

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-663515-D2 AND
ALL OTHER SEAMAN DOCUMENTS
Issued to: Thomas V. Donlan

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1533

Thomas V. Donlan

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 1 July 1965, an Examiner of the United States Coast Guard at New York, New York revoked Appellant's seaman documents upon finding him guilty of misconduct. The seven specifications found proved allege that while serving an electrician on board the United States SS BRASIL under authority of the document above described, on 30 March 1965, Appellant wrongfully disobeyed a ship's regulations by being in a passenger area, and directed foul and abusive language toward ship's officers; from 31 March to 3 April 1965, inclusive, Appellant wrongfully failed to perform his duties; and on 8 April 1965, Appellant failed to join his ship in a foreign port.

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

The Investigating Officer introduced in evidence certified

extracts from the Shipping Articles, copies of entries in the Official Logbook for the voyage, and the testimony of the Staff Captain and Third Mate.

In defense, Appellant offered no evidence other than entries in the medical log for the dates Appellant is alleged to have wrongfully failed to perform his duties.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved and entered the order of revocation.

FINDINGS OF FACT

From 27 March to 21 April 1965, Appellant was serving as an electrician on board the United States SS BRASIL and acting under authority of his document while the ship was on a foreign voyage.

About 2200 on 30 March, at sea, Appellant was at the bar in the Carioca Cafe, an area which was restricted to the use of passengers except for crew members serving the passengers. Signs were posted in various part of the ship indicating that crew members were not allowed in certain areas. Appellant was approached by the Staff Captain, Third Mated and Chief Steward, and questioned. Appellant said he was a passenger, but ran away when the Chief Steward was checking this information with the passenger list. Appellant was apprehended on another deck and taken to the brig by the Staff Captain, Third Mate and Chief Steward. On the way, Appellant addressed all three of his escorts with foul, abusive and threatening language. Appellant was put in the brig at 2245.

By 2230 on this date, Appellant had torn the grill work from the overhead lighting fixture in the brig and used it to smash the porthole glass in an attempt to escape from the brig. Appellant was put in a restraining jacket and given a sedative. Due to his continued belligerent attitude, Appellant was confined in the brig until 4 April when he resumed his duties on the ship.

On 8 April, Appellant failed to join the BASIL upon her departure from Alicante, Spain at 2200. The scheduled sailing time of 2200 had been posted on the sailing board. One other crew

member also failed to join the ship at this port. Appellant rejoined the ship at Barcelona, Spain on 9 April.

Appellant's prior record since 1957 consists of suspensions for thirteen offenses of failure to perform duties, three offenses of failure to join, three offenses of absence without leave, disobedience of a lawful order, destruction of ship's property and cursing a ship's officer.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the evidence fails to sustain the Examiner's findings with regard to the alleged offenses of disobeying a ship's regulation and failing to perform duties on four days.

There is no evidence that Appellant was aware of the regulation banning crew members from the Carioca Cafe. Moreover, there is no direct evidence that Appellant was "dancing" and "drinking" in the cafe as alleged in the specification. Appellant was not charged with misconduct as a result of his mere presence in the cafe.

Appellant's failure to perform his duties was not wrongful because he was confined in the brig due to a chest condition and a rash which had no association with Appellant's prior conduct.

If the findings as to these alleged offenses are reversed, it is evident that the two remaining offenses (use of foul and abusive language, and failure to join) would not warrant the order of revocation.

APPEARANCE: Abraham Freedman of New York City, by Stanley B. Gruber, Esquire, of Counsel.

OPINION

It is proper to find that Appellant was guilty of misconduct by simply being present in the Carioca Cafe, which was a restricted

area, although the specification alleged "dancing and drinking" in the cafe as the offense. *Kuhn v. C.A.B.*, 183 F.2d 839 (D.C. Cir. 1950) states that proof in administrative proceedings is not limited to the allegations in the pleadings, provided there has been actual notice of the issues involved so that there is ample opportunity to defend.

There could be no claim of surprise due to lack of notice since the basic issue contested was whether or not Appellant knew of the prohibition against crew members going in the cafe. By Appellant's own conduct, he admitted knowing that his was a prohibited area. First, he tried to convince the Staff Captain that he was a passenger; and then, when Appellant's identity was being checked against the passenger list, he ran from the cafe. As stated by the Examiner, these facts are adequate to show Appellant had knowledge of the fact that he should not have been in the Carioca Cafe.

Concerning the reason for Appellant's failure to perform his duties for four consecutive days while he was in the brig, it would be incongruous to conclude that Appellant was kept in the brig because he required medical treatment for a chest condition and rash which incapacitated him for duty. Obviously, a patient would not be confined in the brig for the sole reason that he required medical attention. Furthermore, the medical log does not indicate that Appellant's physical condition was such as to prevent him from performing his duties. The evidence indicates that the reason for this continued confinement was, as stated by the Staff Captain, for the safety of Appellant as well as others on the ship because of Appellant's attitude of extreme belligerence (R. 17). The Staff Captain's testimony as to this is supported not only by the threatening language Appellant used when he was being taken to the brig but also by the property damage he caused on the night he was put in the brig. Appellant's belligerent attitude and intoxication are also commented on in the medical log.

Nevertheless, the findings and conclusions that Appellant wrongfully failed to perform his duties are set aside and these specifications are dismissed because Appellant was relieved of his duties on the ship when he was placed in the brig by those in authority on the ship acting on behalf of the Master. When there is an intervening cause (confinement on the ship or otherwise

relieved of duty) for failure to perform duties, the seaman should be charged with the offense or offenses on which the relief from duty is based and, if applicable, another specification alleging the inability to perform duties due to intoxication or other cause resulting from the seaman's misconduct.

CONCLUSION

There is substantial evidence to support the other offenses alleged. Considering the cumulative effect of these offenses together with Appellant's extensive prior record, revocation is the only appropriate order in interest of safety at sea.

ORDER

The order of the Examiner dated at New York, New York, on 1 July 1965, is AFFIRMED.

W. D. Shields
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 13th day of December 1965.

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