In the Matter of Merchant Mariner's Document No. Z-816048 and all other Licenses and Documents
Issued to: ARTHUR H. MacKINNON

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

953

ARTHUR H. MacKINNON

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

By order dated 30 April 1956, an Examiner of the United States Coast Guard at New York, New York, suspended License No. 147505 and Merchant Mariner's Document No. Z-816048 issued to Arthur H. MacKinnon upon finding him guilty of misconduct. The specification alleges in substance that while serving as First Assistant Engineer on board the American SS WINCHESTER under authority of the license above described, on or about 29 April 1954, while said vessel was at Rio Haina, Dominican Republic, Appellant wrongfully struck Frank Hellard, an oiler on the ship.

On 19 September 1955, Appellant was served with the charge and specification when he arrived in New York City on board the ship. Appellant was directed to appear for a hearing on 28 September. It was then mutually agreed between Appellant and the Investigating Officer that the hearing be set for some time within a month after 20 December when Appellant expected to be on vacation. The Investigating Officer's evidence was not available at the time of this understanding.

On 28 September 1955, the Examiner convened the hearing and the Investigating Officer requested an adjournment. The Examiner continued the hearing until 5 January 1956 and requested the Investigating Officer to notify Appellant. This was done by letter dated 11 October 1955 addressed to Appellant on the SS MARYLAND TRADER. The letter advised Appellant that the hearing would

proceed although Appellant failed to appear on 5 January. Appellant received the letter while serving as Second Assistant Engineer on this ship. He continued to act in this capacity on the same ship for seven consecutive coastwise voyages. Official notice is taken of the fact that the ship completed a coastwise voyage at Salem, Massachusetts on 3 January 1956. With full knowledge that the hearing was scheduled to reconvene in New York City on 5 January, Appellant obligated himself to remain employed on the MARYLAND TRADER for a voyage to the West Coast commencing on 4 January.

Appellant's ship was still in Salem when the hearing was reconvened on 5 January. Appellant was neither present nor represented by counsel. He was contacted through the Boston Coast Guard office by telephone on this date. The message relayed to New York was that Appellant claimed that a replacement for him could not be obtained and also that the owner of the MARYLAND TRADER had said it was not necessary for Appellant to be present at the hearing for this offense which the owner considered to be a minor one.

Although the Investigating Officer's witness, oiler Hellard, was available to testify on 5 January, his testimony was not taken until 6 January in order to give Appellant an opportunity to be present. Since Appellant still did not appear on the latter date, the Examiner noted Appellant's default, entered pleas of "not guilty" to the charge and specification on behalf of Appellant, and conducted the hearing in accordance with the regulations for in absentia hearings.

After the Investigating Officer made his opening statement, the seaman allegedly struck by Appellant, oiler Hellard, testified. In addition, the Investigating Officer introduced in evidence a certified copy of an extract from the Official Logbook of the WINCHESTER for the voyage including the date of the incident in question. The Investigating Officer then made application for the taking of two depositions and the Examiner adjourned the hearing *sine die*.

The hearing was reconvened on 21 March 1956. Appellant had not contacted the coast Guard and no attempt had been made to get in touch with him after 5 January. The Investigating Officer withdrew his request for the taking of depositions because the two men could not be located. The Investigating Officer rested his case and submitted oral argument.

Nothing further having been heard from Appellant, the Examiner announced his decision on 30 April 1956. The Examiner concluded that the charge and specification had been proved. He then entered the order suspending Appellant's License No. 147505, Merchant

Mariner's Document No. Z-816048, and all other Licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of six months outright and six months on twelve months' probation. Appellant was served with the original of the decision on 8 May 1956 at Seattle, Washington.

On 14 May 1956, counsel for Appellant submitted a petition to reopen the charge, for the sole purpose of permitting Appellant to testify in his behalf, on the ground that Appellant should have been given notice of the adjournments to 6 January and 21 March 1956. The Examination heard argument on the petition on 28 May 1956 and denied the petition by decision dated 19 June 1956. Appellant has appealed from this decision of the Examiner and also from his decision on the merits of the case dated 30 April 1956.

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

FINDINGS OF FACT

On 28 and 29 April 1954, Appellant was serving as First Assistant Engineer on board the American SS WINCHESTER and acting under authority of his License No. 147505 while the ship was at Rio Haina, Dominican Republic. Frank A. Hellard was serving as an oiler on the ship.

On the evening of 28 April, Appellant and Hellard engaged in an altercation while ashore in a barroom. The difficulty started when Hellard tore in half a $20.00 bill which he had loaned Appellant earlier in the day. Appellant became angry at this and commented about Hellard's conduct later in the evening. Both seamen were under the influence of intoxicating liquor when they returned separately to the ship.

At approximately 0230 on 29 April, Hellard was in his room

removing his clothes when Appellant entered, made a derogatory remark, and used his fists to beat Hellard until he was unconscious. Hellard suffered severe pain from a fractured jaw. He was taken ashore for treatment at a hospital in Ciudad Trujillo and returned to the ship on 30 April after his jaw had been put in a brace. Subsequently, he received treatment at the U.S.P.H.S. Hospital in Baltimore, Maryland.

