UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: Lawrence E, KEENAN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2132

Lawrence E. KEENAN

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 11 January 1971, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Appellant's seaman's documents upon finding him guilty of misconduct in a hearing held at Corpus Cristi, Texas, on 21 December 1970. The specification found proved alleges that while serving as able seaman on board the United States SS OVERSEAS PROGRESS under authority of the document above captioned, on or about 18 December 1970, Appellant wrongfully engaged in acts of sexual perversion with two other (named) members of the crew of the vessel.

At the hearing, Appellant was represented by professional counsel and pleaded guilty to the charge and specification.

The Administrative Law Judge warned Appellant of the seriousness of the misconduct charged but Appellant, with concurrence of counsel, persisted in the plea.

The Investigating Officer made a statement as to the facts as to which evidence was available and Appellant, through counsel, pleaded for leniency on the grounds that he was intoxicated at the time of the occurrences.

At the end of the hearing, on 21 December 1970, the

Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved by plea. He then advised Appellant that his order was one of revocation of all documents issued to Appellant.

The written decision was mailed to Appellant on 11 January 1971 but could not be served because Appellant could not be located at the address given by him. The decision was not served until 2 September 1977. Appeal was timely filed, and perfected on 17 January 1978.

FINDINGS OF FACT

On 18 December 1970, Appellant was serving as able seaman on board the United States SS OVERSEAS PROGRESS and acting under authority of his document while the ship was at Corpus Christi, Texas. In the morning hours of that day Appellant accosted, separately, two ordinary seamen of the crew, who were asleep in their bunks in different rooms, by placing a hand on their private parts. The first seaman so accosted threatened Appellant with bodily harm if he did not leave the room. Appellant did leave. The second seaman so accosted did, in response to the touching, strike Appellant with open hand or fist, upon which that seaman left the room and Appellant went to bed.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge.

Appellant urges four grounds for appeal. First, he argues that laches on the part of the Coast Guard, resulting in service of the decision seven years after the hearing, operates to nullify the decision and render it inoperative. He then attacks the validity of the record itself as being improperly "certified."

It is further argued that he was deprived of due process of law because the Administrative Law Judge never enumerated to him the possible outcomes of the proceeding in light of his guilty plea, noting that the statement of possible results provided in the Investigating Officer's affidavit of service of the charges was not timely presented, being given to him and his professional counsel only after the hearing had begun.

Finally, Appellant urges that the order of revocation is too severe.

APPEARANCE: Joseph S. Presnall, III, Esq., Galveston, Texas

OPINION

I

The record here reflects clearly that on the plea of guilty the Adm*in*istrative Law Judge properly announced that the specification and charge were found proved and that his order was revocation. This was done in the presence of both Appellant and his counsel. The statute and the regulations both, however, require a written statement of findings in an order to be served upon the party. Although I see no compelling reason why a written decision could not have been prepared and served upon Appellant on the day of the hearing, especially in view of the plea entered and the fact that the ultimate findings and the order of revocation itself had been made and announced, it was not in and of itself error for the Administrative Law Judge to postpone the issuance of the written decision until he had returned to his permanent post at Houston from the place where the hearing had been held. The procedure having been under taken to issue the decision from Houston rendered it out of the question to contemplate reopening of the proceeding, solely for service of the writing, at that place and there was no point in looking to a return of all the participants to Corpus Christi for that same purpose. Thus, service by mail became appropriate.

When Appellant had been asked at hearing whether he would accept service on his professional counsel as service upon himself he did not assent. After disclaiming an address of record he did give a mailing address at a place in Michigan. It was to this address that the Administrative Law Judge sent the written decision, sending also a copy to the counsel who had represented Appellant at the hearing. The original decision mailed to Appellant was returned to the sender with a notation, in the registry accounting, that Appellant was "In Merchant Marines Last base was Israel."

While the methods used here were not, in light of the known circumstances, particularly laudable as ways to obtain effective service of the written decision, there was no legal fault such as to corrupt the decision itself.

Appellant now urges that he has been amenable to service at

all times since then since he "has worked as a seaman since the time of the hearing on various vessels in and around the Texas and Louisiana area, and his whereabouts has always been known to the Coast Guard."

II

Some attention must be given to Appellant's claim that he was always amenable to service although, it must be made clear, such amenability would not necessarily dictate a conclusion that the order of revocation had somehow been completely nullified.

There can be no doubt that the failure of the initial attempt to serve the written decision upon Appellant is attributable to him although the naivete' which accepted as an address for receipt of registered mail an address in Michigan reluctantly given by a "coastwise" seaman is not to be commended. Since that time, declares Appellant, he has been sailing regularly. As will be seen more pertinently, there is a startling aspect to this since Appellant had every ground for a reasonable belief that his seamen's papers would be revoked by the formal order which he knew would be fruitlessly directed to Warren, Michigan. Nevertheless, the record of his service, of which I here take official notice, shows that since the hearing he has served aboard four different vessels on nine occasions. Each service involved the "offshore" (Gulf of Mexico) supply service of a "coastwise" voyage.

Records of employment of this sort are initially made under the cognizance of the master of the vessel and are submitted for the purpose of maintaining records of a seaman's creditable service, at appropriate, irregular intervals. There is no direct supervision of a government officer at any active stage of the process whose official cognizance would consider the impropriety of Appellant's service. Further, for each occasion of such service, Appellant is recorded as displayed, to fulfill the requirements of 46 U.S.C. 672(i), a merchant mariner's document showing by the suffix to his identification number that it is the third duplicate issued to him, "Z-1082790-D3."

