In the Matter of Merchant Mariner's Document Z-35960
Issued to: JOSEPH NASSER

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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JOSEPH NASSER

This appeal comes before me by virtue of Title 46 United States Code 239 (g) and 46 Code of Federal Regulations 137.11-1.

On 17 March, 1949, the Appellant appeared before an Examiner of the United States Coast Guard at New York on a charge of "misconduct" supported by a specification alleging that while Appellant was serving as utilityman on board the American SS PONTUS H. ROSS, under authority of a duly issued Merchant Mariner's Document (Z-35960), he unlawfully possessed and concealed, and facilitated the transportation and concealment at New York on or about 7 March, 1948, of a certain narcotic drug commonly known as heroin which weighed approximately seventeen ounces.

At the hearing, the Appellant was given a full explanation of the nature of the proceedings and the possible consequences, and he was represented by counsel of his own selection. Appellant entered a plea of "guilty" to the specification. Upon completion of the hearing, the Examiner entered an order revoking said Merchant Mariner's Document and all other licenses, certificates or documents issued by the United States Coast Guard to Appellant.

There had not previously been any disciplinary action taken

against the Appellant by the United States Coast Guard or predecessor authority.

On appeal, it is urged that:

1. The United States Coast Guard had no jurisdiction to revoke Appellant's Merchant Mariner's Document Z-35960 (Appellant's point No. 1) or other documents (Appellant's point No. 2), and the Examiner had no authority to make the order (Appellant's point No. 7).

2. The charge of misconduct is not a violation of 21 U.S.C. 173, 174 as alleged in the charge and, therefore, a plea of "guilty" to the charge is not a plea to any violation. (Appellant's point No. 3).

3. The specification is defective because it alleges that the offense took place at some prior time in New York City and, at such prior time, Appellant was not serving on board the PONTUS H. ROSS and hence was not acting under authority of his Merchant Mariner's Document. (Appellant's point No. 4).

4. Appellant's constitutional rights were infringed in the following respects:

    a. He was not afforded "due process" in that evidence offered in mitigation was not given the weight required by law. (Appellant's point No. 5).

    b. This action constitutes "double jeopardy" since it followed the Federal Court conviction. (Appellant's point No. 6).

    c. The order herein is "cruel and unusual punishment" within the contemplation of the VIII Amendment. (Appellant's point No. g).

5. It was error to have received the photostatic copy of the Federal Court action after Appellant had pleaded "guilty". (Appellant's point No. 9).

FINDINGS OF FACT

On or about 7 March, 1948, Appellant was serving as a member of the crew in the capacity of utilityman on board the American SS PONTUS H. ROSS under authority of Merchant Mariner's Document Z-35960. On 30 April, 1948, the Appellant pleaded "guilty", in the District Court of the United States for the Southern District of New York, to an indictment charging him with violation of Section 173,174 of Title 21 of the United States Code on or about 7 March, 1948. The wording of the indictment was substantially the same as the wording of the specification here.

OPINION

Prefatory to discussing the several points raised by this appeal, I wish to make it crystal clear that the United States Coast Guard, as an agency of the United States presently designated to protect American citizens, or those others, who sail in American merchant vessels, will not tolerate as seamen on vessels, any person or persons as a user, purveyor, trafficker or otherwise associated with opiates, drugs or narcotics while under Articles.

Quite a number of such cases have come before me for consideration since January, 1949. The policy which has been stated, and consistently followed, is to treat such persons as undesirable seamen. Whatever documents they may hold will be rescinded, vacated, revoked and canceled upon any satisfactory showing that they have participated in the handling of such commodities. This edict applies with equal force to those persons who become associated, while under Articles, with the handling of opiates, drugs and narcotics ashore as to those actually apprehended on shipboard - or leaving a vessel.

"Misconduct", within the purview of 46 United States Code 239 (R.S. 4450), as amended, of which the Coast Guard will take cognizance and affirmative action, includes the use, sale, purchase, possession, control (actual or constructive), or any association with any of the foregoing, together with any other

association in the traffic of opiates, drugs and narcotics.

Again, I restate the duty of the Coast Guard to protect merchant seamen in American vessels, and in the absence of a direct judicial order reversing this policy, I intend to adhere to it without regard to action or inaction taken by other officers of Government whose duty it is to enforce the laws - but whose course of action may be influenced by other considerations than those which dictate my present policy.

In this particular case I have questioned the factual accuracy of the specification submitted to support the charge. But Appellant was represented by counsel and in the presence of his counsel, stated:

"I am guilty." (R.3)

No explanation was offered by Appellant for his conduct; his counsel was content to offer only documents designed to establish Appellant's good character, but not in mitigation of the offense.(R.6).

Whatever redundancy, multiplicity and tautology may appear in the specification have been admitted and cured by Appellant's direct unequivocal plea to the charge and specification.

And here I may observe, the appeal as presented does not indicate sincerity since Appellant's counsel was present before the Examiner; raised no such questions as are here advanced - and acquiesced in (if not recommend) Appellant's statement (R.3)

"I am guilty."

