

In the Matter of Merchant Mariner's Document No. Z-567216-D3
Issued to: ANDREW C. REED

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

408

ANDREW C. REED

This appeal has been taken in conformance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 11 October, 1949, an Examiner of the United States Coast Guard at Galveston, Texas, revoked Merchant Mariner's Document No. Z-567216-D3 issued to Andrew C. Reed upon finding him guilty of "misconduct" based upon three specifications. The specifications allege that while Appellant was serving as a fireman and watertender on board the American SS LELAND STANFORD, under authority of the document above described, he did:

"First Specification: * * * on or about 12 December, 1947, while said vessel was at sea, under the influence of intoxicants, create a disturbance prejudicial to the preservation of good order and discipline.

"Second Specification: * * * on or about 11 November, 1947, while said vessel was at sea, commit sodomy on the person of Carl Heck, a crew member.

"Third Specification: * * * on or about 17 and 18

November, 1947, while said vessel was in the Panama Canal and in transit through said waters, commit sodomy on the person of Eugene E. Means, a crew member."

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Although advised of his right to be represented by counsel of his own selection, he elected to waive that right and act as his own counsel. He entered a plea of "not guilty" to the charge and each specification.

After the Investigating Officer and Appellant had completed their opening statements, the Investigating Officer presented his case-in-chief. He introduced in evidence eleven depositions which form part of the Coast Guard investigation record conducted at Mobile, Alabama, on 12 February, 1948. He then rested his case. In defense, Appellant introduced four depositions and a letter by the third assistant engineer.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant, the Examiner found the charge "proved" by proof of specifications Nos. 1, 2 and 3, and entered an order revoking Merchant Mariner's Document No. Z-567216-D3 and all other valid certificates of service and licenses issued to Appellant. This order was specifically stated to apply also to duplicate Merchant Mariner's Document No. Z-567216-D3, application for which was made on 6 September, 1949.

From that order, this appeal has been taken, and it is urged that:

POINT 1. The Examiner erred in not advising the Appellant that if he desired counsel, and had no means of obtaining one, that the Examiner would secure a Coast Guard officer, if one was available to act in his defense, as is required by Title 46 C.F.R. 137.09-5(a).

POINT 2. The Examiner erred in failing to explain properly to the accused, not only his right to testify in his own behalf, but also the necessity for his taking the stand as a witness, as distinguished

from making an opening and closing argument, if his denials of the accusation against him were to be legal evidence in his behalf.

POINT 3. The Coast Guard has no jurisdiction over acts of sodomy committed under circumstances such as those alleged in Specifications 2 and 3, because such acts are not in violation of any law of the United States, nor were the acts committed while Appellant was acting under authority of his certificate of service.

POINT 4. The findings of the Examiner and his decision to revoke Appellant's certificate, are not justified by the legally competent evidence adduced at the hearing before the Examiner. The burden is on the accuser to prove the charges beyond a reasonable doubt and this has not been done with respect to Specifications 2 and 3.

In conclusion, Appellant requests that the findings on the second and third specifications be reversed and the order imposed reduced, or that Appellant be given a new hearing in the interest of justice and fairness. It is pointed out that the Coast Guard should recognize the significance of the fact that the Grand Jury refused to indict Appellant on the basis of the depositions. And attention is brought to the fact that although the testimony of the crew members strongly favors Appellant, their impartiality is shown by the fact that they voted to send a telegram from the ship to request an investigation of the sodomy charges.

Appearances: Pillans, Reams, Tappan and Wood of Mobile, Alabama
By: W.D. Reams, of counsel

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

Between 27 August, 1947, and 31 December, 1947, Appellant was serving as a fireman watertender on board the American SS LELAND

STANFORD, under authority of his Merchant Mariner's Document No. Z-567216-D3, while the said ship was engaged on a foreign voyage. The voyage commenced at Tampa, Florida, on 27 August, 1947, and was completed at Mobile, Alabama, on 11 February, 1948. Although originally scheduled to stop at ports in the Pacific Ocean and terminate the voyage after returning from that area, the vessel was rerouted to proceed to Cuba and Hamburg, Germany, before returning to the United States. Appellant was discharged from the ship, by mutual consent, while the vessel was at the port of Hamburg, Germany.

On 17 September, 1947, three crew members - Heck, Means and Miller - were signed on the articles at San Pedro, California, before the vessel departed for Japan. Heck and Means were both comparatively young men being 18 and 17 years old respectively, and they became good friends while on the voyage. Both Heck and Means also appeared to have been on friendly terms with Appellant. They went to the engine room while Appellant was on watch and helped Appellant while receiving instructions from him. Means borrowed two cartons of cigarettes from Appellant between the time the former reported the alleged acts of sodomy to the master and when Appellant was confined for participating in the fight alleged in the first specification. Heck and Appellant had a minor fight in Japan but, on the night of the alleged fight between Appellant and Miller, Heck had been given a drink by Appellant while they were drinking with other crew members. This also took place after the alleged acts of sodomy had been committed and reported to the master.

Early in the morning on 12 December, 1947, there was a fight on board the vessel in which Appellant and Miller were the main participants. This took place while the ship was enroute from Cuba to Hamburg, Germany. Miller had been standing Appellant's watch because the latter had been drinking. Appellant had hit two different members of the crew and a third man had taken a small closed pocket knife out of Appellant's hand. Miller was making the rounds calling the next watch when he noticed the commotion. He tried to quiet the disturbance by holding Appellant. Appellant insisted on fighting and Miller beat him severely when he was mistakenly informed by one of the crew that Appellant still had a knife and was attempting to use it. The master was called and he appeared when Miller was wiping the blood off Appellant's face. On the master's orders, Appellant was given a sedative, put to bed and

a guard was put over him for the duration of the trip to Hamburg. The master took this action because he had heard that the crew was afraid Appellant might cause further trouble if set free.

