

IN THE MATTER OF MERCHANT MARINA'S DOCUMENT NO. Z-587895-D6
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: BERNARD N. MEYER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1874

BERNARD N. MEYER,

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 24 July 1970, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for twelve months outright plus twelve months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a first assistant engineer on board SS WINGLESS VICTORY under authority of the document and license above captioned, Appellant:

- (1) On 17 September 1968 wrongfully absented himself between 1100 and 2100 at Bremerhaven, Germany;
- (2) On 17 September 1968 wrongfully failed to perform duties in connection with shifting of the ship at Bremerhaven;
- (3) On 18 September 1968 wrongfully failed to perform duties on sailing from Bremerhaven; and
- (4) While serving aboard SS PALMETTO STATE as first assistant engineer under authority of his license and document, wrongfully failed to join the vessel on 6 September 1969 at San Francisco, California.

At the hearing, Appellant was represented by professional counsel. Counsel entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of WINGLESS VICTORY and PALMETTO STATE.

In defense, Appellant offered in evidence several documents and his own testimony.

At the end of the hearing, the Examiner rendered a decision in

which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of twelve months outright plus twelve months on twelve months' probation.

The entire decision was served on 29 July 1970. Appeal was timely filed on 20 August 1970 and perfected on 31 March 1971.

FINDING OF FACT

On all dates in question, Appellant was serving as alleged and acting under authority of his license and document. Because of the disposition to be made of this case, no further findings of fact are required.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Because of the disposition to be made of this case, no detailed recitation of Appellant's allegations of error is required.

APPEARANCE: George E. Shibley, Esq., Long Beach, California

OPINION

I

The road to the disposition of this case follows the route of the procedure followed.

On 10 February 1970 the notice of charges was served on Appellant, with the hearing to begin at "2:00 P.M. on 12 February 1970." The transcript of proceedings submitted on appeal records the hearing as opened "pursuant to notice" at "2:10 p.m. on 13 February 1970." There is no record of what happened at "2:00 P.M. on 12 February 1970."

When the hearing before the Examiner, as recorded and transcribed, opened, Appellant was not present. An appearance was made by an attorney who apparently presented to the Examiner "an authorization from Mr. Meyer that he has retained Mr. Shibley as his attorney . . . to appear . . . on his behalf." No such "authorization" was marked so as to become part of the record.

No immediate representation was made to the Examiner as to why Appellant was not present. The Examiner volunteered that the proceeding proposed to be undertaken in the absence of Appellant was not "really authorized under the regulations." In this

statement the Examiner was eminently correct since the record up to that point contained no explanation as to why the hearing did not begin pursuant to the notice actually served on Appellant or as to the authorization for the attorney to appear in lieu of Appellant. The Examiner added, however, that he understood that under the original notice for 12 February 1970 Counsel needed more time to prepare his defense, and that a day's delay had been granted "because the Respondent allegedly had a job in Seattle."

The case is not necessarily irretrievably lost here because, as it happened, Appellant, by an appearance five months later on the record, ratified the authority of his attorney, but the procedural errors to this point set the pattern for what happened later. At the time the record opens, the Examiner is obviously privy to matters that had not been presented to him in open hearing. It does not appear who "granted" a day's delay in opening the hearing as set by notice. While a request for postponement made at 1400 on 12 February 1970 on the grounds that Counsel needed time to prepare should unquestionably have been granted under the circumstances, it cannot be perceived why a day's delay in opening could have been justified by the fact that Appellant had a job in Seattle. A legitimate reason for Appellant's leaving the scene would be good reason for advancing the opening of the hearing rather than postponing it. The matter is not adequately covered in the proceedings of 13 February 1970 and subsequent proceedings make the matter even more difficult to understand. As will be seen, the record is assailable as completely inaccurate.

After the Examiner had found no authorization for the proposed proceeding, the Investigating Officer did "feel" that Appellant should have been present (R-3), but he consented to proceeding without Appellant's presence. Here again I see indisputable proof of "off the record" proceedings. However the Investigating Officer might have "felt" about Appellant's nonappearance at the time and place specified in the notice of hearing and his nonappearance on the following day, he admitted by his consent to what had happened that he was a party to the "grant" of a postponement so that Appellant could leave the area without appearance before the Examiner.