Considering now, the individual propositions submitted:

As regards Appellant's contention (No. 1-2) that the United States Coast Guard had no jurisdiction to revoke Appellant's Merchant Mariner's Documents, attention is directed to 46 United States Code 239(g).

Misconduct is specifically mentioned in 46 United States Code 239(g) as a ground for revoking Merchant Mariner's documents and licenses when the offense charged is committed while he is acting under authority of the Merchant Mariner's document or license. The present specification states specifically that Appellant was

serving on board the American SS PONTUS H. ROSS under authority of his Merchant Mariner's Document at the time of the offense charged. Appellant admitted the allegation by his plea tendered in the presence of, and presumably upon the advice of his counsel. Hence, there seems to be no question of jurisdiction involved in this action.

Authority for the Coast Guard Examiner to make this order is found in 46 Code of Federal Regulations 137 which contain the regulations promulgated to carry out the intent of 46 United States Code 239 (Appellant's Point No. 7).

Appellant's further claim, (No. 3) that he should not be penalized because a plea of "guilty" to the charge does not admit a violation of 21 United States Code 173,174, may be concurred in as it is of no significance since a statutory violation is not a necessary element of a "misconduct" charge. Regardless of whether or not there is a violation of any statute involved, the primary factor to be considered is whether the conduct alleged is compatible with safety of life or property on shipboard. In this case, Appellant's admission by his plea, of an association with the importation into the United States of a known narcotic is incompatible with safety of life or property on shipboard.

Point No. 4 is covered by my prefatory comment. By my decision in HQ (Appeal No. 315), I have sustained the jurisdiction of the Coast Guard to control its documents issued to merchant seamen with respect to misconduct which such seamen commit ashore while under Articles. That decision is in harmony with the judicial recognition of the contention that a seaman is still in the service of his vessel although he goes ashore for his own relaxation, entertainment or purposes and while so ashore sustains an injury for which he can hold his vessel to the admiralty doctrine of maintenance and cure. *Aquilar v. Standard Oil Co., of New Jersey, 31g U.S. 724, 1943 AMC 451, 461.*

Analogously, a merchant seamen may jeopardize his documents, while at sea, by "misconduct" consisting of activities in which he is not physically participating at the time of the alleged offense. The presence on shipboard of a man, who is or has been in any way involved with narcotics, is a dangerous and constant threat to the safety of the crew and ship because of the probability that, at any

time, this potential danger might become an actuality. Such situations afford an ample basis for the revocation of documents, licenses and certifications since the statute (46 U.S.C. 239) requires this action by the Coast Guard where conduct is incompatible with safety of life or property on shipboard.

Hence, the Coast Guard clearly has the authority to exercise preventive measures by removing this potential danger rather than waiting until the damage has been done. The United States Coast Guard, which issued documents of any description to this Appellant may invalidate any or all of said documents for good cause, satisfactorily demonstrated to its representatives. 46 U.S.C. 239.

Contention (No. 5) also urges that Appellant was deprived of the protection of the United States Constitution, as contained in the "due process" clause.

I find no merit in his "due process" argument, since there is nothing in the record to indicate that any evidence introduced by the Appellant was rejected or that the evidence offered was not given its full evidential value in determining the result of the hearing.

The "due process" clause requires that the findings be based upon substantial evidence, rather than upon arbitrary or capricious deductions, and that there must be a fair hearing. *Denver Union Stock Yard Company v. U.S.*, 21 F. Supp. g3, affirmed 304 U.S. 470.

In view of Appellant's plea of "guilty", there can be no justification for urging that there was no "due process" due to lack of substantial evidence. As to what weight any evidence which Appellant might offer in mitigation, should be given, the Examiner is in the best position to judge because his presence at the hearing affords him the opportunity for personal observations and, consequently, a more accurate evaluation of all the testimony. It will be remembered that Appellant did *not* testify in his own behalf, and his counsel stated that the evidence tendered was not in mitigation of the offense. (R. 6).

The other element required by the "due process" clause is that

there must be a fair hearing. It was held in *Ashburg Truck Company v. Railroad Commission of the State of California, 52 F. 2d 263, affirmed 287 U.S. 570* that this requirement is fulfilled if the party is apprised of the nature of the hearing and is afforded an opportunity to offer evidence and examine the opposition. The present Appellant was certainly given every opportunity to submit evidence. In fact, under strict rules, some of the evidence offered in his behalf might well have been excluded from the record. I find nothing in the Record to show a violation of the "due process" clause of the United States Constitution.

Although Appellant had previously been convicted by a United States District Court of charges based on the same acts referred to herein, there is no question of "double jeopardy" (Point 6) present because this is not a penal action or a criminal prosecution but it is a remedial sanction which may deprive Appellant of the use of his Merchant Mariner's Document, thus preventing him from exercising the privileges to which such document entitled him.

