IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-510185-D3 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Kelly Miller

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1556

Kelly Miller

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 10 January 1966, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for 3 months outright upon finding him guilty of misconduct. The specification found proved alleges that while serving as a messman on board the United States SS AUDREY J. LUCKENBACH under authority of the document above described from 19 through 23 November 1965, while the vessel was at sea, wrongfully failed to perform his assigned duties by reason of intoxication.

At the hearing, Appellant did not appear. Proceedings were held in absentia.

The Investigating Officer introduced in evidence extracts from the shipping articles and Official Log Book of AUDREY J. LUCKENBACH.

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 three month outright.

The entire decision order was served on 26 January 1966. Notice of appeal was timely filed on 26 January 1966. At Appellant's request, time for filing a further brief was extended to 9 May 1966. By that date no brief has been filed.

FINDINGS OF FACT

From 24 August 1965 to 7 January 1966, Appellant was serving as a messman on board the United States SS AUDREY J. LUCKENBACH and acting under authority of his document.

From 19 through 23 November 1965, while the vessel was at Bangkok, Thailand, Appellant failed to perform his duties because of intoxication.

On 24 November 1965, while the vessel was en route from Bangkok to Qui Nhon, Vietnam, Appellant was "logged" by the master of the vessel for these failures and, in the presence of the steward, voiced no reply.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

In his Notice of Appeal, Appellant urged that the vessel was in a safe harbor, and not at sea, when the failure to perform duties took place, and that the suspension ordered was too severe in view of the nature of the offense and Appellant's past record.

In a brief filed the same date, Appellant admits guilt but urges the same contentions as in the Notice of Appeal.

APPEARANCES: L. C. Gay, Esquire, San Francisco, California, by Eric J. Schmidt, Esquire

OPINION

Some slight confusion entered this case because of an apparent failure of all parties to read the available records.

The specification alleges that the five days of failure to perform duties occurred when the vessel was at sea. The Notice of Appeal asserts that the vessel was on the dates in question in a safe harbor. Appellant's brief asserts further that on the five days in question according to the deck log of AUDREY J. JUCKENBACH for "VOY.__," the vessel was at Saigon. It is noted that the deck log of the vessel is not in evidence and that Counsel had not ascertained the voyage number when citing the deck log.

These details need not detain us. The Official Log Book entry in evidence shows in itself that the entry was made at 1000 on 25 November 1965, that the vessel was then proceeding from Bangkok to Qui Nhon, and that the five previous days of failure to perform had occurred in port.

It seems to me that the only possible inference is that the failures to perform because of intoxication occurred not at sea, as the specification alleges, not at Saigon, as Appellant's brief alleges, but at Bangkok.

This variance between place of alleged misconduct and place of misconduct proved is not fatal. The character of the act as misconduct remains the same and Appellant was on notice as to the character of the acts and the dates. Failure to perform duties by reason of intoxication is misconduct whether a vessel is at sea or in port.

Appellant correctly states that an Examiner's opinion of the degree of misconduct could be

altered, because intoxication at sea is usually worse than intoxication when the vessel is in a safe port.

But in Appellant's case I can find only that the Examiner's order is lenient. The Examiner took notice of conditions in Southeast Asia affecting our merchant shipping. One might even speculate that intoxication in port under such conditions might be worse than failure to perform duties at sea. But no speculation is in order here.

The inescapable block to any reduction in the severity of the Examiner's order is Appellant's prior record.

In December 1959, he was given two months' suspension, plus four more on a year's probation, at New York, for a battery aboard AMERICAN HUNTER.

Less than three years later, in October 1962, he was given a four month suspension, plus five more on ten months probation, at New York, for battery (again), disobedience of orders, and failure to perform duties aboard INDEPENDENCE.

In March 1963, he was warned in New York for failure to join MORMACCAPE (although he was apparently on probation at the time.)

In August 1964, he was warned at New York for failure to join GREEN VALLEY.

In July 1965, he was warned at San Francisco for failure to join ALOHA STATE.

In view of Appellant's record, it seems to one that the Examiner's order in this case is lenient to the point that Appellant is lucky to know that in only three months he will be able to go back to sea.

CONCLUSION

I conclude that the findings of the Examiner must be amended to reflect that on the dates alleged in the specification AUDREY J. LUCKENBACH was in the port of Bangkok.

The order need not be disturbed.

ORDER

It is ordered that the Findings of the Examiner in this case be amended to show that the misconduct found proved took place in Bangkok, Thailand.

The findings of the Examiner, as amended, and the order, are AFFIRMED.

E. J. ROLAND

Admiral U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 26th day of May 1966.

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