IN THE MATTER OF LICENSE NO. 290000 MERCHANT MARINER'S DOCUMENT
Z-310112-D2 AND ALL OTHER DOCUMENTS
Issued to: James C. SCHEPIS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1757

James C. SCHEPIS

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 22 December 1967, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's license for one year, plus one year on two years' probation, upon finding him guilty of misconduct. The specifications found proved allege that while serving as master of SS WILD RANGER under authority of the document and license above captioned, on or about 30 May and 8 September 1967, Appellant wrongfully confined a member of his crew in an area forward of the collision bulkhead that was not safe and commensurate with the offenses committed for certain periods of time. (It was stipulated prior to arraignment that the words "commensurate with the offense[s] committed" were to be construed as meaning "not reasonably required to maintain custody of the person involved.")

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of three witnesses and several documents.

In defense, Appellant offered in evidence his own testimony, that of two other witnesses, and several documents.

The Examiner entered four documents as his own exhibits.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and both specifications had been proved. The Examiner then entered an order suspending Appellant's license for a period of one year outright plus one year on two years' probation.

The entire decision was served on 8 January 1968. Appeal was timely filed on 26 January 1968, and perfected on 12 February 1968.

FINDINGS OF FACT

On all dates in question, Appellant was serving as master of CSS WILD RANGER and acting under authority of his license and document.

On 30 May 1967, Appellant placed one Arnold Brock, a fireman, in confinement in the lower forepeak. On 8 September 1967, Appellant placed one Sam A. Crosby, an able seaman, in confinement in the same compartment.

This compartment was located entirely forward of the "collision bulkhead" on the third deck, just above the peak tank.

The two confinements took place on two different voyages of the vessel.

BASES OF APPEAL

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

(1) the decision was based upon findings which were not within the specifications as clarified by stipulation, and which Appellant was not notified he would be required to meet;

(2) the findings were not based on substantial evidence;

(3) it was error to use regulations relative to permanent crew quarters as determinative of the standards for a place of confinements;

(4) an erroneous standard was used to judge Appellant's conduct; and

(5) (i) the order is extremely severe, and

(ii) Appellant's prior record as presented to the Examiner was erroneous, and not properly received in evidence.

APPEARANCE: Graham & James of San Francisco, California, by Francis L. Tetreault, Esq.

OPINION

I

At the outset of the hearing, Counsel said, "First, it is my understanding that this charge does not place in issue at all the propriety of the fact of confinement of the men referred to." The Examiner acknowledged, "I think that is right; the master has the right to confine properly." Counsel then repeated his belief that the charges did not imply that the mere act of confining was improper, and stated that he would not plan to adduce evidence as to the conduct which induced the confinement. The Investigating Officer agreed, declaring: "That is correct. The issue here is solely the location of the confinement, and not the action that brought the confinement about..." Rather inconsistently, he went on to say,"...however, through the course of testimony, I feel that

we will bring not to be considered on the charges and specifications; solely the confinement area." (R-4, 5).

This unfortunate reservation, and the Examiner's allowance of irrelevant evidence resulted in the compilation of a record of 307 page and 24 *ex*hibits, most of which dealt with the conduct of the two persons confined, including the conduct of the fireman Brock on two others ships and his paranoid condition as found some seven weeks after his confinement on board the ship, and the conduct of the person who originally lodged a complaint against Appellant.

It might be thought that Counsel acquiesced in litigation of the irrelevant issues, but it must be considered that at one point he was assured by the Examiner that while the Examiner would admit "the kitchen sink" in evidence he would not consider what was irrelevant or of no probative value. In his closing argument, Counsel noted that much of the Investigating Officer's closing argument went beyond the scope of the framed issues and reminded the Examiner that the propriety of confinement as such was not in issue but only the nature of the place of confinement.

It is therefore considered that certain findings and opinions of the Examiner, made without notice to Counsel that the issues had been perceived to be expanded beyond the agreement, must be rejected.

All of the Examiner's findings from that numbered 9 (including 19 subfindings) through that numbered 11, dealing with the conduct of fireman Brock, must be excluded from consideration.

Similarly, all of the Findings from that numbered 13 through that numbered 17, dealing with the conduct of seaman Crosby must be disregarded.

In the interest of time and space saving, there is no need to quote these findings verbatim. It is enough to note that insofar as they dealt with the conduct and condition of the persons confined they went beyond the stipulated issue, but two findings may be quoted to illustrate the irrelevancy.

