

In the Matter of Certificate of Service No. E-382821
Issued to: JUAN BENITEZ

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

390

JUAN BENITEZ

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

Appellant was originally served with a copy of the charges and specifications on 11 May, 1948. No hearing was held, at that time, due to the fact that there was no Examiner available. On 29 March, 1949, Appellant was again served with a copy of the charges and specifications as well as a subpoena summoning him to appear before an Examiner of the United States Coast Guard at New Orleans, Louisiana, on 31 March, 1949, to answer charges of "misconduct" and "inattention to duty" supported by the following specifications:

"CHARGE: Inattention to duty

FIRST SPECIFICATION: In that you, while serving as O.S. on board a merchant vessel of the United States, the S.S. CAPE TRINITY, under authority of your duly issued Certificate, did, on or about 23 April, 1948, while said vessel was in a foreign port, neglect to inform the mate on watch of cargo irregularities in #5 hold.

"CHARGE: *MISCONDUCT*

First Specification: In that you, while serving as

above, on 23 April, 1948, vessel being in a foreign port, had in your possession a portion of cargo without proper authority. Second Specification: In that you, while serving as aforesaid, on 23 April, 1948, vessel being in a foreign port, use abusive and obscene language toward John Wheeler, Chief Mate, without reasonable cause. Third Specification: In that you, while serving as O.S. on board a merchant vessel of the United States, the S.S. CAPE TRINITY, under authority of your duly issued certificate, did, on or about 23 April, 1948, while said vessel was in a foreign port, threaten John Wheeler, Chief Mate, with body injury, without reasonable cause."

On the date of last service, Appellant was fully informed as to his rights, privileges, and obligations with respect to the summons, the charges, and the hearing. He agreed that two days would give him sufficient time to prepare his defense.

(R. 1) Although he was impressed by the Investigating Officer with the necessity of appearing at the hearing or informing the Coast Guard of any delay (R.2,5), Appellant did not put in an appearance at the designated place, on 31 March, 1949, or at any time thereafter. For this reason, the hearing was conducted "in absentia", on 31 March, 1949, in accordance with Title 46 Code of Federal Regulations 137.09-5(f).

The Investigating Officer swore that his statements concerning the service upon Appellant, on 29 March, 1949, were true. There was also introduced in evidence the sworn testimony of a witness who was present at the service upon Appellant. His testimony substantiated that of the Investigating Officer and he also identified the signature on the back of the copy of the summons as being the signature of the Appellant. (R. 4)

Since Appellant did not attend the hearing, the Examiner entered a plea of "not guilty", on behalf of Appellant, to each of the three specifications under the "misconduct" charge and to the one specification under the charge of "inattention to duty".

After the Investigating Officer had completed his opening statement, he proceeded to introduce into evidence documentary records in order to establish a prima facie case. The

Investigating Officer was then afforded the opportunity to make an argument and submit proposed findings. At the conclusion of the hearing, the Examiner found "proved" the specification and charge pertaining to "inattention to duty." He also found the second and third "misconduct" specifications "proved"; the first "misconduct" specification "not proved" and the charge of "misconduct" "proved." He thereupon entered an order suspending Appellant's Certificate of Service No. E-382821, and all other valid licenses and certificates held by him, for a period of six months; said suspension to terminate six months from the date Appellant turned over his certificate to any United States Coast Guard authority.

A copy of the order was served on Appellant on 20 May, 1949, at which time he filed his notice of appeal and reserved the right to submit a supporting brief after examination of the record. At this time, Appellant was issued a temporary certificate for one voyage on the S.S. WILLIAM LYKES. This certificate was surrendered on 20 August, 1949, and no further temporary certificate has been issued pending the appeal.

On this appeal Appellant has submitted a supplemental memorandum dated 24 August, 1949, in which *inter alia* it is urged:

1. The alleged offenses are not true but are a result of the Chief Mate's discrimination against, and abuse of, Appellant throughout the voyage because Appellant is a negro.
2. Appellant was not given an opportunity to defend himself. He did not appear at the hearing on 31 March, 1949, because he was unable to locate his witnesses.
3. The six months outright suspension order is unduly harsh for the nature of the offenses. Leniency should be shown since Appellant has a wife and four small children to support.

