IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-947185-D3
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert B. ARNOLD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1727

Robert B. ARNOLD

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 1 February 1967, an Examiner of the United States Coast Guard at Charleston, S.C., suspended Appellant's seaman's documents for twelve months outright plus six 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 AMERICAN REPORTER under authority of the document above described, Appellant:

(1) on or about 16 December 1966 created a disturbance on board at Bremerhaven, Germany, because of intoxication;

(2) on or about 22 December 1966, wrongfully absented himself from the vessel at Liverpool, England;

(3) on or about 24 December 1966, wrongfully failed to perform duties at sea because of intoxication;

(4) on or about 6 January 1967, wrongfully absented himself from the vessel at Antwerp, Belgium;

(5) on or about 7 January 1967, wrongfully failed to perform duties while the vessel was in the Schelde River, Belgium; and

(6) on or about 19 January 1967, wrongfully failed to join the vessel at Wilmington, N. C.

At the hearing, Appellant failed to appear. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of AMERICAN REPORTER.

No evidence was produced in defense.

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

The entire decision was served on 9 March 1967. Appeal was timely filed on 10 March 1967, and perfected on 29 March 1967.

FINDINGS OF FACT

On all dates in question, Appellant was serving as an AB Seaman on board SS AMERICAN REPORTER and acting under authority of his document.

On 16 December 1966, Appellant wrongfully created disturbance aboard the vessel at Bremerhaven, Germany. This necessitated his confinement under guard until he was restored to duty on 18 December 1966 while the vessel was at sea en route to Liverpool, England. On 22 December 1966, Appellant was absent from the vessel without authority at Liverpool.

On 24 December 1966, Appellant wrongfully failed to perform his duties at sea, by reason of intoxication.

On 6 January 1967, Appellant wrongfully absented himself from the vessel at Antwerp, Belgium. Having rejoined the vessel in the locks, he was unable, because of "hangover" to perform his duties while the vessel was transiting the Schelde River toward sea on 7 January 1967.

On 16 January 1967, at Wilmington, N. C., Appellant obtained a "master's certificate" to appear at a U.S.P.H.S. facility. He did not return to the vessel until twenty four hours later, when he appeared, intoxicated, and demanded to be "paid off." When mutual release was refused, Appellant left the ship without authority and was not seen again until he appeared on 27 January 1967 to be "paid off" at Charleston, S. C.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

(1) Appellant was denied due process because he was not given sufficient time after service of notice of the time and place of hearing to obtain counsel, obtain witnesses, or to prepare his defense;

(2) "The investigating officer and hearing Examiner erred in denying Appellant's request for a charge of venue when reasonable cause appeared therefore.";

(3) "The Hearing Examiner erred in finding Appellant guilty of the charge in specification number two on the ground and for the reason that Appellant was not timely furnished with a copy of the entry in the vessel's log. . .before the vessel's arrival at its next port of call, to wit: Liverpool, England;" and

(4) The Examiner erred in finding the sixth specification proved for the reason that Appellant was not timely

apprized of the charge or given a copy of the charge (under 46 U.S.C. 702) prior to the time the vessel left Wilmington, N.C.

APPEARANCE: Gray, Frederickson and Heath, Portland, Oregon, by Eugene D. Cox, Esq.

OPINION

I

Appellant's first point is blurred by his second point, but effort is made to treat it as a separate proposition of appeal.

Appellant's position would be better taken if he had appeared for hearing and been denied time by way of postponement to procure witnesses and obtain counsel, but, first, it must be said that three days' notice for hearing cannot be said, as a matter of law, to deny due process. Proceedings of this nature, understandably, must be opened expeditiously, and should be brought expeditiously to conclusion. The great problem, as Appellant himself indicates, is the disappearance of witnesses whose calling is the sea. Appellant himself asserts, although the record only inferentially supports his statement, that the vessel and witnesses had departed Charleston before the charges had been served.

