IN THE MATTER OF LICENSE NO. 322376 MERCHANT MARINER'S DOCUMENT AND ALL OTHER SEAMAN'S DOCUMENTS NO. Z-420476-D1
Issued to: John D. Van Teslaar

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1678

John D. Van Teslaar

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 3 March 1967, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for two months on twelve months' probation 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 PONCE under authority of the document and license above described, on or about 7 January 1966, Appellant assaulted and battered, and used abusive language to, the Chief Engineer of the vessel, at Houston, Texas.

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 two witnesses and a deposition of a third witness

In defense, Appellant offered in evidence several documents, photograph, and 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 two months on twelve months' probation.

The entire decision was served on 3 March, 1967. Appeal was timely on 10 April 1967, and perfected on 21 June 1967. In addition to his counsel's brief, Appellant personally submitted material for consideration on 22 August 1967.

FINDINGS OF FACT

On 7 January 1966, Appellant was serving as a third assistant engineer on board the United States SS PONCE and acting under authority of his license and document while the ship was in the port of Houston, Texas.

On that date, during the course of fighting an engine room fire aboard PONCE, and after Appellant had been ordered from the machinery spaces, Appellant shoved the chief engineer and called him "stupid." In retaliation, the chief Engineer damaged Appellant's eye.

BASES OF APPEAL

This appeal has been taken from the or*de*r imposed by the Examiner. It is contended that:

(1) There was a failure of jurisdiction because the misconduct alleged came within the jurisdiction of the Marine Inspection Office at Houston, Texas, and thus the Third Coast Guard District (Marine Inspection Office, New York) lacked authority;

(2) An alleged failure to comply with 46 CFR 137.05-10, a failure to advise Appellant informally of the nature of the complaints against him and to give him an opportunity to comment before service of charges, was a jurisdictional

deficiency;

(3) when the Examiner who opened the hearing later disqualified himself and withdrew, it was error for the substituted Examiner not to have commenced de *novo*; and

(4) the findings are against the weight of the evidence.

APPEARANCE: Jack Skinner, Esq., New York City

OPINION

One argument of Appellant is that since the Coast Guard Marine Inspection Office at Houston, Texas, did not take action against Appellant, no action could be taken against him in the Third Coast Guard District (in this case, at New York). It so happens that in this case the Investigating Officer spread upon the record a request by the Houston Office for the New York office to act, probably because Appellant lived in the New York area and could be more easily reached there. This request for transfer of action was ma*de* pursuant to 46 CFR 137.05-15(a) Item 3. Although this regulation was followed in procedure, it must be noted that the substance of the regulation is descriptive of certain things that may happen, not a limitation upon what can happen.

Jurisdiction exists under 46 CFR 137 when the terms of the authorizing statutes are met. Geography is not controlling in the sense that it is in civil or criminal cases. Thus, in the instant case, the allegation that Appellant while serving under authority of his license committed an act of misconduct at Houston, Texas, is a sufficient allegation of jurisdiction whether the hearing be held in Houston, New York, or Seattle.

No question such as distant service appears in this case. The charges were served in New York by a duly designated Investigating officer and were heard at New York by a duly designated examiner. Jurisdiction cannot be questioned on the grounds that the alleged offenses took place elsewhere, or even that they were known to, or had become known to, an officer elsewhere which did not prefer charges.

II

The second jurisdictional question raised was that 46 CFR 137.05-10, which says that an Investigating Officer will, under certain conditions, "advise...[a] person informally of the substance of the complaint against him and afford him an opportunity to make such comment as he may desire," before preferring charges.

Appellant raised this question before the first Examiner hearing the case by asserting that when he appeared before the Investigating Officer for the first time, accompanied by his counsel, the charges had already been drafted and thus he had been denied the informal advice and opportunity to comment to which he was entitled. Appellant, possibly significantly, did not raise this question until one month after the case against him had been rested, more than five months after the hearing had begun. When the Examiner ruled that evidence upon the question was needed, and the Investigating Officer announced that the officer who served the charges was immediately available to testify on the matter, Appellant's counsel declared that he himself had been a witness to the process of service of charges, and that he was reluctant to proffer himself as a witness, although Appellant himself, present and available, could also testify. The Examiner allowed a dilatory continuation of fifteen days before hearing evidence on the question. Then the Examiner permitted Appellant and his Counsel to testify as to the circumstances of service of charges. The testimony occupied some fifteen pages of the record. The Investigating Officer did not offer testimony of the officer who had served the charges.

Ultimately the first Examiner denied the motion to dismiss on the grounds of lack of jurisdiction for failure to comply with 46 CFR 137.05-10, but only because he had disqualified himself from further action. He gave leave to renew the motion. The second Examiner denied the motion on the grounds that the compliance or non-compliance with 46 CFR 137.05-10 was not a jurisdictional question.

