IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-621406-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Andre CHALONEC

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1747

Andre CHALONEC

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 12 March 1968, an Examiner of the United States Coast Guard at San Francisco, CA., suspended Appellant's seaman's documents for one month on six months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a junior engineer on board SS CCNY VICTORY under authority of the document above captioned Appellant

(1) on or about 9 and 12 January 1968, at Qui Nhon, Vietnam, wrongfully failed to perform his duties; and

(2) on or about 27 January 1968, at Manila, P.R., wrongfully failed to perform his duties.

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

The Investigating Officer introduced in evidence voyage records of CCNY VICTORY. At Appellant's earlier request, the Investigating Officer also displayed to the Examiner a medical record from the ship. This record was summarized by the Examiner (R-8,9). The specification to which this latter material was relevant is not mentioned above because it was dismissed by the Examiner.

Since Appellant did not appear, no formal defense was entered.

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 one month on six months' probation.

The entire decision was served on 16 March 1968. Appeal was timely filed, and was finally perfected on 22 July 1968.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a junior engineer on board SS CCNY VICTORY and acting under authority of his document.

On 9 and 12 January 1968, at Qui Nhon, Vietnam, Appellant failed to perform his duties.

On 27 January 1968, at Manila, P.R., Appellant failed to perform his duties.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Six arguments are urged. Because of their unusual nature, no summary of these bases will be attempted here. Each is quoted in full at the outset of the section of the Opinion dealing

with it. The general thrust is that Appellant's hearing was unfair and lacked due process of law.

APPEARANCE: William E. Fuller, Esq., New York, N.Y.

OPINION

Appellant's first point is:

> "The record on its face demonstrates it was no reason for a prejudiced hearing *in absentia* because the Person charged failed to telephone the Ensign Investigating Officer personally (Tr. p. 1-2, p. 5) where said I.O. had information that Mr. Chalonec was absent with reason (p. 1)."

The record shows that Appellant was served with the charges and notice of hearing on 9 March 1968 for hearing on 11 March 1968. Appellant was told that the hearing would proceed in his absence if he did not appear. R-4.

When Appellant speaks of "information" known to the Investigating Officer that he was "absent with reason, he refers to a statement of that officer at R-1:

> "Another member of the crew was in my office today and stated that Mr. Chalonec had told him that he had gotten 'bad news' from home and was leaving. He never did attempt to contact me. I do not know the nature of the bad news."

This does not demonstrate that "it was no reason for a prejudicial hearing *in absentia*..."

Appellant was notice of the date, place, and time of hear*in*g. It has been frequent practice, of which I may take notice, that these proceedings investigating officers have notified examiners of communications from persons charged stating reasons for postponement of hearing. When such requests have been reasonably presented they have been granted.

The mere fact that the Investigating Officer in this case had hearsay knowledge that Appellant had elected not to appear for his hearing, for whatever asserted reason (here, "bad news" at home) cannot frustrate the proceeding which Appellant had been advised would proceed in his absence.

The negative aspect of Appellant's point must be remarked. The important thing is not that Appellant failed to notify the Investigating Officer personally by telephone that he had some reason not to appear. Even if it be accepted, although it is not asserted, that the person who told the Investigating Officer that Appellant would not appear because of "bad news" at home was acting as Appellant's agent, there is still no reason to hold that the hearing should not have been held as it was.

To accept Appellant's point seriously would require that other possibilities would have been available. But if the hearing could not have been held at the date, time, and place specified, under pain of denial of "due process" to Appellant, to what time would it have properly been postponed, and to what place should it have been transferred?

The very positing of these questions shows that Appellant's first point has no merit.

Appellant's second point is thus posed;

> "If the I.O. had chosen to inquire of the Master he would have been advised that the Person Charged had been signed off the day before, March 11, 1968, with a Master's Certificate for Medical Treatment to report to the U.S. Public Health Service Outpatient Clinic, Hudson & Jay Streets, New York City, on or before March 15, 1968 for treatment of his back injury."

It cannot be overlooked that Appellant's second point makes a shift from the grounds of his first point. Nor can it be overlooked that if Appellant's first point actually claimed merit there should have been some support offered that Appellant had received "bad news" which excused his absence from hearing and that

he had somehow communicated this need to some appropriate person. No attempt has been made.

