

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-705166
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Willis T. CAREY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1770

Willis T. CAREY

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

By order dated 31 January 1968 at Seattle, Washington, an Examiner of the United States Coast Guard after a hearing at Honolulu, Hawaii revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a deck maintenance/AB on board SS MANHATTAN under authority of the document above captioned, on or about 24 June 1967, Appellant wrongfully had in his quarters narcotics, "thereby violating 46 U.S.C. 239b."

At the hearing, Appellant did not appear. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of MANHATTAN and a Japanese court record.

There was no defense.

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

The entire decision was served on 10 February 1968. Appeal was timely filed on 12 February 1968. Although afforded time to do so, Appellant has not attempted to add to the material originally provided on appeal.

FINDINGS OF FACT

On 24 June 1967, Appellant was serving as a deck maintenance/AB on board SS MANHATTAN and acting under authority of his document while the ship was in the port of Sasebo, Japan. Because of the disposition of this case no further findings are appropriate.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The disposition to be made renders statement of the bases of appeal unnecessary, except to note that Appellant did not appear for hearing in the first place and wants a hearing at Boston, Mass.

APPEARANCE: Appellant, *pro se*.

OPINION

So that cumulative errors can be avoided in any further proceedings in this case some comments are required before the major problem is discussed.

The specification found proved is defective. It alleges "possession of narcotics" as misconduct under R.S. 4450 and goes on

to characterize the possession as "thereby violating 46 U.S.C. 239b." No person can violate 46 U.S.C. 239b.

That section authorized the Secretary to take certain actions when a person has been convicted of violation of Federal or State narcotic drug laws or has been a user of narcotics. It does not prohibit use of narcotics, much less possession of narcotics, any more than it prohibits conviction of a narcotic drug law violation.

On a proper record which established wrong possession of narcotics the fault of the specification could have been cured by striking the quoted words, but it is emphasized that 46 U.S.C. 239b should not be referred to in a proceeding under R.S. 4450 (46 U.S.C. 239).

II

One of the voyage records of MANHATTAN accepted in evidence was an official log book entry. This document recorded the removal of Appellant from the vessel by Sasebo police and subsequent notice to the master that Appellant would not be aboard when the vessel was to sail. Of this, the Examiner said, in his decision:

"This logbook entry was not made in accordance with the regulations as set forth in Title 46, U.S.C. Section 702. It was admissible in evidence as a part of the ship's regular business entries, but was given no weight by the Examiner."

In this case, the only failure of compliance with the statutes dealing with official log entries seems to be the omission of the acts required when a seaman is confronted with, or is entitled to be confronted with, the entry. As has been said before, "substantial" compliance with the law is enough. Literal compliance is obviously impossible in the case of a seaman who deserts or fails to join. Literal compliance was impossible in the instant case when the seaman was forcibly removed from the vessel by local authorities and never returned to the vessel. Literal compliance is not required to achieve substantial compliance.

But this concept is important only when the consideration is whether the log entry, by itself, establishes a *prima facie* case such as to shift the burden of proceeding.

It does not mean that no weight may, or should be, given by an examiner to the document as probative evidence. There would be no point in distinguishing between a log entry which established a *prima facie* case and an entry which is admissible, although not establishing a *prima facie* case, if it necessarily followed that the latter type of document must automatically be allowed no weight.

Any admissible evidence may be given weight by an examiner. The stricture is that his findings may not be based upon hearsay alone. If an examiner chooses to give no weight to an admissible log entry it must be because of his independent evaluation of the evidence and not because of an idea that the failure of the log entry, in and of itself, to establish a *prima facie* case means that it must be given no weight at all.

III

Apart from the proof of Appellant's service upon his document as a condition of employment, the only evidence relied upon by the Examiner for his findings in this case was a document which purported to prove that Appellant had been convicted in a Japanese court of having had hashish in his possession aboard MANHATTAN at Sasebo, Japan.

The document, accepted as a consular record, is merely a certification by the vice consul that the translator of the document appeared at the consulate, that the translator was known to the consular officer, and that the translator had acknowledged that she was the translator. The document does not support to be a record in the office of the consul nor does it purport to be a consular certification of a Japanese court record.

It does not, by itself, adequately prove that Appellant was convicted in a Japanese court of possession of narcotics.

This case must be distinguished from that decided in Decision on [Appeal No. 1769](#). In that case, the document used to prove conviction in a Japanese court was identical, in its essentials, to the one used here. In that case, however, the appellant admitted

that he had been convicted in the Japanese court and tried to make a collateral attack on the judgement.

Here, Appellant did not appear for hearing, and admitted nothing.

The document was admissible in evidence and was entitled to be accorded weight by the Examiner. Insofar as it was the only basis for the Examiner's findings, it was hearsay alone and does not support the findings made.

IV

The charges in this case should be dismissed, but without prejudice. The record reasonably indicates that the errors are correctible, with a reasonable possibility that the charges may be found proved.

Unreasonable repetitions of action could be repugnant to the idea of due process, but when, as here, the errors are seen to be correctible, especially since Appellant wants a new hearing, there is not reason not to permit a hearing *de novo*.

CONCLUSION

There is no question here of a remand. The hearing was held in Honolulu. The Examiner is located in Seattle, Appellant lives in Vermont and wants a hearing in Boston. The findings of the Examiner must be set aside and the charges dismissed, without prejudice to renewal of proceedings. Renewal must begin with service of new charges.

ORDER

The order of the Examiner in this case is VACATED. The findings are SET ASIDE. The charges are DISMISSED, but without prejudice to renewal of an action to move against Appellant's seaman's documents.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 26 day of June 1969.

Charges and Specifications

Alleging violation of 46 U.S.C. 239b invalid
Defective

Consul

Certification of foreign court records

Dismissal of Charges

Without prejudice, reason for

Evidence

Authentication of document
Judgment of conviction, foreign court
Log entries

Findings of Fact

Not supported by hearsay alone

Hearings

Remand after dismissal of charges

Hearsay Evidence

Consideration of by Examiner
Foreign judgments
Hearsay alone insufficient

Log Entries

Admissibility of
Exception to hearsay rule
Failure to read to party
Literal compliance with 46 U.S.C. 702 impossible
Prima facie case, establishment of
Requirements regarding
Substantial compliance
Weight of

Misconduct

Alleging violation of 46 U.S.C. 239b

Narcotics

46 U.S.C. 239b not sole authority to proceed
Possession of does not violate 46 U.S.C. 239b

Narcotics statute

Alleging violation of 46 U.S.C. 239b

Prima Facie Case

Log entries, sufficiency of

Remand

Appropriateness of

***** END OF DECISION NO. 1770 *****

