In the Matter of License No. A-16363
Issued to: JOSEPH B. GAIER

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

312

JOSEPH B. GAIER

This appeal comes before me by virtue of 46 United States Code 239(g) and 46 Code of Federal Regulations 137.11-1.

On December 22, 1948, a hearing was held before an Examiner, United States Coast Guard, New York, New York, on a charge of misconduct, supported by three specifications, preferred against Joseph B. Gaier, Z-15807 (hereinafter referred to as the appellant), formerly Chief Mate of the SS SIMEON G. REED.

The appellant was represented by counsel and entered a plea of "not guilty" to the charge of misconduct, as well as to the three specifications alleging (1) breaking in of the stateroom door of the 3rd Assistant Engineer; (2) incapacity for proper performance of duty by reason of intoxication; and, (3) use of abusive and threatening language to the master.

The Investigating Officer, after summarizing the results of his investigation, called Axel Thomsen, Master of the SS SIMEON G. REED on November 25, 1948. Captain Thomsen testified as to the Appellant's conduct on November 25, 1948, while the vessel was in port in London, England. Cross-examination of Captain Thomsen brought out that the alleged offenses were not noted in the

Official Log of the vessel.

No other witnesses were called by the Investigating Officer and when he rested his case, counsel for appellant moved to strike specifications one and two on the ground that there was no testimony adduced to support them. The motion to strike the first specification was granted and the Examiner reserved his decision until the presentation of the appellant's case-in-chief.

The appellant took the stand on his own behalf and categorically denied having any argument with the Master on November 25, 1948, or the use of abusive and threatening language to the Master as alleged in specification three. He admitted on direct examination that he had drunk several glasses of red wine with his meals on the date in question. On cross-examination, he admitted that he had asked the Master on December 2, 1948, if charges were to be preferred against him. He also admitted that a Coast Guard officer gave him a sheet of paper containing a charge of misconduct but that he had no idea what the charge was all about.

No other witnesses were called by the appellant. The Examiner then granted the motion of the appellant's counsel to strike the second specification. Counsel for appellant, in summation then submitted a motion to strike the third specification on the ground that the specification had not been proven by a preponderance of credible evidence. This motion was denied. Thereafter the Examiner found the charge of misconduct proved and third specification, supporting the charge proved. He then issued an order suspending for one month License No. A-16363 and all other valid certificates and documents held by the appellant. This suspension order was not to become effective provided that no further charges under R.S. 4450, as amended, for acts committed within three months of December 22, 1948, were proven against the appellant.

From that order, this appeal has been taken and it is contended that:

(a) The evidence was not sufficient to sustain the findings and order; and,
(b) The burden of proof, resting upon the proponents of the charge, was not met.

OPINION

In the instant case, the Examiner, after hearing the witnesses, determining their credibility, and drawing inferences from the evidence adduced, found that the charge of misconduct and the third supporting specification had been proven against the appellant. Rule 52 of the Federal Rules of Civil Procedure provides that "Findings of fact shall not be set aside unless clearly erroneous ***." I believe for the purposes of the administrative hearings held under R.S. 4450, as amended, the same rule should apply. Further, I do not feel that I can set aside a decision of an Examiner on the ground that such decision was "clearly erroneous" merely because I may entertain some doubt as to the quantum of evidence. I feel that I am bound to at least the duty placed upon appellate courts by a long line of decisions viz. that I am required to attach to the testimony of witnesses the full weight and quality of credibility which the Examiner gave it. *Belm Co. v. Landy*, 113 F. 2d 897; *Atlas Beverage Co. v. Minneapolis Brewing Co.*, 113 F. 2d 672; *Webb v. Frisch*, 111 F. 2d 887; *National Mutual Casualty Co. v. Eisenhower*, 116 F. 2d 891, 895; *Camden Woolen Co. v. Eastern S.S. Lines*, 12 F. 2d 917, 919; *Flack v. Holtegel*, 93 F. 2d 512, 515; *Kincaid v. Mikles*, 144 F. 2d 784, 787; *Columbus Outdoor Advertising Co. v. Harris*, 127 F. 2d 38, 42; *Limbach v. Yellow Cab Co.*, 45 F. 2d 386, 387; *United States v. Gamble-Skogmo*, 91 F. 2d 372, 374; *Continental Petroleum Co. v. United States*, 87 F. 2d 91, 95; *Bradley v. Smith*, 114 F. 2d 161, 165; *Walling v. Rutherford Food Corp.*, 156 F. 2d 513.

To warrant a setting aside of the decision of the Examiner on the grounds urged in the appeal, I must find that such decision is "clearly erroneous" because it is not supported by substantial evidence. In re *Chicago & N.W.R. Co.*, 110 F. 2d 425. The "substantial evidence" rule is aptly set forth in the cases of *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 F. 641, 643, and *National Labor Relations Board v. Union Pacific Stages*, 99 F. 2d 153, 177.

In Jenkins & Reynolds Co. v. Alpena Portland Cement Co.,

supra, the Court stated:

> "By `substantial evidence' is not meant that which goes beyond a mere `Scintilla' of evidence, since evidence may go beyond a mere scintilla and yet not be substantial evidence. Substantial evidence must possess something of substance and relevant consequence and not consist of vague, uncertain, or irrelevant matter, not carrying the quality of proof or having fitness to induce conviction. Substantial evidence is such that reasonable men may fairly differ as to whether it establishes plaintiff's case, and, if all reasonable men must conclude that it does not establish such case, then it is not substantial evidence."

In National Labor Relations Board v. Union Pacific Stages, supra, the Court stated:

> "`Substantial evidence' means more than a mere scintilla. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom, and, considering them in their entirety and relation to each other, arrives at a fixed conclusion."

I have carefully reviewed the entire record in the case before me and am of the opinion that the Examiner's decision was supported by "substantial evidence" as that term has been defined in the cases cited above. Hence, having reached this conclusion, it follows that there is nothing "clearly erroneous" in the trial below. It is not for me, as an appellate authority, to retry the facts. *Essenwein v. Commonwealth*, 325 U.S. 279. It is simply my duty to review the action of an Examiner to ascertain the existence of substantial evidence sufficient to support the finding. *Knapp v. U.S.*, 110 F. 2d 420.

CONCLUSION AND ORDER

Having found nothing to warrant my intervening in this case, it is ordered and directed that the decision of the Coast Guard Examiner dated December 22, 1948, should be, and it is AFFIRMED.

J.F. FARLEY
Admiral, United States Coast Guard

Commandant
Dated at Washington, D.C., this 29th day of April, 1949.

***** END OF DECISION NO. 312 *****

Top