

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 410121
Issued to: VIRGIL EDWARD MCCOY Z-436-20-0885-D7

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2006

VIRGIL EDWARD MCCOY

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 12 December 1973, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman's documents for twelve months upon finding him guilty of misconduct. The specification found proved alleges that while serving as a day third engineer on board SS DEL ORO under authority of the license above captioned, on or about 26 February 1973, Appellant wrongfully failed to perform his assigned duties while the vessel was at Abidjan, Ivory Coast.

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

The Investigating Officer introduced in evidence voyage records of DEL ORO and the testimony of three witnesses.

In defense, Appellant offered no evidence.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of twelve months.

The entire decision was served on Appellant on 7 February 1974. Appeal was timely filed on 8 February 1974 and perfected on 28 June 1974.

FINDINGS OF FACT

On 26 February 1973, Appellant was serving under authority of his license as day third engineer aboard SS DEL ORO at Abidjan,

Ivory Coast. On that day Appellant left the engine spaces where he was assigned to duty under the first assistant engineer, without leave, authority, or consent. He did not return during working hours that day.

The matter was duly recorded in the official log book. On the following day, which was the first opportunity for the master to present the log entry to Appellant, Appellant made no reply. No complaint of any hazardous condition in the engine room was made by Appellant.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) The evidence did not support the findings;
- (2) Appellant acted as a reasonable man and his actions were therefore not wrongful; and
- (3) in any case, the order is too severe in light of the offense.

APPEARANCE: Kierr, Gainsburgh, Benjamin, Fallon and Lewis, New Orleans, Louisiana by George S. Meyer, Esq.

OPINION

I

In suggesting that the evidence did not support the findings and that his conduct was only that of a reasonable man not amounting to wrongful failure to perform his duties, Appellant acknowledgedly relies on only one point: that a dangerous condition in the engineroom, of which he had complained, justified his departure therefrom and failure to return for the rest of his work-day. The effectiveness of such an argument necessarily depends on the amount and quality of the evidence tending to prove the existence of a dangerous condition.

Of this there is none. Despite Counsel's statement on the record: "...the defense has the affirmative burden of exculpating Mr. McCoy from any wrong doing that he failed to stand his watch" (R-45), a position which conceded in all reasonability that there was adequate evidence that the duties had not been performed and which was taken in response to an effort of the Investigating Officer to elicit anticipatorily evidence that no dangerous condition existed or was complained of, Appellant introduce no evidence in his own behalf. In fact, after a routine opening for

the pleading he never appeared at one of the following eight sessions and was, for most of that time, incommunicado even to his attorney.

Counsel's closing argument (or unsworn statement), based on notes he had made of a conference with Appellant earlier, was, of course, not evidence and was unsupported by anything in the record.

Appellant makes much of a marked discrepancy between the testimony of one officer, who was orally deposed on written interrogatories in Houston, and that of another, testifying in person, as to details of a repair job done in the engineroom on the day in question. The discrepancy cannot be denied; it might be inferred that the two were testifying as to two different operations.

There are several reasons why this does not alter the case. Neither version, if accepted, raises in issue of hazard; either one, accepted, negates the existence of hazard. If both versions are disregarded there remains the relevant evidence from both these witnesses and from the ship's records themselves that Appellant, without leave or consent from anyone, abandoned his duties and did not return for the rest of the working day. Failure of evidence to prove one proposition does not of itself prove the contrary. The basic failure of Appellant here is not only not rebutted, it is not even controverted. The burden which Counsel conceded was his he did not even undertake.

II

When Appellant urges that the suspension ordered is too severe for one failure to perform duties during the course of the voyage, he does not squarely face his prior record of misconduct. Over a period of years Appellant has on six occasions been warned, or suffered a suspension on probation or an outright suspension (four times). The misconduct in the instant case occurred just six weeks after the termination of an earlier suspension and violated a probationary order of six months suspension. The Table of Average Order at 46 CFR 137.20-165 does not contemplate more than three suspensions, in any case. As the only logical order short of revocation, the suspension ordered here is entirely appropriate.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana on 12 December 1973, is AFFIRMED.

E. L. PERRY

Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 3rd day of August 1974.

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