

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1049906-D1 AND
ALL OTHER SEAMAN DOCUMENTS
Issued to: Joseph A. Brazden

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

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Joseph A. Brazden

This review has been made in accordance with Title 46 Code of Federal Regulations 137.35.

By order dated 13 September 1965, an Examiner of the United States Coast Guard at Baltimore, Maryland suspended the seaman documents of the person charged upon finding him guilty of misconduct based on the allegations of five specifications. The Examiner concluded that three other specifications were not proved because they merely alleged conclusions.

On 26 March 1965, Appellant was served to appear at a hearing on 29 March. The hearing was convened at 1020 on 29 March. Appellant was present but without counsel. Although the home of the person charged is in Boston, he expressed the desire to have the hearing in Baltimore. After a plea of not guilty was entered to the charge and specifications, the Examiner ordered the hearing adjourned until 1300 on the same day in order to allow time for the Investigating Officer to prepare interrogatories for depositions and to provide time for the person charged to arrange for employment on a ship which was scheduled to sail late on the afternoon of this date.

Reconvening of the hearing was delayed until 1515 waiting for the person charged. When he did not appear and had not been heard from by this time, the hearing was conducted in absentia. The

evidence available was not sufficient to establish a prima facie case with respect to any of the offenses alleged. Nevertheless, the Examiner ruled that the person charged, by his default in failing to appear when the hearing reconvened, admitted the acts alleged in the five specifications. The Examiner then concluded that these specifications were proved.

In his decision, the Examiner states that since the present regulations concerning "in absentia" proceedings (46 CFR 137.20-25) omit the requirement of prima facie evidence of guilt which was formerly in the regulations, the rules of construction require that significance be given to this omission, and, therefore, the result should be the same as in civil proceedings where the defendant is in default through his failure to appear or answer the complaint.

The fallacy in this reasoning is that the Examiner ignores 46 CFR 137.20-75(b) which requires a "not guilty" plea when the person charged fails to appear, the following section (46 CFR 137.20-77) which places the burden of proof on the government, and 46 CFR 137.20-95(b) which states that findings must be supported by substantial evidence. When the regulations were revised (effective 1 January 1963), there were extensive changes made in wording and arrangement of the subject matter. It was not considered necessary to continue to use the "prima facie evidence of guilt" clause relative to "in absentia" proceedings in view of the wording of the above sections and particularly the fact that section 137.20-77 now directly follows section 137.20-75(b), but it did not do so before the revision. It was felt that it was abundantly clear that the meaning of the regulations was to remain the same with respect to the necessity of establishing a prima facie case in "absentia" proceedings. Therefore, the Examiner's reasoning is in error.

The conclusions that Appellant was guilty as alleged are set aside and the case will be remanded to give the Investigating Officer a reasonable opportunity to submit evidence in support of the allegations in the five specifications and to allow the person charged to present evidence in rebuttal.

The allegations were adequate in the three specifications which the Examiner found not proved on the basis of his conclusion that they merely alleged conclusions. Nevertheless, no further action will be taken with respect to these specifications.

Order

The Order of the Examiner dated at Baltimore, Maryland, on 13 September 1965, is VACATED. The record is REMANDED with directions to reopen the hearing for further proceedings not inconsistent with this decision.

W. D. SHIELDS
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 19th day of November 1965.

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