Appellant has no prior record.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that:

POINT I. Appellant was deprived of due process of law which includes the right to be heard.

POINT II. Appellant was entitled to timely notice of the hearing dates before the Examiner announced his decision. Nevertheless, the hearing was reconvened on 6 January and 21 March 1956 without any attempt to communicate with Appellant.

POINT III. The Examiner should have granted Appellant's petition to reopen the hearing.

POINT IV. The evidence is not sufficient to establish a prima facie case by proof beyond a reasonable doubt. The

log entry merely states that there was a "fight" between the two seamen. Hellard's testimony is contradictory, vague and weak although prompted by leading questions. Hellard admitted he was under the influence of liquor and his testimony indicates that Appellant was sober. An unfavorable inference arises from the failure of the Government to produce other witnesses.

POINT V. Although the Examiner mentioned that Appellant had no prior record, it is not disclosed in the hearing record that the Examiner ascertained from the Investigating Officer, as provided by the regulations, whether Appellant had any previous commendatory or disciplinary record.

APPEARANCE ON APPEAL: George J. Hammerman, Esq., of New York City, of Counsel.

OPINION

The first three points raised on appeal have been ably disposed of by the Examiner in his decision denying Appellant's petition to reopen the hearing. The gist of his decision is that the critical time, with respect to giving Appellant timely notice of the hearing dates, was when the hearing was reconvened on 5 January 1956. Although Appellant had been informed far in advance by letter that the hearing would be on this date, he failed to appear personally or by counsel. The inexcusable nature of this default is emphasized by the fact that Appellant had just signed on articles for another voyage on the MARYLAND TRADER on 4 January 1956 with full knowledge of the scheduled hearing date. Hence, it was no excuse that a replacement could not be obtained for him, and thereafter the burden was on Appellant to contact the Examiner in order to find out if the hearing would be reconvened on subsequent dates when Appellant could present his defense. Appellant made no attempt to do this until 14 May 1956 - almost eight months after the charge and specification had been served on him on 19 September 1955.

Approximately, the Examiner cited the case of *Fischer V. Dover Steamship Co.* (C.A.2, 1955), 218 F.2d 683, in which it was held that there was no abuse of discretion by the trial court in denying a motion to vacate an order which had been entered only after the complaining party, a seaman, had failed to present himself for a period of about eight months after he was served with a notice to take his deposition. The courts have often stated that a petition to vacate a judgment is addressed to the sound legal discretion of the trial court, and its determination will not be disturbed on appeal unless there has been an abuse of such discretion. *Cole V. Fairview Development Inc.* (C.A.9, 1955), 226 F.2d 175; *Neville V. American Barge Line Co.* (C.A.3, 1954), 218 F.2d 190; *Independence Lead Mines Co. V. Kingsbury* (C.A.9, 1949), 175 F.2d 983; *Cornwell V. Cornwell* (C.A.D.C., 1941), 118 F.2d 396. It is my opinion that there was no abuse of discretion on the part of the Examiner in denying Appellant's petition to reopen the hearing. Appellant exercised his choice to be absent from the hearing and to have it proceed in absentia because he did not anticipate the severity of the order to be imposed by the Examiner. Clearly, this was not a case of "excusable neglect." Hence, the Examiner will be upheld and Appellant will not be permitted to submit in evidence his version of the incident. Appellant states that he acted in self-defense when Hellard attacked Appellant with a bottle while Appellant was attempting to assist Hellard to his quarters.

With respect to Point IV on appeal, it is first noted that the degree of proof required in these administrative proceedings is substantial evidence rather than proof beyond a reasonable doubt. Since Hellard's testimony as to the material facts was accepted by the Examiner, it constituted the necessary substantial evidence to make out a prima facie case against Appellant. Appellant effectively waived his right to cross-examine Hellard and otherwise attack his credibility by failing to appear at the hearing. It is evident from Hellard's testimony that both seamen were under the influence of intoxicating liquor to some extent. Although the log entry only states that there was a "fight" (rather an assault by Appellant), the entry also states that it occurred in Hellard's room. In view of the bad feeling between the two seamen, Appellant's initiative in going to Hellard's room and the severe beating which Hellard received are indicative of Appellant's belligerent attitude. And there is no denial in the record that Hellard received a fractured jaw. It would have served no purpose for the Government to have produced additional witnesses if the two seamen were alone as stated by Hellard.

Concerning Point V, official notice is taken by me of the fact that the Examiner was correct in stating that Appellant had no prior record. Hence, Appellant was not prejudiced by the failure of the hearing record to show that the Examiner obtained this

information from the Investigating Officer.

In view of the seriousness of the injury received by Hellard, the order imposed by the Examiner is not considered to be excessive. The fact that Appellant is a licensed officer aggravates the graveness of this breach of discipline on his part. Considering all the circumstances of the case, it is my opinion that the order of the Examiner should be sustained.

ORDER

The order of the Examiner dated at New York, New York, on 30 April 1956, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 20th day of February, 1957.

***** END OF DECISION NO. 953 *****

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