

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-314898
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: HAUSER, Frederick

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1715

HAUSER, Frederick

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 13 July 1967, an Examiner of the United States Coast Guard at New Orleans, La., suspended Appellant's seaman's documents for four months finding him guilty of misconduct. The specifications found proved allege that while serving as an oiler on board SS ROBIN TRENT under authority of the document Appellant:

- (1) on or about 4 and 5 April 1967 wrongfully absented himself from the vessel and his duties at a foreign port;
- (2) on or about 8 April 1967, wrongfully failed to perform duties at sea; and
- (3) on or about 26 April 1967, wrongfully failed to comply with a lawfully issued subpoena of a Coast Guard Officer at a domestic port.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of guilty to the charge and each specification.

The Investigating Officer introduced no evidence in view of the pleas of guilty.

In defense, Appellant offered no evidence, but gave an explanation as to why he failed to comply with the subpoena.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications had been proved by plea. The Examiner then served a written order on Appellant suspending all documents issued to him for a period of four months.

The entire decision was served on 14 July 1967. Appeal was

timely filed on 7 August 1967.

FINDINGS OF FACT

On all dates in question, Appellant was serving as an oiler on board SS ROBIN TRENT and acting under authority of his document.

On 4 and 5 April 1967, at a foreign port, Appellant wrongfully absented himself from his vessel and duties at a foreign port.

On 8 April 1967, Appellant wrongfully failed to stand one of his watches while the vessel was at sea.

On 25 April 1967, Appellant was served with a valid subpoena under R.S. 4450, at San Francisco, and on 26 April 1967 he failed to comply with the subpoena.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that Appellant should be accorded leniency because of his age and his need to support a family.

APPEARANCE: Appellant, pro se.

OPINION

I

The prior record of Appellant, as accepted by the Examiner was as follows:

- (1) 22 January 1944, suspended one month for failure to perform duties;
- (2) 6 February 1959, admonished for failure to perform duties because of intoxication;
- (3) 4 August 1959, suspended for four months on eighteen months' probation, for failure to perform duties because of intoxication and absence without leave;
- (4) 5 November 1959, admonished for failure to perform duties;
- (5) 29 September 1960, suspended for six months on twenty four months probation for failure to perform duties, failure to perform because of intoxication, and wrongfully absenting himself; and

- (6) 24 November 1964, suspended six months on twenty four months probation for failure to perform duties.

Before considering the propriety of the order entered in this case, some notice must be taken of the apparent discrepancy between items (3) and (4) above. Without going to the extent of taking official notice of Appellant's entire record, some conclusions may be drawn. The offense in item (4) was handled by an admonition given at Bremen, Germany. This was within the suspension period ordered in item (3). Therefore, either Appellant was sailing on a suspended document at the time, or was sailing on a temporary document issued pending an appeal from the order of item (3). Whichever the fact was, and whatever the circumstances were, Appellant escaped remarkably easily on 5 November 1959.

With this record, even as formally accepted by the Examiner in this case, Appellant cannot complain that a suspension of four months in the instant case is improper because of his age and need to support a family. It is precisely these interests which should induce Appellant so to conduct himself that remedial action under R.S. 4450 would not be needed.

II

There is another fact that cannot be ignored in this connection. In discussing Appellant's prior record, the Examiner said (based upon the record made before him):

"Although not considered as part of his prior record because the decision was not served until 6 July 1967, Mr. Hauser's document is presently under two months' suspension as a result of a hearing which was held in New Orleans on 3 July 1967. It is now ordered that his document is suspended outright for a period of four months, the first two months of which is to run concurrently with the aforementioned order dated 3 July 1967." (D-3).

The fact of the suspension of two months, which began on 6 July 1967, is undeniable. The Examiner does not deny it; he accepts it and makes that suspension part of ("concurrent with") his own order. It seems to me that if a suspension order is cognizable by an examiner so that he can make part of his own order run concurrently with it, he can recognize that order as "prior record."