Since Appellant has raised the question, the inference from the evidence in this record must be that he left the ship at Wilmington, N. C. on 18 January 1967, that the voyage on foreign articles had ended at Charleston, S. C. between 20 and 26 January 1967, and that Appellant appeared at the Marine Inspection Office, Charleston, on 27 January 1967, with an agent of the owner, to be "signed off" in the presence of the shipping commissioner.

The inference is that all the immediately available evidence on 27 January 1967, the voyage records of AMERICAN REPORTER, were at Charleston. Another reasonable inference is that, from the nature of the seaman's life, some witnesses had become unavailable not merely because the ship had left Charleston but because they had left the ship at the end of the foreign voyage at Charleston.

This fact will be returned to in considering Appellant's second point. The important matter here is that there is no absolute determination of a period of time which must be allowed between the service of notice of hearing and the opening of proceedings. The time could conceivably be as little as ten minutes, if the person charged reasonably consents. In the same fashion, the time could be inordinately long if the seaman were charged for a distant date with notice of hearing for a place far from his home or usual port of shipment.

Appellant's brief acknowledges that he was served with notice on a Friday for appearance on the following Monday. The record does not reflect that he asked the Investigating Officer for subpoenas for witnesses. It does not reflect that he desired a later date so that he could procure counsel. It reflects only his announced determination to leave as soon as possible for California.

Thus, Appellant's first point fails, because even if the Investigating Officer has served his notice for thirteen days hence instead of three days hence Appellant's position would not have been affected. This, inevitably, leads to Appellant's second point, that a requested "change of venue" had not been granted.

II

Despite the statement of Appellant's argument, it cannot be error for the Examiner to have "denied" Appellant's request for "change of venue" to the "West Coast" because Appellant did not appear before the Examiner to request such a change. Appellant's assertion of error must be limited then to an assertion that it was the Investigating Officer's denial of "change of venue" which was erroneous. Appellant here cites 46 CFR 137.05-5(a) as showing that an investigating officer has the authority to transfer a case to "the Commandant or to any other port" when he finds "adequate basis for complaint" and that "the person under investigation, or witnesses are not available."

While Appellant admits that this language is permissive, not mandatory, he asserts that the action of the Investigating Officer in this case grossly abused his discretion because he "was aware that any witnesses the Appellant might produce in his own defense

would not be available." This is predicated on the statement in "I" above that the vessel had already left Charleston, S. C., and that the "witnesses" were unavailable.

There is no reason to believe that a transfer of the case to the West Coast would have made the already missing witnesses more available to Appellant; there is every reason to suspect the opposite.

Appellant further argues that the Investigating Officer's refusal to transfer the case was arbitrary because it was omitted on the record of hearing that he had advised Appellant that he would transfer the matter to another port if Appellant would "surrender" his document. It is obvious from the record that this is a case in which an investigating officer would be willing to cooperate with a person to be charged, and transfer the matter to a port more convenient for that person, because all his then available evidence was documentary and easily referable by mail.

Appellant must also see, however, that the Investigating Officer must have some assurance that the person to be charged will be amenable to proceedings at the specified distant point. There are only two days in which he can do this. One is by the formal service of charges with notice to appear at a time and place certain, with a stipulation entered by the person charged that the choice of time and place was his and that the hearing will proceed at that time and place even in his absence. This would also require a lengthy affidavit of the Investigating Officer such as to indicate to the examiner before whom the charges were placed that service of the charges and notice had been properly achieved.

This is a cumbersome procedure at best, and can always lead to later assertions by the person charged that for some reason or anther he was deprived of his opportunity to appear as scheduled.

The other alternative to an investigating officer is to ask the person requesting the transfer to deposit (not "surrender") his document as evidence of good faith that he will appear at the place he has selected. This, of course, is fair insurance that the person to be charged will, for his own self-interest, appear to recover his document and thus be amenable to service of charges and notice.