At this point in the record it appears that the Investigating Officer may have been the principal procedural offender by consenting to a day's delay in opening the hearing, by consenting to Appellant's departure for a job at sea before making an appearance before the Examiner, and by advising the Examiner off the record of these matters. (Subsequent disclosures on the record tend to spread the burden, as will be seen.)

The principal consideration here is that investigating

officers must be alert to preserve the continuity of adequate notice as to proceedings and to press for timely opening of hearings (with such matters as continuances, when asked for, proceedings in absentia, when appropriate; and prompt decision left to Examiners). When I reach the point at which Appellant ultimately appeared before the Examiner, I will make more pointed statements about what happened here.

III

Here a new procedural problem enters this case. The Investigating Officer completed his case in chief on 13 February 1970, the day the hearing on the record before the Examiner opened. The evidence was entirely documentary, consisting of voyage records of two vessels.

When this session of the hearing ended, "counsel" had indicated a desire to obtain deposition testimony. After some difficulty in setting a date for continuance was experienced, the Examiner agreed to come in from leave at 1000 on 24 February 1970 to receive an application for taking of a deposition and settling of an order.

On 24 February 1970, the hearing reconvened as scheduled. Neither Appellant nor his counsel was present. The Examiner announced that Counsel had appeared in his office on 20 February 1970, had stated that he could not appear on 24 February 1970, but had been advised that he could submit in writing applications to take testimony by deposition "of absent witnesses." R-34. The Examiner then said that he had just received in the mail an application to take an oral deposition of a witness at New Orleans and would issue an order for the taking of the deposition, noting that he might receive further applications to take depositions, and receiving a statement from the Investigating Officer that he would like to be notified of any further requests for taking of a deposition from any witness. The hearing was adjourned sine die.

Neither an application to take a deposition nor an order issuing as a result of such an application appears in the record.

The next matter of record is at 1040, 12 May 1970. The Investigating Officer and Appellant's "Counsel" were present. Appellant was not present.

The Examiner declared that he had forwarded an order to an Examiner in New Orleans, to take the testimony of a witness, which he had referred to on 24 February, but "upon advise from him [the

Examiner at New Orleans] that he had received no request for the taking of the testimony . . . " the Examiner acted on 12 May 1970. The rest of the incomplete statement of the Examiner will be discussed shortly. I wish to discuss here only the first element quoted. The state of the record deprives me of a knowledge of the order which the Examiner in this case sent to the Examiner in New Orleans. I have also no direct evidence of the reply. Neither document appears in the record. It is difficult for me to envision an "order" to take a deposition which could be returned unfulfilled because the Examiner in New Orleans "had received no request for the taking of the testimony." An "order" does not depend for its execution upon a "request" by someone to execute it. It may be that the documents in this case do not actually constitute a true order to take a deposition and a true notice of return for failure of possible enforcement. I cannot tell because the record does not reflect (1) the written application to take the deposition, (2) the order to take the deposition, nor (3) the reply explanation that no one in New Orleans had "requested" the deposition. Although Appellant's actions on the record could lead me to a belief that there was a waiver of procedural requirements, I am loath to invoke this doctrine in light of further disclosures made on the record, which, I think, constitute error in their own right.

At this session of the hearing the Examiner, in addition to summarizing the unrecorded activities with respect to the taking of a deposition in New Orleans, also referred to a motion of the Investigating Officer asking for final disposition of the case on 13 April 1970. It seems that a letter of the Examiner to "Counsel" advising of the motion of the Investigating Officer had been received by Counsel on 13 April 1970. Neither the motion of the Investigating Officer, however filed, nor the notice to Counsel was made part of the record.

Assuming that a motion had been filed to reopen the hearing on 13 April 1970, nothing appears in the record as to when or how 12 May 1970 had been set as a date for continuance of the hearing.

