

IN THE MATTER OF LICENSE NO. 325139
MERCHANT MARINER'S DOCUMENT NO. Z72339-D1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: William Romeo Sorrentino

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1558

William Romeo Sorrentino

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 21 February 1966, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for two months outright upon finding him guilty of misconduct. The specification found proved alleges that while serving as third mate on board the United States SS NORBERTO CAPAY under authority of the documents above described, on or about 16 September 1965, Appellant wrongfully failed to join the vessel at Qui Nhon, Vitenam.

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

The Investigating Officer introduced in evidence four documents.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of two months outright.

The entire decision was served on 10 February 1966. Appeal was timely filed on 23 February 1966. Prior to decision on appeal, on 3 May 1966, Appellant asked for reopening of the hearing. The petition for reopening admits that the evidence sought to be presented by Appellant was known to Appellant at the time of hearing, but states that the evidence was unattainable at the time of hearing. Since the petition for reopening came so late, Appellant asked for either a remand to the Examiner or a reversal of the decision.

FINDINGS OF FACT

On 15 September 1965, Appellant was serving as a third mate on board the United States SS NORBERTO CAPAY and acting under authority of his license while the ship was in the port of Qui Nhon, Vietnam. He went ashore at 0800 that morning and failed to join the vessel on sailing at 0600 on 16 September 1965.

BASES OF APPEAL

On appeal, Appellant makes three points.

Point I

The evidence presented does not support the hearing examiner's finding that the person charged was on unauthorized absence from the vessel.

Point II

The United States military authorities were without jurisdiction of this vessel and members of its complement.

Point III

The failure of the person charged to return to the vessel was justified.

APPEARANCE: Schwartz and O'Connell, of New York City, by Darryl R. Chason Esquire

PETITION TO REOPEN

The petition to reopen, which accompanied the brief on appeal, offers what purports to be a copy of a certificate of the Vietnamese province chief to the effect that Qui Nhon was not off-limits to merchant seamen. The certificate is dated "November 6, 1965."

The petition states, "Upon information and belief, the person accused knew of said evidence at the time of the hearing. However, same was unobtainable at the time of the hearing."

OPINION

I

The specification in this case alleges but one thing, a wrongful failure to join NORBERTO CAPAY at Aui Nhon, Vietnam, on 16 September 1965.

There is no question but that the Investigating Officer's case in chief established *prima facie* that the failure to join occurred, as alleged on 16 September 1965.

Under Point I of the appeal, it is argued that the Examiner should have advised Appellant, who was then not represented by counsel, of his right to move for a dismissal because a *prima facie* case had not been made out. This argument is without merit; and a motion to dismiss would necessarily have been denied.

As I read the statute (46 U.S.C. 701), once a failure to join has been established it is incumbent upon the seaman charged to

show "reasonable cause" for his failure if he is to escape the consequences.

While unauthorized absence is the predicate of a wrongful failure to join, it is not necessary for a *prima facie* case that the unauthorized absence be independently proved. It is enough to prove the failure. If authority to have been off the vessel at the time of sailing is to be a defense it must affirmatively be shown.

Appellant's testimony at the hearing falls far short of an affirmative showing of authorized absence or of reasonable cause for his failure to join at the time of sailing.

When he came before the master of the vessel to have the log entry read to him (Appellant had rejoined the vessel on its return to Qui Nhon), his reply was, "I thought there was shore leave." But at the hearing, he explained (R-13), "It's a peculiar situation you know. At first they give you shore leave, then they cut that out, then they give you shore leave provided they were working the ship-with the launch. They let you ride the carriers and then they cut that out. Then they gave you shore leave, then they didn't give you shore leave. You never know if you've got shore leave or you were restricted and a lot of people went ashore."

Appellant went ashore in a "bumboat", not one of the launches that, he testified, were provided when shore leave was permitted. He consulted with no one to find out whether he was permitted to go ashore or not. He could not return to the ship that night because there was no transportation available. When he tried, at about noon the next day, to obtain transportation he learned that the ship had left.

A seaman, even one legitimately ashore, has a duty to insure that he can get back to his vessel on time. Appellant's neglect here to find out whether he could go ashore and his failure to provide for a return to the vessel, if he could go ashore, do not amount to "reasonable cause" for missing the sailing.

II

Because of the opinion given thus far, it is evident that I

consider that the charge was proved by reliable, probative, and substantial evidence. But in this portion of the opinion, I must discuss the petition to reopen and the other grounds alleged on appeal.