Appellant's citation of *In re Dimitratos*, D.C.N.D. Cal. 91 F. Supp. 426, is *in*apropos. The question involved here is not one of "suspension without hearing" but of a voluntary agreement to be made for Appellant's stated convenience. Far from the Investigating Officer's action's being a "gross" abuse of discretion, it may be said that had he failed to take an action that would have insured that a person appropriately to be charged would be so charged, and given such notice that his failure to appear could have permitted a hearing in absentia, it would have been improper.

If Appellant had appeared before the Examiner as notified in this case, there is little doubt that a request for change of venue would have been granted. (There is also no doubt that any examiner would grant any reasonable request for delay to obtain counsel or to prepare defense, but he can do this only when the person charged appears and makes the request.) The documentary evidence was easily transferable and any testimony by live witnesses would have been expected to be taken by deposition. This could as well have been done at the port of Appellant's choice just as well as at Charleston.But an Examiner cannot transfer a case to another port simply because he has heard that the person charged wanted the hearing held elsewhere. To issue a meaningful order of change he must have the moving party before him so that he may set a date and place certain for continuance.

On this point, Appellant also has a subsidiary argument that "the Investigating Officer knew or at least must have known that the Appellant had been advised by a United States Public Health Service physician to report to a hospital prior to the day set for his hearing". There is nothing in the record to intimate that the Investigating Officer knew or *should* have known of any such fact. Matters outside the record submitted on appeal will be referred to in dealing with Appellant's fourth point, relative to his failure to join at Wilmington, N. C. on 19 January 1967.

III

Appellant's third point is that 46 U.S.C. 702 was not complied with in that he was not notified of the offense of 16 December 1966 at Bermerhaven, Germany, "but was not apprised of the

charge and the charge was not entered into the log until December 23, 1966, while the vessel was in Liverpool, England."

The concern in these proceedings had always been whether there has been "substantial" compliance with 46 U.S.C. 202 or 702, because it has been consistently held that a log entry made in "substantial" compliance constitutes a *prima facie* case as to the offenses set forth therein. Decisions Nos. 10798 10828 10838 1364. "literal" compliance would ren*de*r some offenses impossible of entry into the log. For example, an offense of failing to stand a 2000-2400 watch could not possibly be entered in the log "on the day on which the offense was committed." Obviously, entry made on the next day would be within the contemplation of the statute. Similarly, an offense committed while a vessel was in a port but in the process of departing the port could not be recorded in the log "before her departure therefrom," unless the unreasonable requirement were made that a master stop his ship for the purpose of "logging" a deficient seaman. Statutes are not to be constructed to absurd results, but in light of their obvious purposes. Decision on Appeal No. 656.

In the instant case, it is not true, as Appellant asserts, that "the charge [of 16 December 1966] was not entered into the log until December 23, 1966, while the vessel was in Liverpool, England."

The record is quite clear that the master entered the details of Appellant's offense at 1930 on 16 December at Bremerhaven, Germany, recounting details from 1335 to 1830. Appellant was confined under guard after examination by local police and a physician. The chronology of entries in the log shows that his entry was made precisely on the date of the offense.

Appellant's objection must be limited to the fact that he was not apprized of the log entry before the vessel had arrived at Liverpool, as apparently called for by 46 U.S.C. 702.

The record shows plainly that Appellant was not restorable to duty until 18 December 1966 when the vessel was at sea.

If speciousness were to be resorted to in interpreting this

statute,it could be said that the statute does not apply to the circumstances of this case. Appellant had rendered himself incapable of having the log entry read to him before the ship left port, and the literal reading of the section requires reading of the log entry to the seaman before arrival in port only when the offense was committed at sea. Such logic-chopping is to be avoided when the plain reading of the law leaves no ambiguity.

In this case, the master as meticulously recorded Appellant's offense as was possible to him on the date of the offense. Appellant was not able to return to duty until the second date thereafter. By that time the ship was at sea; in a heavily trafficked area; en route to Liverpool.