Having carefully considered the Record in this case, I hereby state my

FINDINGS OF FACT

On or about 23 April, 1948, Appellant was serving as a member of the crew in the capacity of ordinary seaman on board the American S.S. CAPE TRINITY, under authority of Certificate of Service No. E-382821, while the ship was at the port of Cadiz,

Spain. On this date at approximately 1810, the Chief Mate went to the No. 5 hold where Appellant was on watch to prevent pilfering of the cargo which consisted of wines and liquors. Appellant was talking with several stevedores and had two bottles of wine in his pockets. He saw the Chief Mate entering the hold and put the two bottles of wine on an overhead beam. The Chief Mate recovered the two bottles and confronted Appellant with them but the latter disclaimed any knowledge about them. Although four cases of wine had been broken open and some of the contents removed, Appellant had not attempted to stop the pilferage or reported the incident to the Chief Mate.

The Chief Mate took Appellant to the Master and reported the facts as stated above. Appellant denied the accusations and repeatedly used abusive and obscene language when questioned about it.

The Chief Mate then ordered Appellant to stand the gangway watch and to stay at the gangway until properly relieved. At about 1935, Appellant was in the messman's room talking with several members of the stewards' department. Upon being ordered back to the gangway by the First Mate, Appellant used vile and obscene language directed toward the First Mate as well as threatening the Chief Mate with bodily injury. This incident was also reported to the Master and Appellant was ordered to be handcuffed. He was later released from the handcuffs when he promised to cease his disobedience and vulgar language.

Appellant's certificate had previously been suspended in 1945 for two months on six months suspension, for failure to join the S.S. JOHN GRANT. The probationary period was satisfactorily completed.

OPINION

Appellant contends that the charges against him are unjustified since they are the outgrowth of the racial prejudice continuously displayed by the Chief Mate (Point 1). Although Appellant was given ample opportunity to submit evidence in support of this contention, he did not appear at the hearing to do so.

A certificate extract from the Official Log Book of the S.S. CAPE TRINITY dated 23 April, 1948, at Cadiz, Spain, was introduced

into evidence by the Investigating Officer. This extract fully recites the facts which are contained in my findings, *supra*, and these findings are sufficient to support the ultimate findings in the specifications which were found "proved" by the Examiner. Since the copy of the log entry meets all the statutory requirements set out in Title 46 United States Code 702, it establishes a *prima facie* case against Appellant. This *prima facie* case became conclusive upon Appellant's failure to take advantage of his opportunity to meet and overcome it with conflicting evidence.

Appellant has also argued that he was not given sufficient opportunity to locate his defense witnesses and, hence, he was not able to defend himself (Point 2). But it appears that Appellant acquiesced in the date set for the hearing and he was carefully cautioned as to the importance of either appearing at the hearing on the date set or requesting an adjournment until his defense could be prepared. Despite this warning, Appellant completely ignored the hearing and did not at any time, before or after the date of the hearing, make known to the Coast Guard authorities the reason for his failure to appear at the hearing. Appellant's statement, at this late date, as to the reason for his failure to comply with the clear instructions of the Investigating Officer and the subpoena cannot be given persuasive influence in altering the order of the Examiner.

Finally, Appellant pleads for clemency because of his large family and the nature of the offenses. Appellant's personal convenience must be completely subjugated to the pertinent factors -- safety of property and discipline at sea -- toward which this proceeding is directed. Appellant's failure to make any report concerning the cargo pilferage definitely endangered the value of the ship's cargo and his subsequent language and threat directed at the Chief Mate were certainly detrimental to the maintenance of discipline on the ship. The seriousness of the latter two offenses is enhanced by the fact that they were committed against the Chief Mate who had complete authority on the ship in the absence of the Master.

It is my opinion that the order imposed was justified regardless of any consideration being given to the fact that Appellant did not consider it of sufficient importance to appear at

the hearing. Appellant suffered the consequences of this course of action by losing his opportunity to overcome the prima facie case made out by the certified copy of entries in the ship's Official Log Book. Hence, no clemency will be granted and the Examiner's Order should be and is sustained.

CONCLUSION AND ORDER

The Order of the Examiner dated 31 March, 1949, should be, and it is, AFFIRMED.

J.F. FARLEY
Admiral, United States Coast Guard
Commandant

DATED at Washington, D. D., this 9th day of December 1949.

***** END OF DECISION NO. 390 *****

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