IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1087530
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Freddie ROSARIO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1833

Freddie ROSARIO

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.30-1.

By order dated 3 January 1970, an Examiner of the United States Coast Guard at New York, N.Y., revoked Appellant's seaman's documents upon finding him guilty of use of narcotics. The specifications found proved allege that Appellant on or about 16 July 1969 and 2 June 1968 was wrongfully the user of a narcotic drug, to wit, heroin.

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

The Investigating Officer introduced in evidence voyage records of SS INDEPENDENCE and SS ARGENTINA, the testimony of a male nurse from INDEPENDENCE, and the testimony of two ship's surgeons, one from INDEPENDENCE and one from ARGENTINA.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 12 January 1970. Appeal was timely filed on 3 February 1970 and perfected on 2 June 1970.

FINDINGS OF FACT

From 1 June through 24 June 1968, Appellant was serving as a waiter aboard SS INDEPENDENCE. From about 6 June 1968 to about 23 June 1968 Appellant was treated aboard the vessel for symptoms of narcotic withdrawal. Appellant's arm displayed evidence of needle puncture.

From 18 through 21 July 1969, Appellant was treated for narcotic withdrawal symptoms aboard SS ARGENTINA. Appellant admitted that he had his last injection of heroin on 16 July 1969, and that he went to sea to deprive himself of access to the drug.

On or about 2 June 1968 and 16 July 1969, Appellant was a user of heroin, a narcotic drug.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

(1) the testimony of the two doctors should have been excluded from evidence under a "physician-patient privilege" rule; and

(2) there was submitted sufficient evidence of cure to bring Appellant within the provision of the statute which permits a dismissal of the charges, in the case of an addict or a user, when a person "furnishes satisfactory evidence that he is cured."

APPEARANCE: Zwerling & Zwerling, New York, N.Y., by Sidney Zwerling, Esq.

OPINION

I

Before proceeding to the issues raised by Appellant in this case a comment concerning specifications involving charges based on 46 U.S.C. 239a is appropriate.

Both specifications in this case alleged that on the dates in question Appellant was "holder" of a Merchant Mariner's Document, and the Examiner's findings so state. The allegation and the findings were not necessary. Jurisdiction attaches under 46 U.S.C. 239a-b whether or not the person charged, at the time of his use of or addiction to narcotic drugs, or at the time of his conviction of violation of a narcotic drug law, was a holder of a Merchant Mariner's Document. Even if the use, addiction, or conviction occurred before issuance of the document, revocation is still possible.

II

A second comment may also be made here on the management of the record.

Appellant and counsel were together before the Examiner only at the first session of the hearing, at which only preliminary matters were considered. The Examiner discussed delivery of his decision by mail. R-2. The entire discussion is quoted:

"EXAMINER:.....Now as you are well aware, Mr. Zwerling, the original decision must be served on the Respondent in this case at the appropriate time. Do you want to have it served on him from your office?

"COUNSEL: Yes, sir.

"EXAMINER: All right. As you know, you have a right to take an appeal if any should be necessary..."

The provisions of 46 CFR 137.20-175(d) were completely disregarded here; there is an implication that service will be made by counsel, not by the Examiner; and Appellant was not consulted at all.

The error in this case is not fatal because Appellant, although he never appeared before the Examiner again, acknowledged service of the decision by surrendering his document in accordance with the Examiner's order. No matter how well known a counsel may be to an examiner the potential problems that can arise should be obviated by adherence to the regulations.

In this same connection, it must be noted here that at the second session of the hearing, which Appellant did not attend, the Examiner became aware that no plea had been entered to the charge and specifications. Counsel assured the Examiner that his notes disclosed that at the first session Appellant had authorized Counsel to enter a plea for him. The Examiner accepted his statement and proceeded with the case, allowing Counsel to enter pleas of "not guilty."

The fact is, however, that no such authorization was mentioned or discussed before the Examiner.

Appellant could scarcely object to the entry of a plea of "not guilty," without a showing that he might have been in a better position had the unauthorized plea not been entered, but in the instant case any objection is waived by ratification of Counsel's act by compliance with the Examiner's order.

The point is, however, that by supervision of the record and compliance with the regulations examiners should stifle the possibility of assertions of error by not permitting unauthorized acts of counsel.

III

To turn to Appellant's first point, I find it completely without merit.

First, I note that on appeal Appellant does not object to the

testimony of the male nurse as he did at hearing. Second, I note that on appeal he objects to the admission of testimony of both doctors while at hearing he did not object to the testimony of Dr. De Simone of SS ARGENTINA (for reasons seemingly obvious, as will be discussed below). Technically, as a matter of law, I might limit Appellant's appeal to a challenge of the testimony of the ship's surgeon of INDEPENDENCE, with notation that the law as to nurses may be different from that as to physicians, and that the challenge or appeal to the testimony of the doctor aboard ARGENTINA is timely raised. I need not do so. The principle upon which I rely is broad enough to cover all cases.

Appellant submits four decisions of State courts to support the view that the "physician-patient" relationship prohibits the use of testimony of a doctor who has examined or treated a patient for a condition in issue. The decisions referred to are:

(1) *Finnegan* v *City of Sioux City*, 112 Iowa 232, 83 N.W. 907;

(2) *Grossman* v *Supreme Lodge of Knights*, etc., 6 N.Y.S. 821;

(3) *Edington et al* v *Aetna Ins. Co.*, 77 N.Y. 564; and

(4) *Meyers* v *State*, 192 Ind. 592, 137 N.E. 547.

The fact that the decisions cited come from only three States and are all from the Nineteenth Century is of no importance. The important fact is that each cited decision construes a specific State Statue granting the privilege to the patient that an examining or treating physician could not testify against him. There is no such Federal statute.

The *Meyers* case, *Supra*, specifically declares that the physician-patient privilege did not exist at common law. Since the privilege is a creature of statute and since there is no Federal statute on the matter, the privilege does not exist under Federal law and does not exist in proceedings under 46 CFR 137.

46 CFR 137.03-25, relied on by the Examiner in determining

that the "privilege" asserted here does not exist when the relationship is between a ship's physician and a seaman employed on the same ship, is conclusive here. The section in the regulations may well be surplusage in view of the absence of Congressional action to amend the general law and may well appear to be too restrictive in view of the fact that seaman may have recourse to physicians who are not "ship's doctors." This point need not be decided here.

The laws of the several States cited by Appellant are not binding on examiners under 46 CFR 137 in any case, but especially so because the Federal regulation, directly in point, controls.

IV

Having argued that the testimony of the doctor aboard ARGENTINA should have not been admitted into evidence before the Examiner, Appellant still asserts that that doctor's testimony amounts to "satisfactory evidence of cure."

There was testimony of the ship's surgeon of ARGENTINA that by the end of the voyage Appellant was not using narcotics. Whether this was "satisfactory evidence of cure" was a question of fact for the Examiner to decide. He was persuaded. It cannot be said that as a matter of law the evidence was so strong that no reasonable man could fail to accept it as adequate proof. The Examiner's rejection of the argument is bolstered by the fact that the physician aboard INDEPENDENCE, who also treated Appellant for withdrawal testified that Appellant seemed "normal" at the end of that voyage. "Appearance of normality" is obviously not compelling evidence of cure for the record shows that Appellant was still a user of narcotics just before the voyage of ARGENTINA.

ORDER

The order of the Examiner dated at New York, N.Y., on 3 January 1970, is AFFIRMED.

T. R. Sargent
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 24th day of February 1971.

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