

In the Matter of Merchant Mariner's Document No. Z-396367-D2 and
all other Seaman Documents

Issued to: JOSEPH W. KUSMIERSKI

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1058

JOSEPH W. KUSMIERSKI

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.

By order dated 21 August 1957, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman documents upon finding him guilty of misconduct. One specification alleges that while serving as an able seaman on board the United States SS COEUR D'ALENE VICTORY under authority of the document above described, on or about 17 April 1957, Appellant failed to join his vessel on its departure from Yokohama, Japan. A second charge of misconduct with four specifications alleges that while serving as Boatswain aboard the United States SS HURRICANE, on 20-23,27, 28 August 1956, Appellant was wrongfully absent without leave and failed to join his vessel on 28 August 1956.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by counsel of his own choice, Appellant elected to waive that right and act as his own counsel. He entered a plea of not guilty to the charges and each specification.

The Investigating Officer made his opening statement and introduced in evidence Shipping Articles and log entries of the COEUR D'ALANE VICTORY and HURRICANE.

In defense, Appellant testified in his behalf and introduced documents relating to his physical condition and medical history.

At the conclusion of hearing the oral argument of the Investigating Officer was heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced the decision in which he concluded that the charges and specifications had been proved. An order was entered suspending all documents, issued to Appellant, for a period of six

months, executing a prior six months' suspension on probation.

The decision was served on 21 August 1957. Appeal was timely filed on 12 September 1957.

FINDINGS OF FACT

On 16 and 17 April 1957, Appellant was in the service of the United States SS COEUR D'ALENE VICTORY as an able seaman and acting under authority of his Merchant's Document No. Z-396367-D2 while the ship was in the port of Yokohama, Japan. When Appellant went ashore on 16 April 1957 a sailing board was posted at the gangway stating that sailing time would be 0600 the next morning. Nevertheless Appellant failed to join the COEUR D'ALENE VICTORY when it departed Yokohama at 0900 on 17 April 1957. Appellant's absence at sailing time was properly logged.

During August 1956, Appellant was serving as Boatswain on board the SS HURRICANE. He was absent from his vessel, without authority, while the ship was at Rotterdam, Holland, from 20 through 23 August 1956. Appellant was also absent from the SS HURRICANE on 27 and 28 August, without permission, while the vessel was in Bremerhaven, Germany, and he failed to join the vessel when it departed Bremerhaven on 28 August. Appellant's absences from the SS HURRICANE and his failure to join that vessel were recorded in the ship's Official Logbook.

Appellant has been going to sea since 1931. His prior record consists of a 3 months' suspension on 9 months' probation in 1944 for failure to perform duties, absence without leave, and failure to join; 6 months' suspension on 12 months' probation in July 1956 for intoxication and being unable to perform duties and refusing to obey a lawful order.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner and is based on the following grounds:

1. The evidence is insufficient to prove the specifications.
2. The Hearing Examiner failed to properly consider and evaluate the medical evidence.
3. The specifications alleging offenses in Rotterdam were the result of a fall and therefore were not misconduct.
4. The Order is harsh in that the Hearing Examiner failed to consider mitigating circumstances.

5. The imposition of 6 months' suspension is improper since the required imposition of a prior probationary period deprives the Hearing Examiner of his right to exercise discretion.

OPINION

The findings of the Hearing Examiner are supported by substantial evidence consisting of Official Logbook entries.

Appellant's excuse for missing the movement of the COEUR D'ALENE VICTORY was that he overslept. Such an excuse is not justification for failure to join.

Appellant contends that his absence from the SS HURRICANE from 20 through 23 August was with the permission of the Chief Mate and was necessitated by injuries suffered in a fall on 18 August. It seems most unlikely that appellant would have answered "that's right" when read the log entry recording his absence, without leave, if he had been given authority by the Chief Mate to be absent; and that the Chief Mate would have signed the entry. Appellant alleges a complete failure to recollect the circumstance surrounding his failure to join the vessel on 28 August and his absence from the vessel on that and the previous day. However, the Certificate of Medical Care discloses he had indulged in an undisclosed quantity of intoxicating beverage. The evidence substantially establishes drinking as the most probable reason for the offenses committed on 27 and 28 August.

The Hearing Examiner acted properly in effectuating the probationary six months' suspension awarded at a previous hearing. Only in the most extraordinary circumstances would an Examiner be justified in failing to terminate the probation and imposing the suspension where an offense is committed within the probationary period. There are no such extraordinary circumstances in this case. The Examiner exercised his discretion by not imposing any additional suspension for the offenses under consideration herein. The reasons given by the Examiner for this action were recognition of Appellant's somewhat impaired physical condition in August 1956 and his 30 years' service on merchant vessels.

ORDER

The order of the Examiner dated at Long Beach, California, on 21 August 1957 is hereby.

AFFIRMED.

A.C.RICHMOND
Vice Admiral, United States Coast Guard

Commandant

Dated at Washington, D.C., this 29th day of July, 1958.