

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-177-24-0480
Issued to: Gerald Bayless

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2184

Gerald Bayless

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 26 June 1978, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for six months, plus six months on twelve months' probation, upon finding him guilty of misconduct. The first specification found proved alleges that while serving as able bodied seaman on board SS GATEWAY CITY under authority of the captioned documents, on or about 25 February 1978, Appellant did wrongfully fail to join and desert said vessel, at Hong Kong, B.C.C. The second specification found proved alleges that while serving as able bodied seaman aboard SS MOBILE, under authority of the captioned documents, Appellant did on or about 2 June 1977 wrongfully fail to join said vessel at Hong Kong, B.C.C.

The Hearing was held at San Francisco, California, on 14 June 1978.

Appellant did not appear at the hearing, and the hearing was held in absentia. A plea of not guilty to the charge and specification was entered on behalf of Appellant.

The Investigating Officer introduced in evidence six documents, consisting of: (1) abstracts of vessel logs stating the dates and places of Appellant's multiple failures to join; (2) abstracts of the shipping articles of MOBILE and GATEWAY CITY for the voyages in question; and (3) an affidavit of United States Consul John Coffey.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and both specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of six months plus six months on twelve months' probation.

The entire decision was served on 7 July 1978. Appeal was timely filed on 24 July 1978 and perfected on 4 December 1978.

FINDINGS OF FACT

On 25 February 1978, Appellant was serving as A.B. on board SS Gateway City and acting under authority of his document while the vessel was in the port of Hong Kong, B.C.C. At that time Appellant deserted from the service of that vessel. Appellant reported to United States Consul John Coffey at Hong Kong and advised Coffey that he departed the vessel intending not to be on board at sailing time.

On 3 June 1977, Appellant was serving as A.B. on board SS MOBILE and acting under the authority of his document while the vessel was in the port of Hong Kong, B.C.C. At 1500 on 3 June 1977, Appellant wrongfully failed to join the vessel upon the departure from port.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge failed to consider Appellant's request for change of venue. Accordingly, Appellant was not given an opportunity to present an allegedly meritorious defense, that he had left the vessel to obtain a refill of a medical prescription, as to the first specification.

APPEARANCE: Michael C. Miller, of South Folsom Law Firm, San Francisco, California.

OPINION

I

The record is devoid of any request for a change of venue. Accordingly, the hearing was held in San Francisco, California, on 14 June 1978, as stated in the Notice of Hearing served on Appellant on 24 May 1978. Appellant, by failing to utilize the procedures for requesting a change of venue, waived any opportunity for objecting to holding the hearing in San Francisco.

II

A defense that may have been meritorious if advanced during the hearing is lacking in value when raised for the first time on appeal. Decisions on Appeal Nos. 1741 and 1732. When a respondent does not appear for a hearing, he forfeits the privilege of presenting his side and waives any defenses that may have been

available to him. As pointed out in Decision on Appeal No. 1865:

The forum in which to present evidence is the hearing before the examiner. When a person fails to appear on notice and later asserts he had evidence which would have helped his cause, he is not only too late, he has not even stated grounds for appeal such as to call for a Decision on Appeal.

III

Alternatively, even if Appellant's defense to the first specification is considered, the record adequately supports the finding of desertion as charged. Additionally, Appellant has failed to refute in any way the second specification, the failure to join the SS MOBILE. I have previously held that a seaman's voluntary failure to sail with a vessel constitutes desertion. Decision on Appeal No. 2003. Accordingly, I shall affirm this order without modification.

IV

It should also be noted that the first specification is improperly drawn. A charge of failure to join is a lesser included offense of desertion, and thus is mere surplusage to the specification. The error in finding the specification proved in that form is not prejudicial.

ORDER

The findings entered in the initial decision are modified to eliminate from the first specification the words "wrongfully fail to join and," and as MODIFIED are AFFIRMED. The order of the Administrative Law Judge dated at San Francisco, California on 26 June 1978, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 22nd day of February 1980.

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