discussed, had been for Appellant to remain aboard and work during other than normal working hours, to correct an intolerable situation which his neglect had caused, a different situation would exist.

But since the "direct order" of 21 September 1967 was to "clean your assigned duty station," I can perceive no more than an order identical in content to that of 22 September 1967 of which the Examiner found the disobedience to be an aggravating circumstance,not an independent offense.

CONCLUSION

I conclude that the original fourth specification should have been dismissed by the Examiner as "not proved," but should have been dismissed as duplicitous of another proved allegation. For the same reasons as given at the hearing by the Examiner with respect to the original fourth specification I consider that the first specification should have been dismissed as duplicitous of the second, as merely asserting disobedience to an order to do what Appellant was already required to do and which the second specification, as proved, shows that he did not do.

The fact that Appellant's conduct required the master's personal attention in these instances is definitely believed to be aggravation, and justifying the order of the Examiner as issued.

ORDER

The findings of the Examiner as to the original first specification are SET ASIDE, and that specification is DISMISSED as duplicitous. The findings of the Examiner, as MODIFIED, and the order, dated at Long Beach, Cal., on 30 October 1967, are AFFIRMED.

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

Signed at Washington, D. C., this 26th day of July 1968.

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