But the second point is predicated on a claim not that Appellant absented himself from hearing because he had "bad news" from home but because he had been discharged from CCNY VICTORY on 11 March 1968 with a certificate authorizing his reporting to the U.S.P.H.S. Outpatient Clinic in New York on or before 15 March 1968. This is not consonant with the first point. But even dealt with independently it carries no persuasion.

Without resort to any form of official notice about how people travel, I must declare that a mere statement that a person discharge from a ship in San Francisco on 11 March 1968 with authorization to report to a U.S.P.H.S. facility in New York on 15 March 1968 would not be justification, under a theory of denial of due process, for failing to appear for hearing at San Francisco on the eleventh.

Further, Appellant's second point attempts to place upon the Investigating Officer a burden which falls, from the moment the charges are properly served, upon the person charged.

The Investigating Officer had no burden to locate Appellant after he had served the notice of hearing. There is no reason why he should have "chosen to inquire of the Master...." If Appellant had some good medical reason not to appear, the burden was upon him to have forward and shown it. He did not do it on date of hearing and he has done so on appeal.

A claim of denial of "due process" cannot be based upon Appellant's own failure to act.

III

Appellant's third point is so phrased:

> "The warning advice of the I.O. (Tr. p. 3, lines 24-25) 'I tried to explain to him that this was substantially a written record form of wrist slapping... was misleading and

> improperly minimized possible serious consequences."

This statement has been extracted from its context. When the statement was made to Appellant, Appellant had already been advised that the hearing could result even in the revocation of his document, along with intermediate effects.

For the Investigating Officer to have explained the meaning of "admonition," which is a word which might well require special explanation to a merchant seaman at times when the words "revoked" or "suspended" would be immediately clear to him, is not misleading as long as the possible results of hearing are explained.

If the advice had been unqualifiedly that the hearing would result in an "admonition," translated as a "written...wrist slapping," there would have been grounds for assertion of error. Since the terms "revoked" and "suspended" had been used already, the attempted explanation of what "admonition" meant cannot be seriously regarded as "misleading," so as to result in denial of due process.

IV

Appellant's fourth point reads:

> "The Opening Statement of the I.O. (Tr. p. 4, line 9-12) was highly prejudiced and inaccurate hearsay, unfounded and unsupported by evidence in the record."

The opening statement of the Investigating Officer is not evidence at all with respect to the merits of a case. It is a statement of what he will prove in a contested case or a statement of what he could have proved in an uncontested case. Since an in *absentia* proceeding is treated as a contested case, all that must be done on review is to look to whether the evidence actually adduced at hearing supports the examiner's findings of facts.

It appears that the Investigating Officer's opening statement

went beyond the matters which he later actually proved. But the proof adduced supported the specifications found proved. The Examiner's findings and opinion show clearly that he was not mislead or unduly influenced by anything the Investigating Officer said.

V

Appellant's fifth point is:

> "The I.O. as a prosecuting officer improperly with held part of the evidence in his possession. Which could and did favor the Person Charged by defeating one specification, i.e. the Medical Record, until after the Hearing Medical Examiner had found the Charged proved. (Tr. p. 7, lines 23 *et. seq*.) (In the Decision the Examiner used this "mitigation" evidence (Opinion, para. 5) to find one specification not proved).

The record shows that as soon as the Investigating Officer rested his case in chief the Examiner said, "I find the charge and supporting specifications proved." R-7. After answering four inquiries of the Examiner, the Investigating Officer volunteered that he had a medical record relative to Appellant's performance of his duties on 6 March 1968, saying:

> "He asked me to obtain and present for him, a medical report from the ship. With respect to that matter, as much as he isn't here, I think perhaps it should be presented." R-8

The Examiner then immediately summarized the material for the record, since the documents had to be returned to the ship. Upon this informally presented evidence, the Examiner apparently based his dismissal of the specification dealing with 6 March.

