IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-60925-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Ian H. McMurchie

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1554

Ian H. McMurchie

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title Code of Federal Regulations 137.30-1.

By order dated 15 October 1965, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a deck utilityman on board the United States SS SANTA LUISA under authority of the document above described, on or about 15 and 16 March 1965, Appellant, at Kingston, St. Vincent,

1) wrongfully failed to perform duties at unmooring the vessel by reason of intoxication;

2) wrongfully destroyed ship's property by throwing mooring lines overboard;

3) wrongfully assaulted and battered the master of the vessel; and

4) wrongfully used foul and abusive language to the master of the vessel.

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 several witnesses, officers and seaman aboard SANTA LUISA.

In defense, Appellant entered in evidence statements made by persons not called as witnesses.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and four specifications had been proved. The Examiner served a written order on Appellant revoking all documents issued to him.

The entire decision was served on 18 October 1965, Appeal was timely filed on 15 November 1965.

FINDINGS OF FACT

On 15 March 1965, Appellant was serving as a deck utilityman on board the United States SS SANTA LUISA and acting under authority of his document while the ship was in the port of Kingston, St. Vincent.

Shortly before midnight on 15 March 1965, SANTA LUISA, a passenger-carrying vessel, was preparing to sail from Kingston. Appellant returned from shore leave intoxicated and fouled lines on the windlass. He was ordered by the second mate to stop work and go to his quarters.

The vessel got underway, but at 2353 the master was advised that lines had been seen running over the after end of the ship. The master stopped the ship. After quick emergency action one of two after lines was retrieved, but the other, valued at $900.00 was lost completely. The vessel started up again.

One or two minutes after midnight the bow lookout of the vessel saw Appellant feeding another mooring line overboard. The lookout caused Appellant to run away and the lookout saved the line. The vessel again had to be stopped.

Upon identification of Appellant by the lookout, the master caused Appellant to be found and brought to the bridge. When the master ordered that Appellant be taken to sick bay Appellant became violent and kicked the master. After Appellant was removed to sick bay he was again violent and struck the master with his fist, using vile, vulgar, and abusive language to him.

BASES OF APPEAL

The appeal in this case is based upon two principal arguments, that the findings of the Examiner were not supported by substantial evidence, and that the Examiner should have disqualified himself from hearing the case by reason of bias against Appellant which arose because this Examiner had heard an earlier case involving Appellant, the decision of which was on appeal at the time of the instant hearing.

APPEARANCE: Paul C. Matthews, Esq. of New York, New York.

OPINION

The first basis of appeal has no merit. While there is no eyewitness to Appellant's activities at the after end of the vessel, which resulted in one line's being lost and the other retrieved, it is a reasonable inference from his positive identification by an eyewitness as the one who was attempting to dispose of one of the forward lines overboard that he was the one who had committed the acts aft.

There is ample eyewitness testimony that Appellant performed the other acts alleged in the specifications found proved for the Examiner to have predicated his ultimate findings upon it. Since no specific grounds are urged upon appeal, no specific opinion need be given.

On the question of possible prejudice of the Examiner, I note

that prior to the taking of any evidence, counsel moved that the Examiner disqualify himself from hearing the case because this same Examiner had heard earlier charges against Appellant and found them proved.

It is axiomatic that for there to be a disqualification of the trier of facts there must be a showing of prejudice. The Examiner here correctly states that many a defendant may appear many times before the same criminal court judge.

If the naked assertion that a seaman charged under R. S. 4450 could never appear before the same Examiner twice, with no showing of actual bias or prejudice, were enough to require disqualification of the Examiner, the machinery of these remedial hearings could often be caused to come to an administrative impasse.

There are just so many ports; there are just so many Examiners; and seamen often ship from and to the same port or area for years at a stretch. The realities of shipping are such that an often offending seaman may well end up for hearing in the same port for each offense. Surely, it is inconceivable that an offender could be heard to claim that his case could not be heard merely because he had chosen to commit offenses triable in the same jurisdiction.

The true test, the only realistic test, then is actual prejudice or bias.

In this case, in which the prejudice and bias are presented as grounds for appeal, we need only look to record of hearing itself, on which Appellant was represented by the same counsel as on appeal.

Counsel on the record of hearing said, even while moving for disqualification of the Examiner, "I don't claim - certainly I claim no prejudice...."

An assertion such as is made here, as grounds for appeal, must be substantiated by affirmative showing of bias or prejudice. Nothinglike this is offered.

Triers of facts constituted as such by statute may be presumed to be impartial. The burden is upon him who argues bias or prejudice to establish it affirmatively. Such an establishment has not even been attempted in this case.

To the contrary, considering the statements in the record, the appeal turns out to be the urging of a reversal solely on the grounds that the Examiner heard another case involving Appellant, with an admission that prejudice is not involved.

CONCLUSION

There is nothing in this record to call for consideration of any disturbance of the Examiner's action. Appellant's record within the last five years, while understandably not urged in mitigation, is not such as to lead one to tamper with an order of revocation, since he had a warning in October 1962, and was placed on probation in March 1965 for offending against superiors and failing to perform because of intoxication much as he did in this case.

On consideration of this prior record further comments may be in order on Appellant's argument that the instant case should not have been heard by this Examiner. When an Examiner extends clemency to a party against whom charges have been proved, by way of probation, he words the order so that not only he but any other Examiner may revoke the probation he allowed.

I note here that Appellant in this case was accorded no outright suspension at all but only fifteen months probation by this very Examiner on 25 March 1965.

It would not make sense that simply because Appellant's misconduct in the instant case managed to outrace the Examiner's decision in the last one by ten days he should not only on a technicality not have been on probation at the time of the instant offenses but also should have been immune to hearing by the Examiner who accorded him the probationary period.

The conduct proved here adequately merits the order, whether or not Appellant had a prior record.

ORDER

The order of the Examiner dated at New York, New York on 15 October 1965, is AFFIRMED.

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

Signed at Washington, D. C., this 16th day of May 1966.

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