Finding No. 11 reads: "Brock should have been hospitalized and watched either ashore or afloat." Finding No. 16 reads:: "At

the time Crosby was confined, if he had wilfully disobeyed any lawful command at sea, his disobedience had long since ceased."

Both these findings deal with the fundamental lawfulness of the confinements and both are outside the issue as framed, agreed upon, and settled.

II

Another question raised on appeal in this case is the procedure of ascertaining the prior record of the person charged "off the record." Decision on Appeal No. 1580, cited by Appellant, was definitely an instruction to examiners that ascertainment of prior record was as much a part of the hearing proceeding as the taking of evidence on the merits. One of the possible evils perceived as avoidable in Decision on Appeal 1580 was an erroneous statement of the prior record. This is apparently what happened in the instant case. A report charged Appellant with an offense he had not committed.

In this case, Appellant, by Counsel, had specifically agreed that information as to prior record could be ascertained by the Examiner after his decision on the merits had been reached, with a stipulation that the record should first be made available to Counsel for possible objection.

An erroneous record was provided to the Investigating Officer and furnished by him to the Examiner. Appellant alleges that knowledge of this erroneous record came to him only accidentally. On 19 December 1967, Counsel sent a vigorous objection to the Examiner that the prior record had been supplied without notice to or consultation with Counsel. Two days later, Counsel specifically protested the error found.

When the Examiner's decision emanated on 22 December 1967, the erroneous report had been corrected and the Examiner had under consideration, in framing his order, the true record.

While the apparent failure to communicate the prior record to Counsel prior to its submission to the Examiner's in accordance with the agreement arrived at in open hearing, cannot be condoned,

the fact is that, apparently by accident, Counsel was able to correct the error. If this were the only error to be found in this record, it would have to be considered unprejudicial because the Examiner did not know of any prior record of Appellant before making his findings and the error was corrected before he entered his order. But the happenings in this case illustrate the need for the careful attention required to be given to the fact that the entry of the prior record is an integral part of the hearing procedure. Entry of prior record, after findings that a charge has been proved, may not be accomplished by a purely ex *parte* consultation between the Examiner and the Investigating Officer, and if arrangements are made that the prior record may somehow be received outside of open hearing the terms of the agreement must be strictly adhered to.

III

Discarding all findings made irrelevant to the issues formulated and ignoring, generally, all evidence not bearing upon the primary issue involved, the sole question here is whether the evidence supports the Examiner's findings (Nos. 12 and 15) that Appellant had "wrongfully" confined crewmembers "in an area forward of the collision bulkhead that was not safe and reasonably required to maintain custody of the *per*son involved...."

The theory of the Investigating Officer, as adopted by the Examiner, insofar as it is applicable to the ca*se*, depends upon the fact that the place of confinement was not in accordance with the requirements of 46 CFR 92.20-5, -10, -20, -90. The Investigating Officer also urged that, while 46 U.S.C. 701, which authorizes confinement, does not suggest what might be *per*missible places of confinement, 18 U.S.C. 2191 prohibits any "cruel or unusual punishment."

It must be mentioned again here that the question of whether Appellant might have violated 18 U.S.C. 2191 by flogging, beating, or wounding a *se*aman, or by imprisoning a seaman without justifiable cause, or by inflicting upon a seaman a corporal punishment, was expressly waived as an issue. If 18 U.S.C. 2191 has any application to this case, it must be that confinement in the place described in this proceeding was, as a matter of law, a cruel and unusual punishment.

Appellant argues that the regulations cited by the Examiner deal with the structure of permanent crew-quarters, points out that no stature or regulation of the United States prescribes minimal standards for a place of confinement of a seaman, and urges that still effective laws of the United States permit the assignment of some passengers to areas of habitation of less comfort and security that the area assigned to the seaman confined in the instant case.

It must be immediately conceded that no law or regulation presently prescribes minimum standards for places of confinement of seamen lawfully confined. It must also be conceded that regulations as to minimum requirements for ordinary crew accommodations do not apply to a place of otherwise lawful confinement.

