

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-186840-D1 AND  
ALL OTHER SEAMAN'S DOCUMENTS  
Issued to: Arthur Theodore Foster

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1590

Arthur Theodore Foster

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 31 May 1966, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for one month outright plus two month on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as oiler on board the United States SS EXERMONT under authority of the document above described, Appellant wrongfully failed to perform duties on 23 and 24 April 1966, at Cam Ranh Bay, and from 28 April 1966 through 4 May at Nha Trang, Vietnam.

At the hearing, appellant elected to act as his own counsel. Appellant entered a plea of guilty to the charge and each specification.

Appellant offered in mitigation a statement detailing the difficulties of working an ole, reactivated ship, under oppressive weather conditions.

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

Four days later the Examiner entered a written decision containing an order suspending Appellant's documents for one month outright, plus two months on twelve months' probation.

The entire decision was served on 8 June 1966. Appeal was timely filed on 9 June 1966.

#### *FINDINGS OF FACT*

On all dates in question, Appellant was serving as oiler on board the United States SS EXERMONT and acting under authority of his document.

On 23 and 24 April 1966, at Cam Ranh Bay, and from 28 April 1966 through 4 May 1966, at Nha Trang, Vietnam, Appellant wrongfully failed to perform his duties.

Appellant retired from the United States Navy in November, 1961. His record as a merchant seaman includes two warnings, one given on 26 June 1964, at New York, for failure to perform duties on four occasions aboard SS EXCELSIOR, and for failure to join that vessel, the other given on 8 February 1966 at Newport, Oregon, for engaging in an altercation aboard SS BOWLING GREEN.

#### *BASES OF APPEAL*

This appeal has been taken from the order imposed by the Examiner. The Examiner erred in not giving sufficient weight to the matters in mitigation and that the order is excessive.

APPEARANCE: Appellant, *pro se*.

OPINION

I

It is noted here that the written order of the Examiner served upon Appellant is different from the order given orally on the record in that the three month suspension on the record was entirely placed on probation while the written order provided for one month outright.

The reason for the change is easy to see. At the time of hearing, an official record of Appellant's prior infractions was not available. The Examiner accepted Appellant's unsworn statement that he had been warned in New York in 1962 or 1963 for missing a ship at Barcelona. The Examiner then said, "All right, I'll go ahead and try to complete the decision on that basis. When the report comes in, should it be different I'll have to change the wording."

When the report came in, the Examiner learned that Appellant had been warned not in 1962 or 1963, but in 1964. He found that this was not only for failure to join but also for failure to perform duties. He found also that Appellant had been warned, just one month before the commencement of the voyage aboard EXERMONT, for engaging in an altercation aboard another vessel. Because of the recency of the second warning he decided that some outright suspension was appropriate.

II

I cannot but note here that the means of ascertaining prior record of Appellant conformed to regulations and approved procedures on neither occasion.

46 CFR 137.20-160(b) permits an examiner to accept a statement from a person charged as to his prior record, *under oath*. This was not done here.

The true prior record was not entered in open hearing in the presence of Appellant, nor was he permitted expressly to waive such practice. See Appeal Decision No. [1472](#).

This error I cure by taking notice of Appellant's true record.

### III

With the foregoing in mind, it may be said that Appellant was most fortunate that the order in this case was not more severe.

Even his first warning seems to have been scarcely appropriate for multiple offenses. The recency of the altercation warning, as the Examiner reasoned, necessitated outright suspension.

Appellant's own statements in his appeal make it appear that he was possibly dealt with more leniently than he deserved. He says that he was charged "with intoxication and failure to perform duties on four occasions" aboard EXERMONT. This is not true. He was charged with failure to perform duties on two consecutive dates and on seven consecutive dates. No reference to intoxication was made in the charges and no reference to intoxication was made on the record of hearing.

Appellant also urges that on these occasions "he had to find some means of relaxation and recreation which he could only do under the prevailing conditions by drinking and resting."

This philosophy can scarcely be endorsed for a working seaman on articles, especially when seven consecutive days are needed for drinking and resting, but it appears to me that Appellant's suspension might well have been for longer duration had he so expressed himself to the Examiner.

### CONCLUSION

Appellant has provided no persuasion to disturb the Examiner's order.

### ORDER

The order of the Examiner dated at San Francisco, California, on 31 May 1966, is AFFIRMED.

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

Signed at Washington, D. C., this 22nd day of November 196 .

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Prior record

method of ascertaining

\*\*\*\*\* END OF DECISION NO. 1590 \*\*\*\*\*

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