

In The Matter Of Certificate of Service No. E 460951
Issued to RAMON RIVERA

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

422

RAMON RIVERA

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

On 3 November 1949, an Examiner of the United States Coast Guard at New York City suspended Certificate of Service No. E-460 951 issued to RAMON RIVERA upon finding him guilty of "misconduct" based upon two specifications alleging, in substance, that while serving as ordinary seaman on board the American S. S. WOODSTOCK VICTORY, under authority of the document above described, on or about 31 March 1947, while said vessel was at a foreign port, he did: (1) wrongfully have in his possession a certain narcotic substance, to wit, marijuana; and (2) desert said vessel in a foreign port. Another specification alleging that Appellant wrongfully had in his possession certain ship's stores (soap) was dismissed by the Examiner.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Although advised of his right to be represented by counsel of his own selection, he elected to waive that right and act as his own counsel. He declined to plead to the specification charging

possession of marijuana, and the Examiner entered a plea of "not guilty"; he pleaded "not guilty" to the specification alleging wrongful possession of ship's stores; but "guilty" to the specification charging him with desertion.

Thereupon the Investigating Officer introduced in evidence a certified copy of a criminal information filed in the District Court of the United States for the Eastern District of Virginia; a certified copy of a Record of judgment in the District Court of the United States for the Eastern District of Pennsylvania, and a certified copy of an entry from the official log of the S. S. WOODSTOCK VICTORY for the date 31 March 1947. In defense, Appellant testified, under oath, in his own behalf.

At the conclusion of the hearing, the Examiner found the charge proved by proof of the first specification (possession of marijuana) and by Appellant's plea to the third specification (desertion), and entered an order suspending Appellant's Certificate of Service No. E-460 951, and all other certificates, documents and licenses issued to Appellant by the United States Coast Guard, for a period of two years. The first year of the suspension was outright, and the second year is on two years probation from the termination of the outright suspension.

From that Order, this appeal has been taken, and it is urged that:

POINT 1. There was no *prima facie* case established with respect to the first specification because the documentary evidence introduced is not reliable, probative and substantial, and should not have been received in evidence since Appellant did not have counsel at the hearing (46 C.F.R. 137.21-5); the defendant and offense contained in the Federal Court judgment are not identified as being the same as the Appellant herein and the offense alleged in the first specification; and there were no witnesses at the hearing to identify the Appellant and be cross examined by him. (46 C.F.R. 137.09-50)

POINT 2. The criminal Information was improper evidence

to support the first specification because it contained hearsay evidence. The fact that doubt existed as to its admissibility shows that it is not reliable, probative and substantial evidence.

POINT 3. With regard to the third specification: The Examiner should have changed Appellant's plea to "not guilty" because the Record indicates there was no desertion but, at most, a failure to join. Therefore, the Examiner should have amended the specification to read as such.

POINT 4. Violation of the following procedural requirements constitute reversible error: 46 C.F.R. 137.09-5(a) requires a fair and impartial hearing; 46 C.F.R. 137-09-5(c) pertains to the amendment of charges and specifications; 46 C.F.R. 137.09-40 set forth the opening statement requirements; and, 46 C.F.R. 137.09-60 states that both parties have a right to submit proposed findings and conclusions. None of these regulations were complied with.

Based on the foregoing, Appellant contends that the decision of the Examiner should be reversed and the suspension imposed should be vacated.

APPEARANCES: Herman E. Cooper, Esq., of New York City Samuel Leigh of counsel.

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

On 31 March 1947, Appellant was serving as an ordinary seaman on board the American S. S. WOODSTOCK VICTORY, under authority of his Certificate of Service No. 460951, while the ship was at the port of Cherbourg, France, and engaged on a foreign voyage.

On this date, the Master of the WOODSTOCK VICTORY conducted a search for contraband in the crew's quarters. A certain quantity of marijuana was discovered in a package in Appellant's clothes locker. This marijuana did not constitute a part of the cargo entered in the manifest or part of the ship stores. Appellant admitted that he had put the package in his locker but denied that he was aware of the fact that it was marijuana. He stated that the package was given to him by a stranger in return for some old clothing. Appellant contends that this stranger told him it was medicine which would help his mother's rheumatism.

Early in the afternoon of 31 March 1947, a notice had been posted to the effect that the WOODSTOCK VICTORY would sail at 0600 on 1 April 1947. The ship got underway at 0852, on 1 April 1947, from the dock at Cherbourg. On this latter date, although Appellant was still in the service of the ship, acting under authority of his certificate of service, he was not on board when the ship departed. He later returned to the United States on another ship. An investigation on board the WOODSTOCK VICTORY disclosed that Appellant had removed all of his personal effects from the ship.

On 8 August 1947, a Criminal Information was filed in the District Court of the United States for the Eastern District of Virginia, Norfolk Division. This Information alleges that Appellant, on or about 31 March 1947, at Cherbourg, France, had in his possession on board the S. S. WOODSTOCK VICTORY, a vessel of the United States which was engaged on a foreign voyage, a certain quantity of marijuana which did not constitute a part of the cargo entered in the manifest or a part of the ship stores, contrary to Title 21 United States Code 184a. This Information was transferred to and filed in the District Court of the United States for the Eastern District of Pennsylvania on 3 September 1947. On 15 September 1947, Appellant appeared in person, and by counsel, and was convicted on a plea of *Nolo Contendere* of the offense charged in the Information. Appellant was found guilty of the offense and ordered to pay a fine of fifty dollars.

Appellant is now twenty-three years of age and has been going to sea for approximately eight years. The only record of any previous disciplinary action taken against Appellant by the Coast

Guard was an admonition in 1945 for having been absent without leave from the S. S. FAIRFAX.

