UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 147 112
Issued to: Alexander H. ROGERS, III.

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2208

Alexander H. ROGERS, III.

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 5.30-1.

By order dated 4 January 1979, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, after a hearing at Miami, Florida, on 21 November 1978, revoked Appellant's license upon finding hum guilty of conviction for a Narcotic Drug Law violation. The specification found proved alleges that Appellant,while the holder of the captioned document, was convicted on 23 November 1977, of possession of narcotics, to wit, marijuana, by the Hampton District Court, Hampton, New Hampshire.

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

The Investigation Officer introduced into evidence one document.

In defense, Appellant introduced into evidence one document.

Subsequent to the hearing, the Administrative Law Judge

entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of revocation.

The written decision was served on 27 January 1979. Appeal was timely filed on 22 January 1979, and perfected on 2 April 1979.

FINDINGS OF FACT

On 23 November 1977, Appellant was convicted, upon a plea of "guilty" pursuant to New Hampshire RSA 318-B:26, for possession of a controlled drug (marijuana) a misdemeanor. Appellant was the holder of a duly issued Coast Guard license, number 147 112.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that the Administrative Law Judge erred: (1) "in entering an order revoking the Appellant's license based upon the provisions of Title 46 USC Section 239(b) [sic], in light of the fact that the Appellant's record of conviction, which is the basis of these proceedings, was annulled, "for the purposes', pursuant to law of the state of New Hampshire;" and (2) "in entering an order revoking the Appellant's license in view of the fact that Title 46 CFR 5.03-1 mandates that the Administrative Law Judge follow the prior decisions of the Commandant unless same are `modified or rejected by competent authority,' and the National Transportation Safety Board has rejected the enunciated [sic] policy of the Commandant in the case of *Owen W. Siler v. Charles Hardy Ogeron*, (12/6/77), NTSB Order No. EM-65."

APPEARANCE: Thomas F. Panza, Esq., Ft. Lauderdale, Florida.

OPINION

I rejected both of Appellant's contentions on appeal.

As Appellant concedes, on 23 November 1977, he properly was convicted for possession of a "narcotic drug." At that time, Appellant was the holder of a duly issued Coast Guard license. On

17 November 1978, pursuant to New Hampshire RSA 651:5, the record of conviction was "annulled" by the same court which originally convicted him. Subsequently, Appellant's license was ordered revoked, after a full hearing before a Coast Guard Administrative Law Judge, pursuant to Section (b)(1) of the Act of 15 July 1954, P.L. 500, c.5512, 68 Stat. 484(46 U.S.C. 239a-b).

The question which presents itself is what effect, if any, does the New Hampshire court's action of 17 November 1978 have upon the action taken subsequently by the Administrative Law Judge? My conclusion is that it has no effect.

The Act of 15 July 1954 provides, in pertinent part, that "[t] he Secretary may...(b) take action...to revoke the seaman's document of -(1) any person who...has been convicted in a court of record of a violation of the narcotic drug laws of...any state...the revocation to be subject to the conviction's becoming final."

Because a Federal license is involved, the effect of any state expungement statute, such as the New Hampshire statute under consideration here, must be measured against the Federal standard. The only portion of the Act of 15 July 1954 which conceivably might be construed to encompass the result of a State's actions pursuant to a State expungement statute is that which provides, "convicted...subject to the conviction's becoming final." The meaning of these words is addressed specifically neither in the body of the statute itself, nor in its legislative history. *See*, [1954] U.S. CODE CONG. & ADM. NEWS 2558-2560: *Revocation or Denial of Seamen's Documents to Narcotic Law Violators: Hearing on H.R. 8538 Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 83rd Cong., 2d Sess. (16 June 1954). However, pursuant to authority properly delegated to the Commandant by the Secretary of the Treasury, the Coast Guard first issued regulations addressing this matter on 17 June 1955. 46 CFR 137.04-15 provided as follows:

> Effect of Court Conviction.
>
> (a) After proof of a court conviction in accordance with Section 2(b)(1) of the act, *but pending the*

> *determination of an appeal*, the Coast Guard is not precluded from taking action based upon this conviction, and the examiner may enter an order revoking the seaman's document.
>
> (b) This order of revocation will be rescinded by the Commandant if the holder submits satisfactory evidence that the court conviction on which the revocation is based has been set aside. Such order of revocation, however, will not be rescinded by the Commandant by virtue of the provisions of *any law or ruling of a court subsequent to the conviction which would relieve disabilities arising out of a suspended sentence or probation*." (emphasis added.) 20 F.R. 4255-56.