It may be added here that, although no evidence was introduced on the point, the Investigating Officer argued that the offenders could have been confined in a room, the port hole of which was rendered unavailable for escape purposes by the securing of a "two by four" outside the opening. This argument is negated by the Investigating Officer's own claim that Appellant's fault lay partly in the fact that "crew quarters" must provide two methods of escape. Had Appellant followed the course recommended by the Investigating Officer he would still run afoul of the regulations cited by the Investigating Officer.

IV

Appellant offered at hearing to produce proof that a vessel, one PERMANENTE CEMENT, certificated by the Coast Guard, had crew quarters authorized by the certificate of inspection forward of the "collision bulkhead." The Investigating Officer refused to dispute the offer on the grounds that it dealt with a different ship. The Examiner accepted the offer of proof as evidence because the proponent was a lawyer.

It is not believed that the Investigating Officer's refusal to admit or accept the proffer was correct. But, upon the Examiner's permissive statement, it must be accepted as fact that a vessel certificated by the Coast Guard had been recently permitted to operated with crew quarters forward of the "collision bulkhead."

The only conclusion that can be derived from this is that the allegation in the specification that the place of confinement was forward of the "collision bulkhead" is immaterial.

V

This reduces the specifications alleged to these questions:

(1) was the area in which the seaman were confined "not safe?", and

(2) not reasonably required to maintain custody of the person involved?

The second alternative can immediately be seen to be outside the state scope of the litigation. The question was not whether the space involved was the only available or whether it was reasonably required that this space be utilized.

Formulation of the issues was poorly handled, as has been intimated before, but on appeal the issue is seen as being whether the place of confinement, per se, violated some law, regulation, or custom.

It follows that the "not safe" phrase of the first alternatives mentioned above is also immaterial, in the absence of some showing that the place of confinement must be "safe" for the person confined, or that the place of confinement, in and of itself, unreasonably the expose the confined person to an imminent or probable danger.

Appellant has argued that deaths from collision have occurred when the persons were sitting in their assigned rooms or even in a dining room area. He also argued that there is an absence of evidence that deaths from collision occur to persons at or near the bow of a ship. The Examiner made exhibits of three semi-annual compilations of statistics as to deaths occurring aboard commercial vessels. Also, some evidence was introduced to prove, and the Examiner has found, that during at least a part of the confinement of Crosby the vessel was in a "war bonus" area for wage purposes.

All of this appears to be irrelevant. The thrust of Appellant's argument must, however, be recognized and answered. By itself it does not constitute a defense. Without recourse to statistics it can easily be seen that an absolute head and head collision of vessels will be a rare occurrence of such extremely low probability as to be insignificant. The cases of pure "side-swiping" must also be considered negligible. Most collisions, then, will occur with the bow, of another. Since most forward most sections of ships do not house or contain people at times of emergency maneuvering, it would not be surprising that analysis of reported cases showed that more people were killed in collision in the middle two quarters of a ship than in the forward and after quarters.

These considerations do not control. In this case the only significant test is whether the area of confinement, in and of itself, constituted the confinement as a "cruel and unusual" punishment. Probability of collision is ruled out as a test because of nebulosity.

Appellant has correctly pointed out that any person in irons must be saved by another person in the event of emergency. Appellant has also correctly pointed out that when the fireman, Brock, had been offered to his quarters, on an earlier occasion, but had been found asleep in a storage area aft, Brock was in more danger that he was in when he confined forward in a place where the master knew he was.

The mere fact that special pay had been given to seaman working aboard the vessel for a period of hours while seaman Crosby was confined is also considered irrelevant to the question of whether the area of confinement was per se unsafe.

VI

As to the reasonableness of the confinement, the date and source of complaint may be of interest and must be returned to now. While Counsel's attack on the motivation of the writer of the letter may have been unnecessary, because the issue was not the fact of confinement which was undisputed, and irrelevant, because the nature of the place of confinement could not be affected by the

motivation of the informant, the materiality of the evidence is of some consequence.

The witness who made the first complaint about the nature of the area of confinement was shown to have made the complaint only after he had been reduced from the authority (although not from the pay) of boatswain. This witness was privy of the fact of the first confinement. At the time he found no reason to complain of it. At the end of the voyage he found no reason to complain of it.

There is ample evidence to show that both confinements were reported to State Department and Coast Guard officials in foreign ports. There is also ample evidence that no union officials at the termination of either of the voyages involved complained of the nature of the area of confinements.

