UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Thomas Harold Vail Z 1118599

DECISION OF THE COMMANDANT APPEAL
UNITED STATES COAST GUARD

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Thomas Harold Vail

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 2 November 1978, and Administrative Law Judge of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleged that while serving as Deck Maintenanceman on board SS PRESIDENT HARRISON under the authority of the document above captioned, on or about 5 March 1978, Appellant wrongfully had in his possession hashish and marihuana; and on the same date wrongfully became under the influence of narcotics.

The hearing was held at San Francisco, California, in two sessions, on 21 July 1978 and 2 November 1978.

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

The Investigating officer introduced in evidence the testimony of two witnesses and seven documentary exhibits.

In defense, Appellant offered in evidence his own testimony and one exhibit. The exhibit was marked for identification but not admitted as competent evidence.

Initially the specifications did not identify the specific narcotic substances involved. At the conclusion of the evidence the Administrative Law Judge, *sua sponte* amended the charge to identify hashish and marihuana.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and both specifications had been proved. He served a written order on Appellant on 14 December 1978 revoking all documents issued to Appellant.

The entire decision was served on 15 December 1978. Appeal was timely filed and perfected.

FINDINGS OF FACT

On 5 March 1978, Appellant was serving as Deck Maintenanceman on board the SS PRESIDENT HARRISON, O. N. 502 569, and acting under authority of his document while the vessel was arriving at the port of Bombay, India.

Appellant was injured while aboard HARRISON due to a fall on 27 February 1978. He was treated by medical doctors and prescribed a limited number of Darvon tablets for pain relief.

At about 2240 on 5 March 1978, the vessel's Master, Delbert J. Coppock, and the Chief Mate, John Murk, followed another crewman to Appellant's room. The crewman, Ronald Kirkland, exhibited signs of disorientation and intoxication. Inside Appellant's room, the officers observed Appellant in an apparent state of intoxication. The Master detected an odor in the room of air freshener and what he identified as the characteristic smell of marihuana smoke.

The two officers, joined by Purser H. C. Moore and deck

delegate J. E. Sparks, Jr., conducted a search of the one-man room. They found two pellets of suspected hashish in Appellant's hand and several slabs of a similar material in a void under a drawer beneath Appellant's bunk. The slabs were located in a plastic bag along with a cigarette rolling machine which Appellant claimed ownership of. No smoking tobacco was found. In a briefcase, material believed to be hashish, some believed to be marihuana, a quantity of pills, and several packs of cigarette papers were found. Other packs of cigarette papers, a hooka-type brass smoking pipe, a chalice with ashes in it, and a partially smoked handrolled cigarette butt were also located and confiscated. Appellant claimed ownership of the pipe and chalice.

Two open beer cans, one full and the other with one inch of the liquid gone were located in the room, as well as 38 unopened cans of beer, and two empties in a trash receptacle. Neither the Master nor the Purser detected and odor of alcohol on Appellant's breath. The Purser checked Appellant's pulse and respiration, and noted his inability to stand or walk.

The Master had some knowledge of marihuana and hashish from his years of experience as a mariner. He also had received some formal training in the recognition of narcotic substances by sight and smell, as well as the effects their abuse might have on a user.

Appellant was relieved of duty and placed under continuous watch. Appropriate log entries were made, and steps were initiated to repatriate Appellant.

Indian customs authorities were advised of the presence of the contraband, which had been marked and sealed in the Master's safe. Those authorities inventoried the confiscated items and took custody of them. Appellant was arrested by the customs officials and remained in custody for 33 days. He was tried and convicted in the Court of the Chief Metropolitan Magistrate of Bombay, India, on 5 May 1978 for possession of 2.6 pounds of hashish. The conviction was founded in part on a customs laboratory report on the nature of the seized items which concluded that some contained "hump"[sic] (hemp), and hashish.

Appellant was ultimately repatriated. Subsequent to his return to the United States, he was unfit for duty for four months.

In open hearing Appellant admitted use of marihuana on several occasions, and admitted that three marihuana cigarettes found in the search of his room were his.

BASES OF APPEAL

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

It is urged that five grounds exist to reverse the decision of the Administrative Law Judge. In brief, these are:

I 46 USC 239 is unconstitutionally vague;

II Appellant' Fourth Amendment rights were violated;

III Appellant was not provided his due process right to a fair and impartial hearing;

IV Evidence of the Indian court proceeding were erroneously admitted;

V A certified chain of custody record was not submitted for the contraband.

APPEARANCE: Henning & Walsh of San Francisco by Jeffrey R. Walsh, Esq.

OPINION

I

Appellant argues that 46 USC 239 is unconstitutional as it is void for vagueness. Disregarding the precise language of the regulations which underlie RS-4450 proceedings, e.g. 46 CFR 5.05-20(a)(l), this constitutional objection is easily resolved. An agency charged with administration of an act of Congress lacks the authority to pass upon the constitutionality of that act, even were it so inclined. Thus the proper forum for such an objection

lies before a court of record and not an administrative proceeding. See generally: *Public Utilities Comm. v. U. S.*, 355 U. S. 534(1958); *Engineers Public Service Co. v. S. E. C.*, 138 F.2d 936(1943); Decisions on Appeal Nos. 2135, 2049 and 1382.