At this time counsel stated that after he had received the Examiner's notice that the hearing would proceed to conclusion on 13 April 1970 on the motion of the Investigating Officer, notice allegedly received on 13 April 1970, he advised his client that he could go to sea. Counsel acknowledged that he might have been guilty of "fault," "negligence," or even "malpractice." R-39,40. Over strong objection by the Investigating Officer, the Examiner granted a continuance to 14 July 1970, a date to be absolutely the last day of the hearing. On 14 July 1970, both Appellant and his counsel appeared before the Examiner. This dual appearance corrected the record, as it appears before me, as to the Counsel's authority to appear for Appellant. There was a ratification of

attorneyship by Appellant's appearance. I cannot imagine what might have happened if the Examiner had granted the Investigating Officer's motion (not set forth in the record) to conclude the proceeding on 13 April 1970. At that time there was not a shred of basis for belief that the attorney "of record" represented Appellant at all on the record available to me on appeal. If the hearing had ended at that time with an initial decision by the Examiner, two possibilities were available to Appellant on appeal:

- (1) that the record showed no authorization for counsel to have represented him, and,
- (2) that he might have appeared at the time and place specified in the notice of hearing, that no one else was present at the time and place of notice of hearing, and that he was thereafter discharged from the disabilities attendant upon nonappearance.

The way this hearing was conducted, the possibilities, during the course of hearing, were almost infinite.

IV

On 14 July 1970, Counsel asked the Examiner for time to locate witnesses. When Counsel stated that he had requested information as to the identity and location of witnesses, the Examiner said:

"when did you request it? You were told, you were told in chambers some time ago by the Investigating Officer that you could have this any time you wanted to if you wanted to come over here. It was available to you; it was available to you." R-122.

"In chambers" apparently refers to some unrecorded proceeding. The record does not reflect that any such statement was made by anyone. In fact, the opposite appears of record. On 13 February 1970, as Appellant points out in his brief, the following colloquy took place, when counsel stated that he needed the names and addresses of certain witnesses:

"Examiner: Well, do the best you can. And we'll see whether we can locate these witnesses if you can't. You certainly have to have their names. When you come in and say you want the testimony of a wiper, . . .

"Counsel: I will have the names of those available, but there will be other witnesses I would like to get whose names I do not have.

"Examiner: Well, it's incumbent [sic] on you, Mr. Shibley,

to pick up the telephone and get hold of these names. I mean, in this day and age it doesn't take very long to obtain this information." R-31

When counsel stated that he needed the names and addresses of all the vessel's wipers, with all of whom he would have to communicate to ascertain which two he would wish to depose he declared that he would need the vessel's articles to ascertain this information. R-42. The Examiner advised him that he could get this information in New York or Washington.

Counsel may have been dilatory in seeking assistance from New York and may have erred in not spreading on the record before the Examiner his frustrating correspondence relative to voyage records of WINGLESS VICTORY. The brief shows that Counsel was advised by a law firm in New York, which he had authorized to act for him with respect to examination of those records, that the firm had been denied access to the record at New York, but that the records were being forwarded to the Los Angeles-Long Beach office where Counsel could inspect them. A letter from the Officer-in-Charge of the latter office, dated 9 June 1970, advised Counsel that the articles and official log book "have now been received by this office." The last sentence of this letter reads:

"If you will advise, in writing, the specific items of information that you desire, we will be pleased to provide you with that information."

If this were all to which Appellant was entitled, it was pointless to have moved the records from New York to Terminal Island, California.

Counsel replied to the letter of 9 June 1970 with a letter in which he specifically requested a photocopy of the crew list ("sign on" sheet of the articles) and an opportunity to inspect the official log book. To this, the Officer-in-Charge replied, by letter of 12 June 1970, that the documents "in their entirety are exempted from disclosure by statute. . . ." It was not until 25 June 1970 that a letter from the Officer-in-Charge provided Counsel with a copy of the "sign on" page of the articles and declared that the log book could be examined on any working day at the Coast Guard Marine Inspection Office.

What happened here is incomprehensible unless there was a failure of internal Coast Guard communications. Normally, when logs and articles in the custody of the Coast Guard are available they are actually produced at the hearing, specific items are identified for use in the hearing, and leave is routinely asked for and granted to substitute certified copies of the relevant matter

as exhibits. There has never been any question but that these documents are available for examination by a person charged when entries therein are offered in evidence against him. I do not mean to imply here that a person charged can always demand production of the documents themselves when only certified copies are reasonably available without some showing that actual production is reasonably necessary. That question does not arise here, in any event, since the log and articles were physically present in the Los Angeles-Long Beach office and could have been produced before the Examiner. Copies of entries were already in evidence on the Investigating Officer's case. Denial of access to the originals both at New York and Los Angeles-Long Beach was improper.