A reasonable inference may be drawn that the area of confinement was such as to shock a knowledgeable person upon first learning of it. Even the witness who ultimately complained was not so shocked at the end of the first voyage on which an offending seaman had been confined in the lower forepeak for disobedience of orders.

The effect of this absence of complaint and absence of criticism is apparent. The nature of the area of confinement was not, in and of itself, enough to constitute a "cruel and unusual punishment."

VII

One further question must be explored. There was evidence that during the confinement of Brock there were a cot, a swill pail, and toilet paper available in the lower forepeak. There is also evidence that during the confinement of Crosby, of a much shorter duration, there was no cot and no toilet paper.

It does not seem that this distinction is pertinent to whether the place of confinement was, in and of itself, such as to make the act of confinement an act of misconduct by the master. The framing of the issues on the record of hearing appears to treat both cases identically. The entire theory of the case was that both specifications must stand or fall together.

Had broader allegations of fault been litigated, then evidence that Appellant was ill during the confinement of Crosby, that he ordered the same conditions for Crosby's confinement that he had ordered for the confinement of Brock, and that the mate had neglected to carry out the orders, would have to be evaluated. Since the specifications as written and as formulated for the record make no distinctions between the two alleged offenses, differences in the evidence of collateral matters need not be considered.

VIII

Several references were made in the development of the Investigating Officer's case, and in the Examiner's decision, to regulations dealing with the crew spaces. Specific references are to 46 CFR 92.10-5, -10, and 46 CFR 92.20-5, -10. Although the fact is irrelevant, since standards for crew berthing do not apply to places of confinement, these regulations do not, on their face, apply to WILD RANGER. They apply only to vessels of the contract for construction of which was entered prior to 1 January 1962 *Merchant Vessels of the United States* (1965 edition) shows WILD RANGER to have been built in 1946. Under the provisions of 46 CFR the standards applicable to this vessel were those in effect in 1946, to which no reference was made and of which official notice was not asked or taken.

IX

This decision must not be construed as a blanket authorization for masters to clap seamen into any available space when 46 U.S.C. 701 authorizes confinement in irons. If Appellant had been charged in different terms and if different issues had been litigated, a charge of misconduct might well have been sustained against Appellant. But charges cannot be sustained when the findings are outside the expressed limits of the issues at hearing.

CONCLUSION

The specifications as framed and refined by stipulation were not proved by substantial evidence. No finding by the Examiner as a predicate of misconduct is based upon evidence introduced in the course of litigation of an issue of which Appellant was reasonably

on notice.

ORDER

The order of the Examiner dated at San Francisco, Cal., on 22 December 1967, is VACATED. The charges, as specified in this record of hearing, are DISMISSED.

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

Signed at Washington, D.C., this 1st day of April 1969.

Charges and specifications

Allegation of specification made immaterial by finding of fact
If no distinction re two alleged offenses, different in evidence not considered
Limited at hearing by agreement of examiner, I.O., & counsel
Not sustained if finding outside limits imposed on issues at hearing

Confinement, wrongful

Confinement forward of collision bulkhead not cruel and unusual punishment
Date and source of complaint relevant to reasonableness of confinement
Location of vessel in "war bonus" are immaterial as to whether per se unsafe
No statute or regulation prescribes standards for place of confinements of seamen
Regulations and standards for ordinary crew accomodations do not apply to place of confinement
Violation of custom as
Wrongful is cruel and unusual punishment

Evidence

Date and source of complaint as relevant
If same specifications re separate offenses, then differences in evidence not considered
Lack of complaint relevant

Examiners

Findings and opinions limited to specifications
Findings and opinions made without notice to counsel that stipulated issues expanded are rejected
Statement making evidence a finding of fact

Findings of Fact

Accepted offer of proof with no evidence *contra* as finding of fact
Can not exceed limits of issues as expressed at hearing
Lack of complaint persuasive
Limited to specifications
Reject those made without notice to counsel that stipulated issues expanded

Masters

Misconduct by wrongful confinement of seaman

Misconduct

By ship's officers
Masters wrongful confinement of crewmember

Prior record

Agreement as to means of introducing must be adhered to
Ascertainment of as integral part of hearing
Entry of, not to be ex parte
Error cured
Improperly ascertained
Method of ascertaining

Proof of in open hearing

Punishment

By master, restructions on
Confinement as cruel and unusual
Cruel and unusual, lack of complaint relevant to

***** END OF DECISION NO. 1757 *****

Top