It is true that courts dealing with criminal matters construe strictly statutes which authorize the punishment of a twice of more convicted offender by a sentence which exceeds the maximum prescribed in the substantive statute itself. The rules vary with

the jurisdictions and the statutes in force there.

In proceedings under R. S. 4450, there are no statutory rules prescribed by Congress. The regulations prescribe no maximum orders for specified offenses. Including cases in which an order of revocation is mandatory, the rule for orders is the "rule of reason." The "Table of Average Orders" set out at 46 CFR 137.20-165 is simply a statement of what is acceptable as a rule of reason in the "average" case. The "Table" is not mandatory, and examiners are expected to formulate orders appropriate under the circumstances of the case heard in light of the record of the person charged.

Practices of examiners are seen to differ. In on case recently under scrutiny an examiner who had been advised that the person charged had a prior record of one hearing noted that that hearing had occurred after the offense in the case which he had just hear, pointedly found that the person charged had no prior record at the time of commission of the misconduct in his case, and issued an order accordingly. In another case recently reviewed on appeal, the examiner took cognizance of the fact that the person charged, who failed to appear at the hearing, was the subject of a decision and order of another examiner who had also held a hearing in absentia, and service of whose decision had been frustrated by the tactics of the person charged. This examiner carefully phrased his order so as to relate it to the hitherto unserved decision and order.

Different philosophies as to "prior record" are obvious when these two cases and the instant case are considered. While individual evaluation of severity of orders by examiners may vary, the theory of what constitutes a "prior record" must not.

In the instant case, it cannot be distinguished whether the Examiner believed that the proper order to issue was one of a suspension of two months which he wished to add to the existing two month suspension or was one of four months (in view of the "accepted" prior record of Appellant) which he felt that he should impose for the offenses found proved, but which might have been of longer duration if he had been able to consider the existing two month suspension as "prior record."

Whichever of these possibilities may be true, the inconsistency is found, as mentioned before, that a prior suspension order was not accepted as "prior record" but was acknowledged to be a fact, and Appellant has benefitted.

In establishing a rule of uniformity for examiners in determining what constitutes "prior record" special consideration

must be given to the "unserved decision" case mentioned above. If it is assumed that the wording of the first unserved order had the standard phrasing that the suspension was to be effective when the decision was served upon the person charged and was to terminate "X" months after surrender of his document in compliance with the order, and that the second order (framed without acknowledgment of or even permissible knowledge of the first order) used the same terms as the first order but specified "Y" months of suspension, and if it is assumed that both decisions are served at the same time, as was the fact in the case referred to, the lesser order would be a nullity and the hearing which produced it would have been a complete waste of time.

This is not consonant with the purposes of R.S. 4450 and interposes mere legalism between it and the substantive interest of safety at sea.

The record of a person charged as it exists and is available to an Examiner at the time of hearing should be considered in formulation of the order. Technical niceties such as the one mentioned above, that at the time of commission of the misconduct there had been no "prior record" must be avoided. Decisions and orders which have been appealed and even unserved decisions and orders, should be considered because they exist. An examiner can easily phrase his order to provide that his order is "thus and so" if the record of the person charged as present remains unchanged, but would be modified by a lessening of severity, or by changing the effective date if the earlier order being appealed, or the order unserved which may be papealed, is set aside.

The philosophy of approach prescribed for Examiners here is one of realism. Under certain conditions orders may necessarily be more complex and conditional, but is better to assume the burden of framing them than to pretend that a fact does not exist, in frustration of the intent of an Act of Congress and the regulations promulgated thereunder.

CONCLUSION

Since Appellant's record is such as it is, and is actually even worse than the Examiner "accepted," the suspension ordered is lenient. There is no reason to disturb the Examiner's findings, since they merely restate the allegations of the specifications to which a plea of "guilty" was entered, nor to mitigate the lenient order on the grounds urged.

ORDER

The order of the Examiner dated at New Orleans, La. on 13 July

1967, is AFFIRMED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 14th day of June 1968.

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