What is readily apparent in these emphasized sections is that the term "has been set aside," which *does not* appear in the statute itself or in its legislative history, was not meant to refer to what the National Transportation Safety Board (NTSB) has termed "expungement statutes." Rather, the intent was to provide for rescission of the order of revocation when, upon successful appeal to an appellate court for instance, proper authority has determined that the conviction was somehow defective and therefore should never have been rendered. Thus, an important distinction must be drawn. An expungement statute does serve to affect the *record* of conviction in much the same fashion as a successful appeal. Nevertheless, and this is the crucial distinction, it does not affect whatsoever the *underlying finding of guilt*.

Subsequent revision of the regulations did not affect this distinction although adoption of language first used in Decision on Appeal No. 852 [13 January 1956] has led to some confusion. In that decision, in addressing the effect of a California expungement statute, I stated, "[t] he conditional setting aside of the conviction will not preclude the subsequent utilization of the conviction in order to take action against a seaman's documents when such action is based on a prior final judgment." The difficulty which as arisen, and which is evident in the opinion of the NTSB in the decision cited by Appellant, NTSB Order No. EM-65, is that the focus of the analysis has shifted from a consideration of whether the underlying finding a guilt at the trial level has

been reversed (*e.g.*, upon appeal), to a consideration solely of whether an expungment statute is "conditional" or "unconditional" in nature. The latter approach clearly is at variance with the Act of 15 July 1954, as the Act originally was construed and implemented in the contemporaneously issued Coast Guard regulations. In these circumstances, "great deference to the interpretation given the statute by the officers or agency charged with its administration" is to be shown. *Udall v. Tallman*, 380 U.S. 1 (1964), 16; *see*, *also*, *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 369 (1961), *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294 (1933). Hence, this novel approach in construing provisions of the Act of 15 July 1954 is wholly without basis in law and must be rejected.

To the extent that the NTSB might be said merely to be construing the Coast Guard regulations in question, rather than the Act itself, its approach also must be rejected. "The salutary and settled rule of administrative law is that the agency, and not the reviewing court, is to be accorded the first opportunity to construe its own regulations." *FTC v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977), 103. As the Agency, I do not construe the language of 46 CFR 5.03-10 as including expungement statutes within that which is "satisfactory evidence that the court conviction on which the revocation is based has been set aside for all purposes." To so construe this regulation would fly in the face of the succeeding sentence, which provides that "[a]n order of revocation will not be rescinded as the result of the operation of any law providing for the subsequent conditional setting aside or modification of the court conviction, *in the nature of the granting of clemency or other relief*, after the court conviction has become final." (emphasis added.) Once a final conviction is rendered, a state expungement statute may be found to serve some useful, legitimate purposes, but it has no effect upon proceedings under 46 U.S.C. 239b.

One final observation is in order. It is apparent that the NTSB, in the decision relied upon by Appellant, was persuaded to order the return of that Appellant's merchant mariner's document by the reasoning of the majority in a deportation case, *Rehman v.Immigration and Naturalization Service*, 544 f.2d 71 (2nd Cir. 1976). I, However, find the reasoning of the dissent considerably

more persuasive. As Circuit Judge Mulligan stated, "[e]very federal court which has encountered the question of the effect of a state expungement statute upon the deportation of an alien convicted of a drug offense in a state court has held that the state conviction per se triggers 8 U.S.C. 1251(A)(11) and that the state's subsequent treatment of the offender is inconsequential." (citations omitted.) 5544 F.2d 71, 78. Judge Mulligan also quoted from one of the decisions he cited, *Cruz-Martinez v. INS*, 404 F.2d 1198 (9th Cor. 1968):

> "Deportation is a function of federal and not of state law. In the context of a narcotics conviction, deportation is a punishment independent from any that may or may not be imposed by the states. While it is true that the same event, the state conviction, triggers both sets of consequences, *it would be anamolous for a federal action based on a state conviction to be controlled by how the state chooses to subsequently treat the event*. *It is the fact of state conviction, and not the manner of state punishment for that conviction, that is crucial*." (emphasis added.) 544 F.2d 71, 78.

CONCLUSION

I conclude that the action taken by the New Hampshire court subsequent to Appellant's Narcotic Drug Law conviction has no effect on these proceedings.

ORDER

The order of the Administrative Law Judge dated at Jacksonville, Florida, on 4 January 1979, is AFFIRMED.

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

Signed at Washington, D.C., this 20th day of May 1980.

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