UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Pedreu C. Lewis (Redacted)

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2279

Pedreu C. Lewis

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated February 11, 1981, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, revoked Appellant's seaman's document upon finding him guilty of misconduct. The amended specifications found proved alleged that while serving as Wiper on board the SS DELTA SUD under authority of the document above captioned, on or about 5 February 1981, Appellant wrongfully possessed a narcotic drug aboard the vessel, to wit: marijuana and did wrongfully engage in disorderly conduct by using foul and abusive language to both the officers of the DELTA SUD and Coast Guard marine inspectors.

The hearing was held at New Orleans, Louisiana, on 11 February 1981.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced in evidence the testimony of two witnesses and five exhibits.

In defense Appellant testified on his own behalf.

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 then served a written order on Appellant revoking all documents issued to Appellant.

The entire decision was forwarded by Certified Mail on March 13, 1981. Appeal was timely filed on March 12, 1981, and perfected, after an extension, on October 30, 1981.

FINDINGS OF FACT

On 5 February 1981, Appellant was serving as Wiper on board SS DELTA SUD and acting under authority of his document while the vessel was in the port of New Orleans, Louisiana.

Appellant signed on the vessel on 4 February 1981, although he had been employed aboard for several months on a foreign voyage.

On the date in question, Appellant appeared in the office of the Chief Engineer several times seeking to borrow money from that officer. By his own testimony Appellant had consumed about a third of a fifth bottle of J & B Scotch during the early morning hours. After being denied a loan several times, Appellant directed foul and abusive language at the Chief Engineer and the First Assistant Engineer. The Chief cautioned Appellant about his conduct, noting the presence of three Coast Guard marine inspectors who were in the Chief's office on official business. Appellant then addressed foul and abusive language, including racial epithets, at the Coast Guard officers.

The Chief Engineer then fired Appellant from the vessel's service and ordered him to depart the vessel. Appellant did not leave the vessel immediately and after one hour the New Orleans Harbor Police were summoned. They placed Appellant under arrest on a disorderly conduct charge and removed him from the vessel. The following day, Appellant pleaded guilty to a charge of "Public Drunkenness" in New Orleans Municipal Court relative to his conduct on DELTA SUD on 5 February 1981.

On 6 February 1981, a ship's officer and a cadet aboard DELTA SUD inventoried Appellant's personal effects which had been left on board. They were assisted by a Coast Guard Warrant Officer who was on board the vessel and had witnessed the previous day's events. While listing the contents of a zippered shoulder bag which belonged to Appellant, six handrolled cigarettes were found. The Coast Guard officer, who had received substantial training as a Special Agent and who had participated in many drug seizures, identified the substance by characteristic color, content and smell to be marijuana. Appellant's room, of which he was the sole occupant, was then locked and sealed. The U.S. Customs Service was

notified of the discovery of possible contraband aboard the vessel which was preparing for another foreign voyage.

On 6 February 1981, an Officer of the Customs Service boarded and searched DELTA SUD, including Appellant's room. By use of a standard field test, which he had employed many times previously, the officer identified the substance in the six handrolled cigarettes as marijuana. Subsequent laboratory tests confirmed this conclusion.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended by Appellan that:

1. He was denied a change of venue;

2. The charges were improperly amended at the hearing;

3. Witnesses gave false testimony;

4. The cigarettes in question were not identified as containing marinjuana;

5. His guilt had been pre-judged before his offer of a defense;

6. He was subjected to double jeopardy by use during the proceeding of a municipal court record of conviction; and

7. The transcript of proceedings is inaccurate.

OPINION

I

The series of papers submitted by Appellant to perfect his appeal and the transcript of the proceedings establish that Appellant appeared before the Administrative Law Judge and proceeded with his case in 11 February 1981. Return of service was originally set for 12 February. It is thus clear that Appellant was aware of the change of schedule and was not thereby prejudiced. The record of proceedings does not identify the reason for the change but amply demonstrates that Appellant had been informed of his rights by the Investigating Officer when charged and that the Administrative Law Judge carefully reviewed those rights at the outset of the proceeding. After acknowledging his understanding of these rights, Appellant stated his wish to proceed with the case,

refusing to request either a change of venue or a continuance to procure professional counsel. Appellant, of course, has alleged on appeal that through collusion the transcript does not reflect his actual statement on these issues. If he was correct in that assertion, the full weight of the civil and criminal law would be brought to bear on the Administrative Law Judge and the Reporter. I am not persuaded by mere accusations, raised well after the events, that Appellant is truthfully recounting events at the hearing. The Administrative Law Judge in the instant case has brought long and honorable service to this case and I will not presume that he or the Reporter take their oaths as lightly as Appellant implies. Appellant has offered not an iota of evidence to substantiate his claims of racism, prejudice and collusion. See Appeal Decision No. 1522 (mere accusations of collusion are insufficient as evidence in rebuttal). Indeed, I can discern no possible motive that would persuade the varied actors in this case to so conspire against any merchant seaman. I thus reject Appellant's arguments, founded on denial of a change of venue and inaccuracies in the transcript of proceeding, as being totally without support.