Revocation of a privilege voluntarily granted is a remedial sanction enforceable by proceedings which are characteristically free of the punitive element of criminal prosecutions and hence such proceedings are not subject to the doctrine of "double jeopardy" which governs criminal prosecutions. Unless the sanction intended primarily as a punishment, so that the proceeding is essentially criminal, the "double jeopardy" clause is inapplicable. *Helvering v. Mitchell, 303 U.S. 391.* The fact that punishment is inflicted, in a certain sense, is not enough to label the statute in question as a criminal one. *Brady v. Daly, 175 U.S. 148.*

It is obvious from the provision of 46 United States Code 239 that Congress intended this statute to be primarily a remedial law for the protection of Merchant seamen rather than a punishment of the individual. The intention of separating the penal from the remedial functions is established by 46 United States Code 239(h) which provides for the referral of any evidence of *criminal* liability to the Department of Justice for investigation and prosecution. The regulations promulgated by the Coast Guard to properly administer section 239 further this obvious distinction by

stating that "the proceedings are not directed against his person or property but are solely concerned with his right to hold a license *** issued by the Coast Guard ***" (46 CFR 137.09-10) and that a Federal court judgment of conviction is conclusive in these proceedings where the same acts form the basis of the charges in the two actions. (46 CFR 137.15-5).

That there may be both a penal and a remedial action based on the same acts is brought out by Mr. Justice Brandeis in the case of *Helvering v. Mitchell, 303 U.S. 391*:

> "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." From this it can be seen that it is a question of statutory construction as to whether 46 United States Code 239 imposes a criminal sanction and section 239(h) answers this question in the negative.

The United States Supreme Court has held that if the evidence and the offense are both identical in two separate proceedings, then it would constitute double jeopardy. But the same acts may be a violation of two different statutes and, in such a case, the two distinct offenses are punishable without "double jeopardy". In *United States v. Bayer, 331 U.S. 532*, a court-martial conviction for conduct prejudicial to good order and military discipline, was said not to bar, on the ground of double jeopardy, another trial in a civil court for a conspiracy to defraud the Government since the two offenses are not the same even though the overt acts charged in a conspiracy count were charged and proved as the basis of the court-martial conviction.

Assuming, although denying that this is a penal action, the above case would support the legality of this proceeding, despite the Federal court conviction, because the offense charged herein is "misconduct" within the contemplation of 46 United States Code 239.

This proceeding is further separated from the realm of punitive sanctions by the difference in the degree of proof required. It has been stated that the "double jeopardy" rule does not apply when there has been a criminal trial followed by another

action requiring a different degree of proof. *Stone v. United States, 167 U.S. 178*. In the present proceeding, the "substantial evidence" rule is applicable while it is necessary in a criminal prosecution to establish proof of guilt "beyond a reasonable doubt." Title 46 CFR 137. 15-5 clearly recognizes this distinction by stating that a Federal court conviction is conclusive in proceedings under 46 United States Code 239 and by omitting to state that a Federal court acquittal is similarly binding.

On the basis of this proceeding being directed against Appellant's document, as mentioned above and as so specified in the hearing record, there is ample authority for stating that the forfeiture of the document is no part of the punishment for the criminal offense. In one case, it was held that proceedings to forfeit a distillery used in defrauding the United States are not barred by the prior conviction of the distillery owner of a conspiracy to violate the National Prohibition Act even though the conviction involved the same transactions. *Various Items of Personal Property v. United States, 282 U.S. 577*.

Contrary to Appellant's contention (No. 8) the order of revocation does not embody any degree of "cruel and unusual punishment" within the meaning of the Eighth Amendment to the United States Constitution nor is this order considered excessive in view of the nature of the offense.

Title 46 United States Code 239 provides for the revocation of licenses in cases of misconduct and *McMenus v. United States, 306 U.S. 651*, holds that a sentence within the limits fixed in a statute which has been violated will not ordinarily be disturbed on appeal as being excessive, cruel or inhuman because the fixing of penalties is a legislative function. And in *Hemans v. United States, 163 F. 2d 228, (certiorari denied 332 U.S. 801)*, it is stated that the constitutional prohibition against cruel and unusual punishment was adopted to prevent inhuman, barbarous or torturous punishment. This order can hardly be classified as such, especially since it is not even directed against Appellant's person.

Appellant's last contention (No. 9) is that a copy of the

Federal Court action should not have been received into the record of this proceeding.
There is no indication in the record that a copy of the Federal Court action was ever made a part of the record. Even so, it could not have prejudiced Appellant's rights to a fair hearing since the Appellant admitted, by his plea of "guilty", all the allegations in the specification and these allegations merely coincide with those contained in the indictment on which the Federal conviction was based.

Other questions posed by this appeal are either covered generally herein or not considered necessary to elaborate. In the absence of any prejudicial error having been found and in line with the customary policy of revoking documents upon being found guilty of narcotics offenses,

CONCLUSION and ORDER

The Order of the Examiner dated 17 March, 1949, should be, and it is, AFFIRMED.

J.F. FARLEY
Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C. this 5th day of July, 1949.
***** END OF DECISION NO. 338 *****

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