On 22 December 1966, at Liverpool, Appellant was absent from the vessel without authority. On 23 December 1966, the log entries for both 22 December and 16 December 1966 were read to him. To both he replied, "No comment."

The question is thus resolved into whether a master failed to comply "substantially" with 46 U.S.C. 702, when he failed to read a log entry of 16 December 1966 to a seaman, who was intoxicated up to 18 December 1966, until 23 December 1966, the day after the seaman returned from a day's unauthorized absence. Keeping in mind the purpose of the statute, to prevent the "framing" of a seaman by a master by a log entry made after the date of something which did not happen, and considering that Appellant made no comment when apprized of the log entry, I think that there is here substantial compliance with the statute such as to constitute the log entry as a prima facie case.

It may further be noted that Appellant's claim on appeal that he had no notice of the offense in Bremerhaven is weakened by the fact that he was in confinement under guard for over twenty four hours while the ship proceeded from Bremerhaven well out to sea. This was de facto notice, and, when the log entry was read to him, had Appellant been unlawfully confined without notice he would have had more to say than "No comment"

IV

Appellant again invokes 46 U.S.C. 702 in connection with his

failure to join at Wilmington, N. C., on 19 January 1967. It is argued that he was not notified of the charge before the vessel sailed for [sic] Wilmington, North Carolina, in violation of the above cited provision 46 USCA 702...."

It does not seem possible that this can be seriously argued. When the essence of an offense is failure to join a vessel or desertion, it could not be clearer that the requirements of 46 U.S.C. 702 that the offender be "furnished with a copy" of the log entry, "have the same read over distinctly and audibly to him," and so forth, have no application whatsoever.

This point is completely without merit.

V

The question of Appellant's medical status, referred to in III above, also becomes pertinent here. On appeal, certain documents have submitted.

The vessel's log shows clearly that on 18 January 1967, at Wilmington, N. C., Appellant was given a "master's certificate" to report to a U.S.P.H.S. facility at Wilmington, that date. On appeal, Appellant has submitted a copy of that certificate, a copy of a Standard Form #544, a U.S.P.H.S. Clinical Record, titled "statement of Patient's Treatment." This form copy, after identifying the seaman and his vessel, lists, under Item 6 ("Chief Complaint and Date of Onset"):

"(1) Last 2 1/2 wks. WEAK

(2) No Appetite"; and

Under Item 7 (3) ("Diagnosis"):
" ?? "

Under Item 9 (Remarks) There appears:
"REFERRED to P.H. Hospital
for diagnosis and Rx Unfit
for duty."

Had this document been produced at the hearing, it would have had little probative value toward justifying a failure to join. It is merely a form referral by a contact physician who made no diagnosis.

Most important to the instant case is the fact that after Appellant left the vessel on 18 January 1967, pursuant to his "master's certificate," he was not seen again until 1500 the next day when he reported aboard intoxicated and demanding to be signed off. There is no evidence that he presented "not fit for duty" slip at the time. Thus his abandonment of the ship was wrongful.

VI

To return now to Appellant's first point, when he says that the Investigating Officer "knew or at least must have known that the Appellant had been advised by a United States Public Health Service physician to report to a hospital prior to the date set for his hearing. I must say that even if the certificate had been presented to the Investigating Officer on 27 January 1967 in the form that it is presented to me on appeal, the Investigating Officer would have had no more reason to believe that Appellant was required to be in a hospital before 30 January 1967, than he would have had to believe that Appellant was required to report to a hospital before he appeared in Charleston on 27 January 1967 to collect his wages.

The form shows no urgency and no diagnosis. Appellant did not consider the referral of 18 January 1967 as an order for immediate above, as an order to return to his ship to be paid off, since, in fact he did not return to the ship for a whole day, and then only when intoxicated. Nor did the referral prevent him from going to Charleston on 27 January to draw his pay.