II

The Administrative Law Judge is required to examine charges and specifications at the outset of a hearing to determine their legal sufficiency. See 46 CFR 5.20-65. The amendments complained of consisted of the addition of "aboard said vessel" to the possession specification and "in that you did use foul and abusive language to both the officers of the DELTA SUD and Coast Guard marine inspectors" to the disorderly conduct specification. Both these amendments had a salutary effect on the clarity of the specifications. This is particularly true with regard to the disorderly conduct specification since it apprised Appellant of the precise conduct at issue. Absent objection on the record, there was no impropriety in the allowance of these technical amendments. It should be born in mind that even errors of substance in a charge of specification do not end the Coard Guard's authority to pursue R.S. 4450 proceedings. New charge sheets may be prepared and served under such ciccumstances. Thus to allow amendments at the outset of a hearing serves to promote efficiency and avoid delay, in the absence of prejudice to a party charged. While a party charged may request a reasonable continuance after a substantive amendment, no such request was made here. Thus I find Appellant was not prejudiced by the amendment of the specifications.

III

Appellant has challenged on appeal the facts found proved by

the Administrative Law Judge. He relies primarily on minor inconsistencies in the testimony of the witnesses and the written evidence and argues the facts as he states them to be. In this regard, Appellant misapprehends the appellate function. The issues raised revolve about the credibility of the witnesses and the evidence presented. The trier of fact, by virture of his unique opportunity to observe witnesses and weigh their testimony, is assigned the duty of determining the credibility of evidence adduced. Decisions on Appeal Nos. 2052 and 2003. There is no appearance of any arbitrary or capricious judgment to justify upsetting the determinations made by the Administrative Law Judge. Other than his accusations, Appellant offers no evidence to substantiate his claim that the testimony of the witnesses was fabricated. Repetition of his own testimony does not enhance its credibility.

IV

The identity of the substance in the six handrolled cigarettes as marijuana is overwhelming. Two federal officers, one of the Customs Service and one from the Coast Guard, preliminarily identified the substance as marijuana based on their experience and training. A field test and a laboratory test confirmed their conclusion as related by the Customs Officer in his testimony. No fact or assertion anywhere in the proceeding ever called the identity of the substance into question.

V

The burden of proof in these proceedings is on the Investigating Officer. 46 CFR 5.20-77. A party charged is entitled to a dismissal at the conclusion of the Investigating Officer's presentation of evidence if the evidence presented would be insufficient to constitute substantial evidence upon which to find the charge proved. If the evidence presented would pass this scrutiny, it is considered to consitute a "prima facie" case. A party charged is still privileged not to personally testify but failure to rebut a prima facie case inevitably leads to the resolution of the proceeding against the party charged. When the Administrative Law Judge advised Appellant that "the Coast Guard [had] presented sufficient evidence to sustain the case against [Appellant]," he in effect was advising Appellant that prima facie case had been made on both specifications of the charge. In so doing, the Judge was being solicitous of a layman who might not be expected to raise a motion to dismiss at that juncture. Record at 41, lines 10-16. There is no intimation that the case was pre-judged or that an effective rebuttal would not have resulted in a different outcome. See generally Decision on Appeal No.

1793.

VI

A record of conviction of Appellant upon a plea of guilty to "Public Drunkenness" in New Orleans Municipal Court was admitted into evidence without objection. The Judge ruled it admissible to the extent it related to the disorderly conduct charge and the events aboard DELTA SUD on 5 February 1981. Such limited use in an administrative proceeding does not raise a double jeopardy issue. Double jeopary is a criminal law concept which has no place in a remedial proceeding such as an R.S. 4450 hearing in which the sole issue is the continued right of the party charged to hold a licenses or mariner's document. There is no penal interest involved here as there is in a criminal court proceeding and the strictures of the Consititution regarding double jeopardy do not act as a bar to the use of records of conviction. See Decisions on Appeal Nos. 701 and 379. Also instructive on this point is 46 U.S.C. 239b, 68 Stat. 484. Therein Congress specifically provided for reference to criminal court records of violation of narcotic drug laws during R.S. 4450 hearings. A stature can not, of course, contravene a constitutional provision such as the proscription against double jeopardy. Yet this provision of the U.S. Code, analogous to the situation addressed by Appellant, has never been successfully challenged on double jeopardy grounds.

CONCLUSION

It is apparent that Appellant was less thatn forthcoming with the Administrative Law Judge when he testified concerning his prior record. Although he had never been charged with possession of narcotics, Appellant's prior record includes charges for use of threatening and abusive language, intoxication, assault, failure to perform, failure to obey lawful orders, failure to join, and mutual assault. In fact Appellant's current document was given him in 1977 by the grace of the administrative clemency. Since that time, Appellant was issued a written warning for conduct remarkably similar to that mentioned in the first specification of the instant proceeding. I do not lightly approve revocation of mariner's documents. The hardship that such a remedial measure may work on a seaman, and those who may look to the seaman for support, is well recognized. Yey Congress has expressly charged the Coast Guard to promote the safety of life and property at sea, and oversight of the conduct of mariners is an essential step in fulfilling that mandate. Appellant is neither a newcomer to the maritime field nor a novice in R.S. 4450 proceedings. Yet his prior with the system, including a prior revocation, seems to have had little remedial

effect on his conduct. The violent nature of many of Appellant's trangressions and the potential violence inherent in the second specification in the instant case cause me much concern. Appellant was offered an opportunity to produce evidence that would mitigate the seriousness of the possession offense by demonstrating it was merely experimentation on his part. He did not avail himself of the opportunity; neither did he offer evidence in mitigation generally.

The Administrative Law Judge ordered the greatest remedial sanction allowed - revocation. After reviewing the record in its entirety, I find that substantial evidence supports the decision of the Law Judge, and that his order was the appropriate one on the facts of this case.

ORDER

The order of the Administrative Law Judge dated at New Orleans, LA., on 11 February 1981, is AFFIRMED.

J .S Gracey
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 16th day of July 1982.

***** END OF DECISION NO. 2279 *****

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