

IN THE MATTER OF LICENSE NO. 295436, MERCHANT MARINER'S DOCUMENT
NO. Z-372945-D2 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Benjamin F. ATKINSON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1645

Benjamin F. ATKINSON

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 1 September 1966, 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 Third Assistant Engineer on board the United States SS PRESIDENT ADAMS under authority and license above described, on or about 10 May 1966, Appellant, at San Francisco, California,

- (1) wrongfully failed to perform duties by reason of intoxication;
- (2) wrongfully failed to obey orders of the Chief Engineer to turn to at duties, and to leave the ship; and
- (3) wrongfully assaulted the first assistant engineer.

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

The Investigating Officer introduced in evidence an official log book entry and the testimony of the Chief and first assistant engineers.

In defense, Appellant offered in evidence his own testimony and documentary evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and three 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 1 September 1966. Appeal was timely filed on 6 September 1966.

FINDINGS OF FACT

On 10 May 1966, Appellant was serving as Third assistant engineer on board the United States SS PRESIDENT ADAMS and acting under authority of his license and document while the ship was in the port of San Francisco, California.

Having signed articles on the morning of 10 May, Appellant reported to the ship in an intoxicated condition. He could not be roused from his bunk, to which he quickly repaired, to go to work. The chief engineer ordered him to work and then ordered him to leave the ship.

Appellant did neither but, in the course of looking for the chief engineer to protest his discharge, swung his fist at the first assistant engineer, fortunately missing. Appellant was eventually removed from the vessel by shoreside security guards.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that Appellant was not intoxicated, but "exhausted", and that he did not have to leave the vessel until he was paid for his day's work.

APPEARANCE: Appellant, *pro se*.

OPINION

I

The record leaves no doubt that Appellant was intoxicated on the morning of 10 May 1966. His explanation of "exhaustion", induced by a taxicab ride that morning from his hotel, to the Shipping Commissioner's office, to Oakland Army Terminal, and back to the ship in San Francisco, cannot persuade me that as a matter of law the Examiner was wrong in accepting the eyewitness testimony that he was intoxicated such that he could not work.

There is also not controversion of the evidence that he "swung on" the first assistant, but missed.

II

One point raised by Appellant, however, raises doubt about his failure to obey orders of the chief engineer. Appellant himself says that his condition, caused by exhaustion, was such that he could not legally go to work in the engine room. I am inclined to agree that he could not have been given the lawful orders set out in specification 2, but on the grounds that he was too intoxicated.

III

Modification of an order may be appropriate when some findings on the merits must be set aside. A factor to be considered is the prior record of the party.

The record of this case gives no information as to prior record of Appellant and discloses no effort by the Examiner to ascertain it.

Appellant, who had been served with charges six days before hearing, asserted his belief that service of the Examiner's decision by mail would be unconstitutional, and insisted that he get his decision in person. He did receive the decision in person, although not "in open hearing", two days later.

But no reference to "prior record" appears, whether extensive or negative. This was error which cannot now be corrected under the circumstances of this case.

CONCLUSION

I conclude that, in the absence of matter on the record as to Appellant's prior conduct, a proper modification of the Examiner's order, to take into account a dismissal as to one specification, is to suspend a portion of the period on probation.

ORDER

The findings of the Examiner, entered at San Francisco, California, on 1 September 1966, are REVISED as the Second Specification and AFFIRMED as to the First and Third Specifications and the charge. The Second Specification is DISMISSED.

The Examiner's Order is MODIFIED so as to provide for a suspension of two months, plus one month on one year's probation, and, as MODIFIED, is AFFIRMED.

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

Signed at Washington, D. C., thus 6th day of July 1967.

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