IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-665 830-D2
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: William H. TODD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1797

William H. TODD

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 15 July 1969, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for three months upon finding him guilty of misconduct. The specifications found proved allege that while serving as a chief steward on board SS AZALEA CITY under authority of the document above captioned, on or about 21 June 1968, Appellant failed to obey an order of the master not to permit the keys to the ship's storeroom to come into the possession of other crew
members,and that, while so serving aboard SS ACHILLES Appellant on 14 February 1968 failed to obey an order of the master to place all ship's stores in proper storage spaces.

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 voyage records of AZALEA CITY and ACHILLES, and the testimony of two witnesses.

Appellant offered no defense except for a letter which he addressed to the Examiner at the Examiner's suggestion. The letter denies that the alleged offenses occurred.

At the end of the hearing, the Examiner rendered a written 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 three months.

The entire decision was served on 16 July 1969. Appeal was timely filed on the same date, and perfected on 12 November 1969.

*FINDINGS OF FACT*

On both dates in question, Appellant was serving as alleged in both specifications as found proved.

Because of the disposition to be made of this case, no further findings are necessary.

*BASES OF APPEAL*

This appeal has been taken from the order imposed by the Examiner. Appellant has submitted a multitude of assignments of error. Most of these are without merit. Because of the disposition to be made of this case, the assignments of error which have no merit are not set out here. Neither are there set out numerous assignments of error which are embraced within the discussion of the case generally, although the point of view of the discussion is different from Appellant's.

One assignment of error specifically noted is that Appellant asserts that the record indicates that the Examiner was apprized of Appellant's prior record before findings were made and that Appellant was denied the opportunity to offer evidence to refute the evidence of prior record or at least to offer evidence in extenuation.

I note that Appellant is represented on appeal by a different professional counsel from the one who appeared for him at hearing.

APPEARANCE: (on appeal only) Thomas J. Graham, Esq., Houston, Texas.

*OPINION*

I

The first matter for consideration is the point specifically raised by Appellant concerning the introduction of his prior record.

Appellant actually raises two issues here:

(1) That the record shows that the Examiner had the prior record available to him before he made findings, and

(2) That Appellant was denied the right to offer evidence relative to his prior record even if the disclosure to the Examiner was made after findings.

With respect to Appellant's first contention in his matter, it must be said that the record does not show that the Examiner was in fact aware of the record before findings were entered but it must be admitted that the record does not affirmatively show that the prior record was not available to the Examiner before he made his findings.

The manner of introduction of prior records has been dealt with before. In Decision on Appeal No. 1472 it was stated specifically that the introduction of prior record after findings had been made was a matter for open proceeding before the examiner just as is the introduction of evidence on the merits of the case.

In the case involved in Decision No. 1472, and in many other cases, an Examiner has stated that he ascertained the prior record only after he had made his findings on the merits. N. 1472 was intended to say, and did in fact say, that this is not enough.

It was apparently the practice of examiners to reserve decision in a case, later reach findings, and after making findings informally, and without notice to the person affected, ascertain the prior record. Decision No. 1472 was designed to stop this practice. The rule was specifically laid down that either the introduction of prior record must be done on notice and in open hearing before the examiner so that contest could be had, or that the person involved should have expressly, on the record, waived his right to be present at the introduction of this information.

Examiners have not always followed this rule and the instant case is an example.

II

The instant case has a peculiar circumstance that is not always present.

If a person on notice for a hearing under 46 CFR 137 does not appear, he waives all right to further notice of proceedings which might occur after the first proceeding on notice, including the introduction of prior record after findings have been made. It follows that if a person appears for hearing initially and then absents himself from proceedings after proper notice, he waives all right to notice of subsequent proceedings.

At this point, the question of representation by counsel intrudes itself. A person who chooses representation by counsel can be in default by failure of counsel to appear on notice, so as to make the proceeding a proceeding *in absentia*. At the same time, a person represented by counsel can disaffirm the authority for representation. A situation of the latter class was reviewed *in* the case of Decision on Appeal No. 1677. In that case the person charged dismissed his counsel on the record before the examiner. When, at the next session of the hearing, the person did not appear but the counsel did, stating that he had been reinstated, the examiner continued to deal with counsel. The difficulty was ultimately resolved months later when the person by appearance in company of counsel ratified what counsel had done in the interim.

