IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-198893-D8
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Frederick Napoleon POWE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1799

Frederick Napoleon POWE

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 28 August 1969, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a cook/baker on board SS AUSTRALIAN GULF under authority of the document above captioned, on or about 24 November 1968, Appellant wrongfully had in his possession 66 Grams of marijuana while the vessel was at Brooklyn, New York.

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

The Investigating Officer introduced in evidence the testimony of two witnesses and a Customs laboratory report of analysis.

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 specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 2 September 1969. Appeal was timely filed on 18 September 1969 and perfected on 21 November 1969.

FINDINGS OF FACT

On 24 August 1968, Appellant was serving as a cook/baker on board SS AUSTRALIAN GULF and acting under authority of his document while the ship was at Brooklyn, New York.

At about 1400 on that date, Appellant was stopped by Customs Inspector Henry L. Montanus while he was proceeding from the ship to the gate of the pier and when asked whether he had any undeclared articles on his person stated that he did not. Montanus searched Appellant's person and felt an object, soft to the touch, near the back right hand pocket of Appellant's trousers. Montanus asked Appellant to produce what he had. Appellant took an eyeglass case and certain other objects from the right rear pockekt.

Not satisfied that this was what he had originally felt, Montanus reached behind Appellant again and felt the object he had earlier felt, but now more toward's Appellant's left side. Almost instantaneously Montanus ceased to feel the object he had been feeling and heard a sound as of something falling to the ground. He picked up a paper bag near Appellant's foot. The bag proved to contain 66 grams of marijuana.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examinjer. Appellant's brief is set out in full:

"Kindly consider this as respondent's brief;

"(1) We most respectfully point out that there is no

substantial evidence for the Examiner to have found that Mr. Powe was guilty of the charges.

"(2) The indefinite, unreliable and unconclusive testimony of the narcotics agent, Henry L. Montanus. Furthermore, based on the same evidence, the Criminal Court, Kings County, dismissed the same charges against Mr. Powe.

"It is our feeling that a reading of the record will show that no such violation took place."

APPEARANCE: Zwerling & Zwerling, New York, New York, by Irving Zwerling, Esquire

OPINION

I

To look first to Appellant's reference to a dismissal of certain charges against him in a criminal court, "based on the same evidence", I note that this matter was not, indeed could not have been, raised before the Examiner. In collateral correspondence dated 12 November 1969, Appellant provided an unauthenicated photocopy of a transcript of record of an action in the Criminal Court of the City of New York, County Of Kings, which tends to show that on the complaint of a New York City police officer Appellant was charged with a violation of "220.20" on "11/24 1968", and that on "10/30/69" the disposition was recorded as "Dismissed".

Appellant does not offer a guide as to what a violation of "220.20" may be under New York law, but even if I assume that prohibited possession of marijuana was involved, there is absolutely nothing to support a statement that this dismissal was "based on the same evidence" or even to warrant a belief that any evidence at all had been considered in the New York criminal proceeding.

Of most significance on this point, however, is the fact that even if the implications of Appellant's brief were to be accepted at face value, the dismissal of a criminal charge in a court of the

State of New York, or even in a Federal Court, is not controlling case under R.S. 4450 and 46 CFR 137, because the standards of proof are different. In American criminal jurisprudence the test generally is "proof beyond a reasonable doubt". In administrative proceedings such as these the test of an Examiner's decision is whether it is predicated on substantial evidence *Universal Camera Corp.* v. *N.L.R.B.*, (1951), 340 U.S.474. See Decision on Appeal No. 1081.

II

It may be noted here, as background, that the substantial evidence rule developed in the process of judicial review of administrative agencies' actions. As a matter is considered on appeal from a decision of an examiner there is not, in fact, a "judicial review" of the kind which engendered the rule, but, since I have authorized examiners to make initial decisions on the record, not merely recommended decisions, I have felt it proper to apply to findings of examiners the tests which the decisions tell me the courts will apply to mine. If an examiner's decision is not arbitrary or capricious but is based on substatial evidence, I will affirm it. See Decisions on Appeal Nos. 1485 and 1578, and *O'Kon* v. *Roland*, D.C. S.D. N.Y. (1965), 247 F. Supp. 743 and *Ingham* v. *Smith*, D.C. S.D. N.Y. (1967), 274 F. Supp. 137.

The first point made by Appellant in this case is precisely that the Examiner's decision is not based on substantial evidence. This argument must be rejected. The critical testimony assailed is that of the Customs officer who made the search and seizure. There is no attack upon the findings of the Customs analyst who found that the substance seized was in fact marijuana.

III

It is apparent then that Appellant's second numbered point, although not expressed as a legal proposition, coalesces with his first point. It is implicitly alleged that the testimony of the witness Henry L. Montanus is so inherently incredible that no reasonable person could believe it. Despite the strong words used by Appellant concerning this testimony, "indefinite", "unreliable",

and "unconclusive", I cannot find in it anything so inherently incredible that a reasonable man could not have believed it.

IV

Although the matter was not raised on appeal, I may take notice here that at the hearing Appellant argued to the Examiner that a decision of another examiner in another, earlier case was controlling since, under a similar fact situation, the other examiner had found insufficient evidence that a marijuana cigarette dropped from the person of a seaman who was under investigation had been in the possession of that person.

That earlier decision is not and never was before me for review, so that no comment is appropriate, but it is proper to approve the holding of the Examiner in this case, made at the hearing, that what another examiner had done in the way of determining facts in another case was not binding upon the Examiner in this case.

To make the point stronger, I emphasize that even when an examiner has dismissed a charge on a question of law his decision is not binding upon another examiner in another case. On matters of law, unless controlled by unambiguous decisions of Federal courts, the only controlling authority as to whether a charge should be dismissed by an examiner is found in Commandant's decision on appeal.

CONCLUSION

I conclude that the specification found proved was supported by reliable, probative, and substantial evidence, and that there is no reason to disturb the findings of the Examiner.

ORDER

The order of the Examiner dated at New York, New York, on 28 August 1969, is AFFIRMED.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard

Acting Commandant

Signed at Washington, D. C., this 2nd day of July 1970.

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