There is no reason to belabor the inference that might be drawn from this, that Appellant had already made up his mind at the time the charges were served that he would not be present for the hearing. The point is that the Investigating Officer did present to the Examiner what Appellant had asked him to, and that as a result

the Examiner dismissed the specification with which it dealt. What relief Appellant seeks from this alleged error, which resulted in a dismissal, is not made clear. But the attempt to characterize the conduct of the Investigating Officer as an improper withholding of evidence is without foundation.

V

Appellant's sixth point is expressed as follows:

> "The I.O. completely failed to produce or act upon written complaints of Mr. Chalonec (attached), a copy of which had been given him by the Person Charged. These complaints were evidence in support of Mr. Chalonec's explanation that the Master had threatened to log and report Mr. Chalonec to the Coast Guard so that he would not be entitled to maintenance and cure or recovery for the serious back injury he had suffered on the vessel. The medical record, subsequently produced, was originally given to the I.O. in this context also. Here the I.O. who prejudicially reported what the Master had told him (Par. 4 above) failed to mention Mr. Chalonec's side of the argument of which he was aware."

The first comment in this connection is that there is no showing, on this appeal, of any form of probative evidence that the written "complaints" of Appellant had been given by him to the Investigating Officer. Even if there were, an appeal is not the vehicle for getting such material into the record. Evidence which a person charged wishes placed before the trier of facts, the examiner who hears his case, should be presented by him in the hearing of which he is given due notice. In this case this was not done.

Further, the "point," as phrased by Appellant, implies that Appellant himself gave the Investigating Officer the "medical record," while the Investigating Officer's version is that Appellant asked him to obtain the medical record. The attempt on appeal to link the two classes of document is without merit.

Next, on this point, it may be said that an Investigating Officer who presented to the Examiner, at Appellant's request, evidence which led to a dismissal of a specification could not be found at fault if he had failed to submit to the Examiner written "complaint" about the master of the ship which not only did not constitute a denial of the facts in the specifications found proved but had no bearing on those specifications at all, assuming *arguendo* that he had the complaints in his possession.

Lastly, it may be noted that had Appellant appeared for hearing and attempted to enter his "complaints" into the record:

(1) the writing itself, dated a month and a half after the last offense as to which a specification was found proved, would probably have been ruled inadmissible, and

(2) the "complaints", if entered into the record by way of Appellant's own direct testimony, would have amounted not to a denial of the allegations of the specifications found proved but only to an attack on the credibility of a witness or of the author of the Official Log Book entries.

Thus, the Examiner would still have been free to accept the voyage records of CCNY VICTORY (or the testimony of the master if, on Appellant's appearance for hearing, it had been found desirable to call him) as substantial evidence of Appellant's misconduct.

VII

It may be briefly noted here that Appellant does not assert, on appeal, that he did not, on 9 and 12 January 1968, at Qui Nhon, fail to perform his duties or that he did not, on 27 January 1968, at Manila, P.R., fail to perform his duties, nor does he assert that there was anything defective in the proof of these offenses. There is not the slightest intimation, even if a failure of due process had been shown (which it was not), that a remand to another examiner in New York with appellate counsel present, as Appellant asks, would lessen the probative value of the evidence which the

Examiner in this case utilized for his findings.

IX

It is further added, so that it may be crystal clear to Appellants and their counsel as well, that when a person charged fails to appear for his hearing he bears a heavy burden for the future. If he has adequate excuse not to appear he has the remedies available to apply in timely fashion to the Investigating Officer or the Examiner to obtain postponement.

A complaint on appeal that Appellant had good reason not to appear, voiced for the first time not even at the time of filing the appeal but more than three months after the date, can scarcely be persuasive.

A person charged is not compelled to appear for hearing because he is not a compelled witness. But if he chooses not to appear after due notice, he forfeits many privileges and finds himself faced with a difficult task of showing why he was justified for not appearing and should therefore be granted a rehearing.

CONCLUSION

Appellant has raised no real substantive points on appeal. The procedural points are without merit. No reasons has been adduced to disturb the ultimate findings or order of the Examiner.

ORDER

The order of the Examiner dated San Francisco, Cal., on 12 March 1968, is AFFIRMED.

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

Signed at Washington, D.C., this 2nd day of January 1969.

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