In the instant case Appellant had professional counsel at the first session of the hearing. The Investigating Officer at that time had no witnesses to produce. There was much confusion as to witnesses whom Appellant had desired to be called. It was made apparent that since the date of service of charges Appellant had been at his home at a distance form the place of hearing and had returned to the place of hearing for the purposes of the proceeding. Thereafter, Appellant did not appear in person, although his counsel did appear.

Three more sessions of the hearing are presented as occurring on the record. The first was the taking of testimony of a witness, the chief cook of ACHILLES, in open hearing before the Examiner. The next was the taking of testimony of the master of AZALEA CITY, not before the Examiner. (More is said of this proceeding below.) The last proceeding on the record was one of 16 January 1969 at which, primarily, arguments were heard. Nothing had occurred on the record at all since the "Third session" of 10 October 1968, and nothing had taken place before the Examiner since 18 July 1968.

To divert for the moment from the question of representation by counsel, it may be noted here that the period from 18 July 1968 to 16 January 1969 is not accounted for in any way before the Examiner, nor is the period from 16 January 1969 to the date of decision, 15 July 1969, accounted for in any way on the record.

During the last session before the Examiner on 16 January 1969, a letter from Appellant to his counsel was introduced into evidence. This letter was dated 15 November 1968, and mailed from Durban, S. A. It said in part, "Your letter (which had recounted that the testimony of the master of AZALEA CITY had finally been obtained) came as a surprise because during our last telephone conversation I told you that if I `had been shafted' there was no need for me to testify and that no counsel was needed.... Afterward I talked with... the Examiner, and stated as much to him.... (The Examiner) informed me that if I would write him a letter concerning the things we discussed that he would have the letter entered as my testimony".

This letter is dated, as mentioned above, 15 November 1968. The document actually introduced into evidence is a carbon copy of

that letter provided to the Examiner. It was introduced into evidence on the Examiner's own motion as an examiner's exhibit. It was marked as Examiner's Exhibit One and admitted at R-67. At R-68 there is colloquy about another document which is not identified other than being what counsel did "presume will be Examiner's Exhibit Number Two. The document is a letter submitted to you by the Person Charged. (To the Examiner) Is that correct?" This document was never formally received into evidence, but there is an Examiner's Exhibit 2 in evidence.

This exhibit is a letter from Appellant to the Examiner dated 31 July 1968. It refers to a telephone conversation between Appellant and the Examiner on the preceding day, and indicates that Appellant intends that the letter stand in lieu of personal testimony. That Examiner's Exhibit 2 as it appears in the record on appeal is the letter spoken of in the record I cannot doubt because in the confused colloquy at R-68 about "Examiner's Exhibit Number Two" the counsel does say: "I don't know the date of it right now, but I believe it is 31 July, the one that actually refers to the telephone conversation on 30 July."

The unexplained confusion here almost beggars belief. Examiner's Exhibit No. 1, a letter form Appellant to his counsel, states that Appellant was surprised by a letter from his counsel dated 30 October 1968 which advised that the testimony of the master of AZALEA CITY had finally been taken (on 1 October 1968). This letter indicates that Appellant had already discharged his attorney by 30 July 1968 at the latest and that he had so advised the Examiner by telephone. Examiner's Exhibit No. 2 shows that the Examiner had been so advised by telephone call on 30 July 1968, and that the Examiner had accepted a letter form Appellant, dated 31 July 1968, as his testimony on the merits of the case.

This acceptance by the Examiner occurred, I must note, two months before the testimony of the master of AZALEA CITY was taken in the "third session" of the hearing.

