IN THE MATTER OF LICENSE NO. 312 444
MERCHANT MARINER'S DOCUMENT NO. Z-137072-D-1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Mark B. ADDITION

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1756

Mark B. ADDITION

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 20 June 1967, an Examiner of the United States Coast Guard at Galveston, Texas, suspended Appellant's seaman's documents for six months outright plus three months on twelve months' probation upon finding him guilty of misconduct. The Specifications found proved allege that while serving as a third assistant on board SS NORINA under authority of the document and license above captioned on or about 16 April 1967, Appellant wrongfully had whiskey in his possession and wrongfully became intoxicated.

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

The Investigating Officer introduced in evidence voyage records of NORINA and the testimony of the master and the second

assistant engineer of the vessel.

In defense, Appellant offered in evidence his own testimony. 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 six months outright plus three months on twelve months' probation.

The decision was not served until 28 June 1968. Appeal was timely filed on 5 July 1968. Although Appellant's counsel requested a transcript of the record and was provided with a copy on 1 August 1968, no further perfection of appeal has since been made.

*FINDINGS OF FACT*

On 15 April 1967, Appellant was serving as a third assistant engineer on board SS NORINA and acting under authority of his license and document while the ship was in the port of Palermo, Italy.

Since Appellant had asked the master, on 14 April, to see a doctor, the master had obtained one and the chief mate and the doctor went to Appellant's room at some unspecified time on 15 April. Appellant was found intoxicated in his bunk. Shortly thereafter the master went to the room and also saw Appellant intoxicated in his bunk. The master saw empty whiskey bottles and another half full. The remaining whiskey was poured down the drain. A search of the quarters produced no more intoxicants.

*BASES OF APPEAL*

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

(1) the findings are contrary to the law and the facts, and
(2) the order is excessive

APPEARANCE: Levinson & Friedman, of Seattle, Wash., by Robert D.Duggan, Esq.

*OPINION*

I

Counsel refers to no "law" to which the findings of the Examiner are contrary, and I am aware of no law to which findings of fact could be contrary unless possibly it were urged that the findings were not predicated upon substantial evidence. Since the findings which supported the specifications were based upon credible eyewitness testimony and a contemporaneous voyage record of the vessel, such an argument must be rejected.

Similarly it has been said that the findings are contrary to "fact". Facts are made known to an examiner through the presentation of evidence. If the argument here is to be construed as contending that the Examiner's findings of fact are contrary to the evidence, the rule in administrative proceedings is that the trier of facts evaluates the evidence, even when there is conflict. The disposition stated in I above is still applicable. When the trier of facts, here the Examiner, chooses between conflicting bodies of evidence, the only question on review is whether the evidence which persuaded him to his findings is " substantial," without regard to the evidence which he has regard to the evidence which he has rejected. Here, it is repeated, the evidence accepted is substantial, and the argument must be rejected.

In addition, it may be pointed out that the facts of possession of liquor on board an the intoxication of Appellant are nor disputed in this case. While the master spoke only of two empty bottles and one half full, Appellant declared that he had four bottles and must have drunk three and one half. While he claimed to have purchased and drunk the whiskey for use as a pain-killer (because he had run out of a supply of almost five thousand non-prescription tablet pain-relievers), the Examiner correctly expressed the opinion that this did not justify the admitted bringing of the liquor aboard the ship.

III

As to the alleged excessiveness of the order of suspension in this case, it might be that under some circumstances a single improper possession of liquor aboard ship might not merit a

suspension of six months. But the Examiner's order in this case was the minimum that he could impose.

Appellant was already on probation and the instant offense was a violation of the probation. The Examiner was thus required to impose the six months' suspension previously ordered. If the Examiner had not additionally given Appellant a suspension of three months on twelve months' he would have, in effect, given Appellant nothing for this offense at all.

What Appellant has been given, for the instant offense alone, is a suspension of three months on twelve months' probation. This is not excessive.

IV

Thorough some disorder in the numbering of the original specifications and the possible misreading of the voyage records of NORINA, the Examiner found ultimately, without comment, that the allegations of the two specifications found proved were proved as of "on or about 16 April 1967." More specific findings of the Examiner were to the effect that the events set forth in my Findings of Fact occurred on 16 April 1967. The evidence is conclusive that they occurred on 15 April 1967.

Since this date is well within the "on or about" provision of the specification, and since time was not of the essence, after the dismissed specifications as to failure to perform duties had been found" not proved," there is no possible fault in my finding specifically that the misconduct by the evidence occurred on 15 April 1967.

*CONCLUSION*

It is concluded that Appellant was wrongfully in possession of intoxicants aboard SS NORINA on 15 April 1967.

*ORDER*

The order of the Examiner dated at Galveston, Texas, on 20 June 1967, is AFFIRMED

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

Signed at Washington, D. C., this 20th day of MARCH 1969.

Charges and Specifications

Date sufficiently alleged
"On or about"
Proof not limited to
Sufficiency of
Variance with proof

Date of offense

Sufficiently alleged

Evidence
Conflicts in testimony resolved by examiner
Creditable eyewitness testimony and a contemporaneous voyage record as substantial
Examiner has duty to weigh
Sufficiency of

Examiners

Conflicts of evidence, resolved by
Evidence, duty to evaluate
Evidence". duty to weigh

Findings of Fact

Credible eyewitness testimony and a contemporaneous voyage record as substantial evidence
Evidence needed to support
Must be based upon substantial evidence

Not disturbed when based on substantial evidence
One day different from specification not fatal error
Upheld if supporting evidence is substantial without regard to rejected evidence
Variance with specification not fatal

Intoxicating liquor

Possession of
Use of whiskey as pain killer does not justify bringing liquor aboard

Misconduct
Use of whiskey as pain killer does not justify bringing liquor aboard

Order of examiner

Commensurate with offense
Held not excessive
Not excessive for intoxication and wrongful possession of liquor
Prior probationary suspension included
Suspension on probation properly added to
Violation of probation necessitates suspension

Probation

Revocation of
Violation of necessitates suspension

***** END OF DECISION NO. 1756 *****

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