Since it was obviously not until some time after 25 June 1970 that Appellant had access to the desired information about witnesses, it was also obviously unfair to cut him off on 14 July 1970 without more time to locate the persons whose testimony he desired.

It may be that the Examiner was unaware of the procedural roadblocks set up in Appellant's way. It may be that the Investigating Officer, as an individual, was similarly unaware. Neither circumstance is an excuse for denying Appellant his rights.

I can envision, from this record, a feeling on the part of both the Investigating Officer and the Examiner that Appellant and his counsel might have been acting in such bad faith as to excite hostility against them. This does not justify "retaliation in kind," nor does it justify a defective record.

V

It should be axiomatic to investigating officers and examiners alike that off the record proceedings invite disaster.

When a brief "off the record" discussion has occurred, some examiners recapitulate on the record what occurred off the record and get the consent of the parties, on the record, to the correctness of his recapitulation. No reversible error has ever appeared to flow from this procedure, although at times it seems that the recapitulation and its verification take longer than the time consumed in the "off the record" proceeding. What I wish to point out first in this connection is that on 24 February 1970, with neither Counsel nor Appellant present, the Examiner unilaterally placed in the record a summation of what had occurred in his office on 20 February 1970 when Counsel apparently appeared there. Counsel had no way of knowing what the Examiner said on 24 February had occurred on 20 February, until he saw the transcript of proceedings when it was delivered to him for purposes of appeal

on 5 October 1970. This unilateral statement is, of course, open to challenge. In a sense, it has been challenged on appeal. More precisely, it has been challenged for what it does not say rather than what it does say.

Appellant quotes from the transcript two statements made by the Examiner on 14 July 1970, the last day of the hearing:

(1) "Mr. Shibley, you were told in February by me that if you wanted any of these things I would see that they were made available to you" R-124, and

(2) "Well, you had ample opportunity to obtain depositions, counsel. We went into this on 24 February and you were told at that time that you could have all that information available to you." R-122.

Appellant correctly points out that no such statements were ever made on the record on either 13 or 24 February 1970, the only dates in that February on which sessions of the hearing were held. It is also true that "we" did not go "into this" on 24 February "and you were told . . ." because Counsel was not even present on 24 February 1970. It is ineluctable that this record as presented to me does not reflect what actually took place among Counsel, the Investigating Officer and the Examiner. The situation may even be worse than thus far perceived. At R-42, on 12 May 1970, the Investigating Officer is quoted as saying, without contradiction:

"At the original seating [meeting?] of this Hearing, the motion for continuance was given orally. Mr. Myers stated at that time that he was going to Seattle because he had a vessel waiting for him, the SS PALMETTO STATE, which is mentioned in one of the charges alleging that he failed to join the vessel. He claimed that there was a job waiting and he had to be there the day after. In fact, he left right from the Hearing to go."

The only conclusion I can deduce from this is that the hearing was convened as per original notice on 12 February 1970, in the presence of the Examiner, with the Investigating Officer, Appellant, and his Counsel in attendance, that no record of the proceeding was made, that the Examiner and the Investigating Officer both consented to Appellant's departure from the scene of hearing, and that the Examiner's apparent knowledge of "off the record proceedings" when the hearing ultimately "convened" on 13 February 1970 was actually a matter which should have been placed on record 12 February 1970, the date for which notice had been issued.

Procedures such as this cannot be tolerated inevitably, as happened in this case, lead to error.

VI

It seems, on the whole, that the instant proceeding must be set aside, because of the cumulation of procedural errors. I will not enter upon Appellant's attempted defense of laches because I believe that the drawn out proceedings here have rendered the matters connected with WINGLESS VICTORY, of which the Coast Guard was initially apprized through the Merchant Detail in Bremen in September 1968, stale and not worth re-litigation. The offense alleged with respect to PALMETTO STATE, as to which this record is not tainted, a domestic failure to join with no showing of aggravating circumstances, is not worth finding proved separately since it would not have been brought to hearing separately without the WINGLESS VICTORY allegations.

ORDER

The order of the Examiner dated at Long Beach, California, on 24 July 1970, is VACATED. The charges are DISMISSED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 17th day of April 1972.

INDEX

Attorney

Authority ratified by party's actions

Continuance

To locate witnesses

"Off the Record" proceedings

Not condoned

Official documents

Right of inspection of