On 8 December 1970, ten days before the offenses in the instant case, and thirteen days before the hearing, Appellant filed at Houston, Texas, an application for issuance of a new duplicate document (which would have been "D-4") in lieu of one assertedly stolen from him at a motel, date and place not given. At this time he was issued a "temporary letter" authorizing interim service until issuance of the new duplicate. This "letter" was the document used to authorize the service aboard OVERSEAS PROGRESS which included the misconduct here considered, and this "letter" is what Appellant produced at the hearing and surrendered to the

Administrative Law Judge in anticipation of the order of revocation.

On the face of the record, then, Appellant's subsequent service, even though on voyages not subject to the supervision of government officers, was performed on the strength of his possession of a document ("D-3) which he had, subject to the penalties prescribed by 18 U.S.C. 1001, declared in a formal statement to have been lost. It is a matter of record that Appellant has asserted, to avoid the imputation of violation of the criminal statute, that he did not in fact have the "D-3" document in his possession when he undertook the employment on the nine voyages mentioned, but that the master in each case had ignored the laws governing shipment of seamen and had permitted him to sign on for the voyages upon his own mere representation that he held such a document. Either way, follows that credibility is not lightly to be accorded to Appellant's statements, and it can be inferred from his invariable practice of entering upon voyages the procedure for which would not come under the scrutiny of government agents, that, fAr from being at all times plainly in the sight and awareness of those seeking to serve on him the written decision in the case, he was in fact carefully avoiding such embarrassing encounters.

A theory of equitable estoppel does not operate against the agency here, but Appellant is in no position to invoke equitable principles in light of the "clean hands" doctrine in any case.

III

The alleged deficiency in the authentication of the transcript in the case is at best a quibble. Appellant notes that one Scurlock was identified as a person to "report" the case at the outset of the hearing while one Theresa Horne is identified as preparing the transcript. This, he claims, somehow invalidates the record. Quite apart from the fact that no law, regulation, or announced principle of court-determined "due process" is involved here and no actual error in the record of proceeding has been asserted, it is clear that the certificate of Horne shows only that Horne prepared a typewritten transcript from a "record" by Scurlock. There is no allegation made that this is not true, and there is no procedural irregularity shown by the statement.

IV

In his claim that "due process" was not accorded at the

hearing itself, Appellant's point is, apparently, that the Administrative Law Judge did not, when Appellant entered his plea of guilty, "admonish" him of "the consequences of his Plea of Guilty" and the "range of decisions available to the Hearing Examiner as a result thereof." Appellant then, anticipating an answer to this, proffers as in rebuttal the comment that the Investigating Officer's affidavit of service, recounting among other things the nature and possible outcomes of the proceeding, was not presented to Appellant and his counsel until "the day of and during the hearing," implying that this, as "notice" was untimely.

Of course, the affidavit filed by the Investigating Officer was not a "notice" to Appellant at all. Such an affidavit is frequently made part of the record of hearing in, for example, in *absentia* cases, as supportive proof that service of the notice was properly made. Since both Appellant and his chosen counsel were present for the proceeding pursuant to the notice given there was absolutely no need in this case that the affidavit be made part of the record or even displayed for any purpose. However, the "affidavit" does not purport to give notice; what it reflects is that a notice had been previously given. In the instant case, heard on 21 December 1970, it established that notice of the nature of proceedings and of the possible outcomes had been given Appellant by the Investigating Officer three days earlier. Thus, the argument that "service" of the affidavit after the hearing had begun was a denial of due process is meaningless.

As to what was done by the Administrative Law Judge, it is customary for the one presiding at a hearing to advise the person charged, when he is present, of the possible outcomes. In 46 CFR 5.20-1(c), the fourth step in the description of the customary procedure is that "Administrative Law Judge advises person charged of his rights." This is not stated as a command and a failure to act in accordance with the customary procedure is not a jurisdictional defect. The controlling statute and the regulations d*et*ermine the "rights" of the person, and there is here no assertion that his "rights" were not in fact accorded. Further, the possible results of the hearing, also determined by the statute, are not "rights" of the party.

It does appear that the customary recitation of the possible outcomes, usually given before the plea is heard, was omitted here because, after the specific "rights" (as to counsel, witnesses, et *cetera*) were stated there was a confused situation because Appellant did not have a merchant mariner's document and its status took some unraveling of threads for understanding. Nevertheless, when Appellant entered his plea of guilty, the

Administrative Law Judge did specifically advise him: "...I can't impress on you too much the seriousness of this charge and while you are represented by able counsel, you do realize, of course, that if your plea of guilty is accepted by the Hearing Examiner what the consequences may be?" Appellant replied, "Yes...." When asked again whether he "fully understood" that, he repeated his affirmation. He was asked again whether he wished to enter a plea of guilty. Both he and his counsel reaffirmed the plea.

There can be no doubt here that Appellant, having been advised of the nature of the proceedings and the possibilities by the Investigating Officer, having been warned by the Administrative Law Judge that the matter was most serious, and having professional counsel's advice and assistance at the time, well knew the meaning of and results of the plea of guilty. Had any further explanation been needed, he waived it, and on the pronouncement of the order of revocation in open hearing he voiced neither surprise nor protest.

There is no merit at all to this issue raised on the appeal.

V

Appellant's last point is that the order is too severe. In support of this he urges his "unblemished" record of service since the date of hearing. Appellant's position here is perilously close to that of the parricide invoking leniency as an orphan. What service he has had, amounting to 197 days of employment as a seaman over a period of seven years, is, if not downright illegal, at best a flouting of the process governing certification of seamen, and entitles him to no special consideration on this long postponed review.

ORDER

This order of the Administrative Law Judge dated at Houston, Texas, on 11 January 1971, is AFFIRMED

J. B. HAYES
Admiral U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 13th day of September 1978.

INDEX

***** END OF DECISION NO. 2132 *****

Top