Appellant argues that United States military authorities have no jurisdiction to deny shore leave to seamen in Vietnam. That proposition I am not prepared to rule on, on the state of this record. The Investigating Officer introduced into evidence, without objection, two documents intended to prove that shore leave was forbidden in Qui Nhon by the United States military authorities. The first document was a directive addressed to "Masters" "All Commercial and MSTs Ships." It is obviously a form, with CSS NORBERTO CAPAY" typed in after "Masters." Dated "09 September 1965" it declares that Qui Nhon is off-limits to civilian personnel "until further notice." The second document is a cablegram addressed to NORBERTO CAPAY from "Commander Qui Nhon Area," also stating that Qui Nhon was off-limits to civilian personnel. It is dated 14 September 1965.

As evidence in this case, I can afford the documents no probative value.

The first reason is that they were introduced into the record by the Investigating Officer thus:

"I submit as Government's exhibit #3 a certified true copy of a message sent to the Master of the NORBERTO CAPAY from the Qui Nhon Military Transportation Battalion." (R-9)

"I would like to submit as Government's exhibit #4 a certified true copy of a radiogram sent to the NORBERTO CAPAY from Commander Qui Nhon Area." (R-9, R-10)

The certifications as to authenticity of the copies are made by the Investigating Officer himself.

I have noted that no objections were made, But I note also that Appellant was not then represented by counsel.

I take official notice that the Investigating Officer had no authority to "certify" true copies of such documents. Had the originals been produced and properly identified and then admitted in evidence, the Investigating Officer could then certify copies as copies of records in official Coast Guard proceedings. Had the master made them part of his Official Log Book they could have been admitted in evidence with a presumption of authenticity. Had the master personally identified them as documents received by him in the regular course of business, the same presumption would attach.

On this record, no foundation for the entry of these documents was laid. They should not have been admitted in evidence in the manner in which they were.

A second fault to be found with these documents is that they are irrelevant to the proceeding in the absence of a showing (and here I must agree with Appellant that a showing was required) that the authority exerted was lawful, and that the lawful order of restriction had either been communicated to the crew by the master or had been used by the master as the basis for an order of his own.

It is true that the master, in the Official Log-Book entry, refers to orders of military authority, but he does not mention either republication of the orders he received or use of them as the basis of an order of his own.

A third difficulty caused by these two documents, inherent in the failure to identify them properly, is that in themselves they create doubt as to the situation.

Are the originators of the two orders the same person or not? I cannot take official notice one way or the other.

If the originators are two different commanders, did both have the authority to issue the order? I do not know.

If the two originators were the same commander an even more difficult problem would arise. Since the 9 September 1965 order was valid "until further notice," the existence of a 14 September 1965 order would open the way to an inference that the 9 September order had been rescinded. This would also open the possibility that the 14 September order might have been rescinded. In other

words, the showing of two orders here is weaker than the showing of one.

The existence of one order would create a presumption that it continued effective for some reasonable time. The fact of a second order five days after the first would create a presumption that the first order had been canceled after a brief period. Such a cancellation of the second order might be expected, and the burden to show that it was in fact effective on a given date might be placed upon the proponent.

For these three reasons I reject completely as probative or relevant to this case the two exhibits supporting to the communications to the master or NORBERTO CAPAY from military authority.

Because of this, and for other reasons, I am of the opinion that Appellant's petition to reopen the hearing must be denied.

All that he seeks to do on the petition to reopen is to introduce into the record a certificate by the Chief of the Province that Qui Nhon was not off limits.

The petition fails in three ways.

First, it admits that the existence of the evidence was known at the time of hearing. But no reference was made to it by Appellant, and no desire to secure it was expressed. It is thus not, "newly discovered evidence."

Second, on its face, it speaks from 6 November 1965, more than a month after Appellant's offense.

Third, my opinion here renders irrelevant all discussion as to the source of authority for granting or restricting shore leave by persons other than the master.

Of this last matter Appellant has referred to union agreements as to restriction of movement of ship's personnel. These matters were not in evidence. Even if they were, they would not serve to curb the legal authority vested in a master nor to relax a

statutory duty imposed upon a seaman.

III

My opinion in this case is founded solely upon the grounds that a seaman is by law bound to join his ship on sailing. Appellant did not join his ship on sailing and presented no "reasonable cause" for such failure.

IV

Considering the general conditions in Vietnam and the obligations of a licensed officer, the order is appropriate.

CONCLUSION

As to the petition to reopen the hearing, I conclude that no adequate grounds to justify reopening exist.

As to the charge and specification, I conclude that they were proved by sufficient evidence.

As to the order, I conclude that it is appropriate.

ORDER

The order of the Examiner dated at Long Beach, California, on 10 February 1966, is AFFIRMED, and the petition to reopen the hearing is DENIED.

W.J. Smith
Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 2nd day of June 1966.

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