Here again is a case where matter in the Federal Regulations is advisory or instructive, not going to substantive questions at all.

There are some intimations in this record that the showing of a charge sheet, unsigned, to the Appellant, constituted "informal" notice, and that the failure of Appellant to comment constituted a waiver. I cannot accept any such narrow construction of these regulations.

This informal regulation is designed obviously to save time on a preliminary looking into a complaint. When A has been heard to accuse B, it is not only reasonable but economical to let B dispute A's statement, if he will, before a decision is made to charge B. I do not think that when B appears for the first time with counsel there is any prejudice to B if he is not formally advised that he is informally advised of the nature of the complaint. In the context of this case, Appellant's initial appearance with counsel would indicate that he was no longer speaking for himself anyway, so that the application of 46 CFR 137.05-10 becomes technically irrelevant. Informed and retained Counsel's failure to speak for a period of five months after the hearing had begun would be a waiver if there had been fault in the first place, but I hold here that 46 CFR 137.05-10 does not set jurisdictional bounds on the Examiner.

The first Examiner should not even have heard the evidence. The second Examiner was correct when he found that jurisdiction was not in question. When charges are before an examiner the question is not how or why they got there but whether jurisdiction is asserted under the statutes.

III

Appellant's principal point derives from the substitution of examiners on the record.

The initial Examiner heard two witnesses and accepted one deposition in evidence before the Investigating Officer rested his case on 15 July 1966. (I must note here that at R-175, when the Investigating Officer protested the further lengthy delay of the hearing the Examiner mistakenly gave 31 August 1966 as the date on which the Investigating Officer's case had been completed.) Almost five months later, and before any substantive matter in Appellant's case had been entered, the Examiner declared that he was disqualified from hearing the case further. The given reason was

that the Examiner's brother had retained Appellant's counsel in a matter "relating to a family business" in which the Examiner had an interest. It is not indicated on the record whether the retainer undertaken by counsel was against or in behalf of the Examiner's personal interests.

If it were the former it would seem that if anyone were disqualified it would be counsel, whose continued participation in the case in hand might not be in the best interests of Appellant. It is difficult to conceive that counsel, by voluntarily assuming a position in an unrelated proceeding of a different nature, could oust the Examiner in this case from his authority to act as trier of facts.

If, on the other hand, counsel's new interest was favorable to that of the Examiner, it is clear that the only resulting prejudice possible would be in Appellant's favor. But the Investigating Officer strenuously objected to the Examiner's act of self-disqualification. There was, therefore, no good reason for the Examiner not to have continued.

IV

When the second Examiner, who ultimately made the findings, entered the case, Appellant's counsel insisted upon trial de *novo*, claiming that what had occurred was akin to a mistrial. The Investigating Officer pointed out that it was his case which would be prejudiced if the Examiner did not hear his witnesses "live", and also that the many months that had elapsed since their appearances could have impaired the recollection of his witnesses. He asked that the Examiner proceed on the record available.

The Examiner ruled that he would read the record and proceed.

I may note that Appellant's position was effectively no worse than if the testimony of all three witnesses against him had been taken by *de*position instead of the testimony of only one so taken. But this factor is not decisive.

I see no need here to go into the general question of whether in the ordinary case a substituted examiner must proceed de

novo. confining attention to the circumstances of this case, it is seen that when the motion to start again was made the hearing had dragged through ten meetings over a period of nine months. Again it is pointed out that almost five months had elapsed since the Investigating Officer had rested and no evidence on the merits had been introduced by Appellant. It appears to me intolerable that Appellant's counsel, precipitating a situation by his own voluntary act in another matter, could nullify all that had gone before in this proceeding.

Under the circumstances of this case, it was not error for the Examiner to have continued on the existing record.

V

The argument that the Examiner's findings are "against the weight of the evidence" is not appropriate in a proceeding of this sort. The Examiner assigns weight to the evidence, and on review the test is whether the evidence on which he relied was substantial.

On the merits, it may be observed that the Examiner who made the findings very carefully weighed the evidence and dismissed three of the original five specifications preferred against Appellant. As trier of facts he leaned in favor of Appellant. His ultimate findings were based upon the unshaken testimony of a disinterested witness who was not even a member of the same department on the ship as the two principals involved. This evidence was substantial enough to support a finding that Appellant had initially and aggressively pushed or shoved his superior officer during a serious emergency and had called him "stupid."

Under other circumstances, to tell a person he is "stupid" might not warrant a charge looking to the suspension of a license, but under the conditions obtaining, coupled with the assault and battery, it cannot be said that the language should have been disregarded by the Examiner.

ORDER

The order of the Examiner dated at New York, N. Y., on 3 March

1967, is AFFIRMED.

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

Signed at Washington, D. C., this 29th day of January 1968.

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Assault (including battery)

pushing of shoving superior officer

***** END OF DECISION NO. 1678 *****

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