After this incident occurred, a union meeting of the crew members was held, and during the meeting Heck and Means reported that Appellant had committed acts of sodomy with each of them - the Heck incident on 11 November, 1947, at sea; the Means incident 17-18 November, 1947, at Balboa, C.Z. As a result of the disclosure of this information, a wireless message was sent from the ship to the Federal Bureau of Investigation at Washington, D.C., requesting that an investigation of the sodomy charges be conducted when the ship returned to the United States. Appellant had not been permitted to present his side of the story at this union meeting since he was in confinement at the time. After this message had been sent, Heck and Means several times indicated their desire to drop the matter entirely. On 31 December, 1947, Appellant was discharged by mutual consent before the American Consul at Hamburg, Germany. Thereafter, the ship returned to the United States and the voyage was completed on 11 February, 1948.

The evidence introduced at the hearing by the Investigating Officer consisted entirely of depositions taken at the Coast Guard Investigation conducted in Mobile, Alabama, on 12 February, 1948. Although he was not represented by counsel at the hearing, Appellant had counsel at the investigation and was given full opportunity to cross-examine all of the deponents on whose testimony the Investigating Officer's case is completely based. Appellant did not testify at the investigation or at the hearing.

There is testimony in several of the depositions which is sufficient to establish that neither Heck nor Means had a very good reputation for telling the truth and that several of the crew members would not believe either one of them even when testifying under oath.

There is also ample testimony to indicate that Appellant was considered to be a good shipmate and a very reliable worker when not drinking.

OPINION

The Examiner found all three of the specifications and the charge of misconduct "proved." This appeal is directed against the findings and conclusions pertaining to the second and third specifications. Hence, there is no need to review the Examiner's action with respect to the first specification.

In view of the action to be taken in this case, no good purpose will be served by discussing in detail every point raised by this appeal. It is sufficient to observe that I find no merit in Points 1 and 2. Appellant was represented by counsel at the Coast Guard investigation, and after being fully advised of his right to counsel at the hearing, voluntarily undertook to represent himself (R.1, 2). Furthermore, he was given ample opportunity to take the witness stand and testify in his own behalf (R. 8, 12).

Point 3 is untenable because "Misconduct" of merchant seamen under 46 United States Code 239 (R.S. 4450), as amended, does not depend upon the violation of a statute. The Coast Guard has a duty to protect lives and property at sea, and that protection extends as well to immorality and moral perversion. In any case where the evidence establishes the commission of acts such as charged here, the Coast Guard will take immediate steps to remove the offender from a field of endeavor where his malignant influences may not affect or involve other seafarers.

Appellant's 4th Point has given me much concern; and after a very careful examination and consideration of the record, I agree the evidence does not justify the Examiner's Findings on the Second and Third Specifications. I do not agree with the contention that the standard of proof in cases of this character must be "beyond a reasonable doubt" as is required in criminal proceedings. Under now recognized standards, the field of administrative law only requires that a fact be established by "substantial evidence." *B & R.R. vs. Postum*, 177 F2, 53 (CCA DC 1949).

I do not find that there is such "substantial evidence" in this record to support the Second and Third Specifications. The testimony of Complainant Means is contradictory, incoherent and not at all plausible; it is directly rebutted by at least three witnesses. Persons testifying as to Means character and veracity do not recommend him in either respect. The Third Specification, which is based entirely on incidents to which Means testified

should have been, and it is, dismissed.

The testimony of Complainant Heck falls into a somewhat different category. He also made contradictory statements; and there are other circumstances reflected by this record that do not inspire confidence in the truthfulness of his story. For instance the long delay in reporting the attack to the master (11 November to 12 December); the apparently cordial relationship between Heck and Appellant *after* the attack and *until* Appellant's misbehavior on 12 December, 1947, caused his confinement - and there are others not necessary to elaborate here. Incidentally, it may be noted that Heck did not enjoy, among his shipmates, a good reputation for truth and veracity. Although Heck's testimony is not categorically contradicted, I am not satisfied that his report was made in good faith; and because there is doubt respecting Appellant's guilt, I will give him the benefit thereof. The Second Specification should have been, and it is, dismissed.

No challenge has been addressed to the First Specification. That is understandable when the testimony bearing thereon is considered. Seamen using or intending to use weapons on their shipmates are distinctly undesirable in the merchant marine. And this applies to seamen who resort to such devices when in a state of cold sobriety or when under the influence of alcohol, stimulants or narcotics.

CONCLUSION

The charge of misconduct is proved by the evidence offered in support of the First Specification. Specifications Two and Three are dismissed.

ORDER

The Order of the Examiner dated Galveston, Texas on 11 October, 1949, is modified to read:

"That Merchant Mariner's Document No. Z-567216-D3, issued to Andrew C. Reed, and all other valid certificates of service and/or licenses issued to Andrew C. Reed, be and the same are suspended for one year. This order shall

also apply to duplicate Merchant Mariner's Document No. Z-567216-D3, application for which was made on 6 September, 1949.

As so MODIFIED, said Order is AFFIRMED.

A. C. Richmond
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D.C., this *29th* day of *March*, 1950.

***** END OF DECISION NO. 408 *****

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