III

If, in July 1968, the Examiner was dealing with Appellant by telephone and accepting a letter form Appellant as "testimony" the Examiner was either dealing with Appellant directly and improperly,

since Appellant was up to that time apparently represented by counsel, or the Examiner had recognized that counsel had been discharged. In the latter case, the proceedings at the third and the last sessions of the hearing were invalid because the Examiner had permitted the appearance and activity of counsel known by him to have been discharged.

Thus far, these matters have been discussed in the context of introduction of prior record but it can be seen that the possible error goes far beyond that area.

Unfortunately, we do not have a record, other than the few details given by Appellant himself, of what specific agreement the Examiner reached with Appellant. It would appear that the Examiner gave Appellant to understand that he need not appear in person any further, since a letter from him would be accepted as testimony. It was apparently also Appellant's understanding that the matter would proceed without counsel. I do not think, however, that this would convert the proceeding into an in *absentia* proceeding such that Appellant would have waived his right to notice of further proceedings, including the taking of prior record, unless Appellant had been specifically advised that such would be the case.

It follows also that if Appellant was led to believe that he no longer had counsel, it was improper for the Investigating Officer to deal with counsel on 1 October 1968, and for him and the Examiner to deal with counsel on 16 January 1969.

IV

The fact is that the Examiner did deal with counsel on the record. If this is assumed to be a good faith dealing then, of course, the failure to apprize counsel of the intention to inquire into prior record was error under Decision on Appeal No. 1472.

Whatever the facts, which cannot be ascertained, may be, the error is worse than that. Either the Examiner dealt with a counsel no longer authorized to represent Appellant, a fact known to the Examiner, or the Examiner dealt privately, directly and off the record with a person who was represented by counsel. A remand for proper entry of prior record is not an adequate remedy here. A full rehearing by another Examiner would be required.

V

A series of other procedural errors mounted up in this case rendering a reversal necessary. Most of these are associated with the so-called "third session" of the hearing. What is presented in this record as the "third session" of the hearing (R-45 to R-63) is actually an attempt to record and perpetuate the testimony of a witness, taken by stipulation out of the presence of the Examiner. The witness was the master of AZALEA CITY.

The record purports to have been made "before" the court reporter who, the record reflects, is considered to have the authority to direct the witness to answer questions. Procedurally this is unacceptable.

The witness here was never asked to give his name, although his name is given at various places in the record as "J. Nemecek" and "Eugene Nemecek".

At numerous key points in the testimony of this witness the record contains gaps filled in with the explanation "(unintelligible to reporter)". When these gaps occur at critical moments dealing with the recording of an order or specific duties of some person, there is a grave flaw in the record. There can be no inference that if the gaps were filled in the import would be adverse to Appellant.

After the testimony of this witness was taken the Investigating Officer utilized the opportunity to introduce copies of voyage records of SS ACHILLES. A stipulation was reached, the details of which are confused, but it is certain that counsel reserved the right to object to their hearsay quality. Both counsel and the Investigating Officer contributed to the confusion here. In any event, the voyage records purport to be entries in the deck log of SS ACHILLES. A deck log is a record kept in the regular course of business but it is not a record required to be kept by statute.

It does not appear that the original was produced. The copies are certified by a notary public in and for the County of San Francisco to be true copies of the original log of SS ACHILLES. No

notary public can, *ex officio*, identify any documents as the deck log of SS ACHILLES. Since there was no identification of the original as a record made in the regular course of business, the "hearsay" objection would normally prevail. There are valid methods for identifying vessel records kept in the regular course of business. If stipulations are to be arrived at to simplify identification, they should be precise.

If a deposition is to be taken from a witness out of the presence of the examiner, the proceeding should not be cluttered with matters not relevant to his testimony.

IV

The totality of procedural errors here renders reversal necessary. Considering the difficulty encountered in conducting the original proceedings and in arriving at decision, a rehearing appears to be undesirable.

*CONCLUSION*

I conclude that the charges should be dismissed

*ORDER*

The order of the Examiner dated at San Francisco, California, on 15 July 1969, is VACATED. The findings are SET ASIDE, and the charges are DISMISSED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 26th day of June 1970.

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