Appellant has also submitted on appeal several documents which are offered as extremely persuasive.

One indicates that Appellant entered a Veterans' Administration Hospital in Portland, Oregon, on 30 January 1967

(the date of the scheduled hearing in this case). Appellant was discharged by order of the Cardiology Service on 11 February 1967, with advice not to work aboard ship for seventeen days. Another, a professional report from that hospital, classified as "privileged" by the Veterans' Administration, but released to me on the appeal, contains this:

> "Regarding our recommendations for his return to ship-board life, please see the last paragraph of the attached summary. It is felt that the patient is perfectly capable of returning to ship-board life. However, his history of recurrent pancreatitis makes ship-board duty without a physician on board to care for him, should he have a recurrent episode, rather precarious. It was suggested that the patient spend from six months to one year in some other type of work until he was sure that abstaining from alcohol and on a good diet could avoid all recurrent episodes of pancreatitis."

To these Appellant adds a letter of United States Lines, Inc., on New York, of 28 March 1968 which indicates that the shipowner paid maintenance and cure up to 28 February 1967, and paid for unearned wages up to the end of the voyage, 23 January 1967.

These records are not persuasive, especially when first presented on appeal, in proceedings of this kind. The fact that the owner decided to pay wages through 23 January 1967 cannot persuade me that Appellant was lawfully aboard at the time of sailing on 19 January 1967 any more than it can persuade one that he was in fact on board after 19 January 1967.

The shipowner's interest in avoiding litigation and avoidance of small claims is obviously different from the interest of the United States to enforce actions under 46 U.S.C. 239.

It does not matter what the shipowner later was inclined to pay in the way of wages or maintenance and cure. What does matter is the independent authority to suspended or revoke licenses or documents under 46 U.S.C. 239, regardless of the opinion of seamen or shipowners, for acts cognizable thereunder. This authority is upheld under this decision.

VIII

The propriety of the Examiner's order may also be considered. Appellant's record shows the following actions under R. S. 4450:

(1) 23 Oct. 1953: 2 months suspension, plus 4 months on 14 months' probation; assault and battery, and creating disturbance;

(2) 3 March 1961: 3 months' suspension, plus 3 months on 12 months' probation; assault and battery, and failure to perform;

(3) 4 December 1961: Admonished for FTJ (with no indication as to why the previously ordered probation had not been found violated);

(4) 17 August 1962: 4 months' suspension on 12 months' probation; AWOL, using abusive language to an officer, and failure to perform because of intoxication;

(5) 22 April 1966: 2 months' suspension, plus 4 months on 12 months' probation; failure to perform and failure to join.

In this, his sixth hearing, Appellant was necessarily found to have violated the probation ordered on 22 April 1966, and the Examiner in this case made effective the four months' suspension then ordered, adding eight more. The Examiner noted that with the extensive prior record of Appellant he would have been inclined to order revocation, but the gap from 1962 to 1966 persuaded him that Appellant could, when he wished to, keep out of trouble.

Appellant has been treated leniently in the past, as the statement of his record shows. A revocation would have been affirmable in this case, especially since Appellant, by his absence from the proceedings gave no affirmative showing of a reason why leniency should be considered. After Appellant has served the year's suspension ordered in this case, he will still be on probation for eighteen months if the chooses to return to sea. The probationary period will determine whether Appellant merits the

"one more chance" the Examiner gave him.

CONCLUSION

The charge and specification were proved by the necessary quality and quantity of the evidence. The Examiner's order, in light of the consideration he gave to its possible remedial effect on Appellant, is not inappropriate.

ORDER

The order of the Examiner dated at Charleston, S. C. on 1 February 1967, is AFFIRMED.

P. E. Trimble
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 16th day of October 1968.

Wages, unearned
payment of, not disproof of wrongful failure to join

Examiner's orders
appropriate in light of prior record

Suspension orders
prior record as affecting

***** END OF DECISION NO. 1727 *****

Top