Appellant's arguments founded on the technical amendment of the specification on reflect the precise narcotics involved is not persuasive. As aptly noted by the Administrative Law Judge, the issue of the identity of the substances was fully litigated and considered. Appellant had actual notice of the gravemen of the charge and was not prejudiced in any way by the amendment. *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839(D. C. Cir. 1950).

II

The seminal case on the right of a Master to conduct a search is *The Styria*, 186 U. S. 1 (1901). Therein the Court recognized the Master's legitimate concern for the safety of the vessel and his right and duty to abate a threat. Authority to conduct a search, and subsequent admissibility of evidence found in an administrative proceeding is not subject to all the strictures which attend criminal actions. Decisions on Appeal Nos. 2135 and 2098; *see also United States v. Janis*, 428 U. S. 433(1976).

Considering the instant case, it is clear that sufficient facts were available to the Master from kirkland's conduct to justify the visit to Appellant's room in Kirkland's wake. Once there, Appellant's condition, coupled with the evidence of the aroma and the pipe in plain view would constitute a level of probable cause sufficient to satisfy even the most stringent of criminal law standards, were they applicable. Thus the standard in *Mendez v. Macy*, 292 F.Supp. 802 (S. D. N. Y. 1968), relied on by Appellant were clearly satisfied.

III

Speedy trial, as that concept is embodied in the Speedy Trial Act of 1974, 18 USC 316(g), does not attach in an administrative proceeding. Although a period in excess of seven months was

necessary to see the resolution of this matter, there has been no showing of prejudice to Appellant. Bare assertions of prejudice are insufficient to establish that the government's action in the proceedings were unduly delayed or worked to the injury of the charged party. Given the complexity of the case, and the need for evidence to be procured from India, I can not say that 7-8 months was an unreasonable amount of time to complete the hearing process.

Appellant's argument with respect to lack of adequate notice of the charges brought and lack of an opportunity to prepare his defense are ill taken, bordering on the spurious. CFR 5.03-4 establishes the offenses which revocation is mandatory. Misconduct by virtue of possession or use, the specifications in the instant case, are included therein. 46 CFR 5.03-5 is also instructive on this point. Thus the election of the Investigation officer to proceed under 46 USC 239 vice 46 USC 239b is immaterial for the purpose of the sanction which might inure. Indeed, the Investigating Officer pointed this out during the hearing. R-120,167. It was also noted at the outset that the charge was couched in terms of 46 USC 239. R-10,11. The possibility of revocation upon proof of the charge was also explained in detail to Appellant. R. 13-18. The Investigating Officer did proceed under the "misconduct section," and, as the charge was proved, revocation was proper.

The Administrative Law Judge correctly noted that under a misconduct charge revocation is not mandatory - provided appropriate evidence and findings document mere experimentation and negate the likelihood of recurrence. Thus the mandatory revocation could only be certain after all evidence was adduced. The regulation and the law are clear, and the record reflects that due process as required by law was afforded Appellant. Appellant had and took full opportunity to defend against the very charges brought. He will not be heard now to cry "foul" if he neglected to heed the warning of possible consequences raised by the Administrative Law Judge and the Investigating Officer.

IV

As related above, the charge herein was under the authority of 46 USC 239, not 239b. Thus Appellant's argument related to the inadmissibility of the transcript of the Indian Court of the Chief

Metropolitan Magistrate, founded on non-compliance with 46 USC 239b(b)l is inapposite.

The transcript is certified to be a true copy by the Magistrate of the Court, Mr. Saptarshi. His signature is authenticated by Mr. M. N. Barve, Section Officer of the General Administration Department, Government of Maharashtra, Bombay, India. The United States of America Vice Consul in Bombay certified Mr. Barve's signature as entitled to faith and credit. Seals are duly affixed or stamped on the appropriate documents.

Federal Rules of Evidence are instructive although not controlling in R. S. 4450 proceedings. In general they are more stringent. However, Rule 902(3) clearly would recognize the transcript of the Indian record as competent evidence, given the chain of authentications culminating in the statement of the Vice Consul. The transcript is substantial evidence of a reliable and probative character of the specification of possession.

V

Appellant contends that the chain of custody of the contraband was inadequate, founded primarily on the grounds that the evidence gathering session of the customs officials is inadmissible as evidence of the transfer of custody to said officials. Without addressing the hearing issue, in which I find little merit, it is sufficient to note the testimony of the Master as to the transfer, and the evidence of Exhibit 3-S on this point. The transcript, and the attached report of the chemical analyzer are sufficient to render credible the conclusion of the Administrative Law Jude that the contraband taken from Appellant was the same as that reported to contain narcotic substances to the Magistrate's Court. As noted, admissibility in these proceedings is not bound by the strict rules of evidence. Appeal Decision No. 2061. If the examiner finds the evidence credible, his judgment will not be supplanted unless arbitrary and capricious. Appeal Decisions Nos. 2097 and 2082. I find no indication of such capriciousness in the record before me.

CONCLUSION

The order of the Administrative Law Judge is supported on the record by substantial evidence of a reliable and probative character.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 14 December 1978, is AFFIRMED.

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

Signed at Washington, D. C., this 28th day of April 1980

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***** END OF DECISION NO. 2202 *****

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