OPINION

Appellant contends that the evidence supporting the First Specification is not substantial, competent and probative. (Point 1). The evidence contained in the record, pertaining to this specification, is a Criminal Information filed in a Federal Court and a Judgment and Commitment based on this Information. The acts forming the basis of the charge set out in the Information are the same as those contained in the First Specification. Title 46 Code of Federal Regulations, section 137.15-5, states that when the basis of the charges in a Federal Court are the same as those in proceedings under Title 46 United States Code, section 239, the judgment of conviction [by the Federal Court must be considered] conclusive in the latter proceedings."

Despite the expression of some doubt in the Examiner's opinion, the above is exactly the situation existing in this case. The Information was originally filed in the District Court of the United States for the Eastern District of Virginia and later transferred to the District Court for the Eastern District of Pennsylvania. The judgment of conviction in the Pennsylvania Federal Court specifically states that it is a judgment based on one count "for violation of U.S.C. Title 21, Sec. 184a." It further states that Appellant was convicted, on a plea of *Nolo Contendere*, of the offense charged in the Information. Although there is reference made to the Harrison Narcotic Act in the Judgment and Commitment, it is clear that the plea was taken to the offense set out in the Information and the Information completely explains the facts on which the conviction was based. Since the Information and First Specification are based on the same set of facts, the Federal Court judgment of conviction must be held to be conclusive in this proceeding. Consequently, there is no merit in Appellant's contention that the evidence is not substantial, competent and probative.

The above comments are sufficient to dispense with Appellant's arguments that the offense pleaded to in the Federal Court is not identified with the offense alleged in the first specification and

that the documents should not have been received in evidence. (Point 1). Concerning the latter point, Title 46 Code of Federal Regulations 137.21-5 requires that the Investigating Officer be required to conform more strictly to the rules of evidence than is required of the person charged when he is given considerable latitude in the absence of legal counsel; but it does not mean that the requirement on the part of the Investigating Officer shall be any greater when the person charged acts on his own behalf than when he is represented by counsel.

Appellant's claim, that the Ramon Rivera named in the Federal Court judgment was not proven to be the same person the Appellant herein (Point 1), is dispelled by Appellant's admission that he was the party who was convicted for this same offense in Philadelphia. (R.24) And Ramon Rivera admitted by sworn testimony at the hearing and by plea to the Criminal Information that he or they were on board the WOODSTOCK VICTORY at Cherbourg, France, on 31 March 1947 (R.24). This is sufficient to identify the Ramon Rivera named in the judgment and the Appellant as one and the same person.

It is also stated that 46 Code of Federal Regulations 137.09-50 requires that the Investigating Officer produce witnesses to identify Appellant and that Appellant may have the opportunity to cross-examine such witnesses. Appellant urges that it was error for the Investigating Officer not to have presented any witnesses since no reason was given for such failure (Point 1). But section 137.09-50 does not make it necessary for the Investigating Officer to introduce the testimony of witnesses to establish his case. It merely requires that if there are such witnesses, they must identify the person charged and the latter may cross-examine them. Since Title 46 Code of Federal Regulation 137.15-5 states that the judgment of conviction by the Federal Court is conclusive in these proceedings, the presentation of witnesses by the Investigating Officer to prove that fact would have been superfluous.

Appellant further contends that the Criminal Information should not have been received in evidence because of its hearsay nature; and that it should not have been considered as substantial evidence because of the Examiner's doubt as to its admissibility. (Point 2) The Information was not received in evidence as proof of the facts set out therein but only to show the circumstances of the offenses pertaining to the judgment. Considering the two documents

together, the Information acquired its value as good documentary evidence because Appellant admitted the allegations set forth in it by his plea. Hence, it is, in effect, a signed acknowledgment of guilt and therefore perfectly admissible. The claim that the weight to be given the Information as evidence is affected by the Examiner's doubt as to its admissibility, has no merit. Since it was properly admitted, it must be given the full weight to which it is entitled.

It is claimed that since the evidence in the record indicates that Appellant did not desert the ship, the Examiner should have changed Appellant's plea of "guilty" to the third specification to a plea of "not guilty". (Point 3) Although Appellant made certain statements of fact from which it would be possible to infer that he did not have the requisite intent to desert the ship, he did not at any time make a statement that he did not intend to desert the ship. The necessary requisite of intent was supplied by Appellant's plea of "guilty" to the specification. Since Appellant did not contradict his admitted intention to desert, there is no plausible reason why the Examiner should have rejected the plea of "guilty" or why he should have made any attempt to amend the specification.

Appellant's contentions (Point 4) with respect to the violation of 46 C.F.R. 137.09-5(a) and 137.09-5(c) have been adequately answered elsewhere herein. It is my opinion that there was substantial compliance with Title 46 C.F.R. 137.09-40. This section requires that "the Investigating Officer shall make a brief statement outlining the basis for the preferment of the charge and all particulars incident to the substance of the complaint." After Appellant had pleaded "guilty" to the third specification, the Investigating Officer made reference to the log entry which indicates that Appellant deserted the ship. This statement satisfies the regulation, especially in view of Appellant's "guilty" plea. Concerning Title 46 C.F.R. 137.09-60, Appellant points out that he was afforded an opportunity to submit proposed findings and conclusions only after the Examiner had rendered his decision. Appellant correctly submits that the regulation states that the parties should have been given this opportunity to submit proposed findings and conclusions prior to the Examiner's decision. Although the Examiner undoubtedly was in error for not having complied with the regulatory requirement, he did ask Appellant if he desired to submit findings and conclusions after the order had

been announced. Appellant replied in the negative. If he had submitted findings and conclusions of sufficient merit to impress the Examiner, the latter would have been able to alter his decision at that time. Since Appellant's interests were not prejudiced by any of these suggested violations of the regulations, there was no reversible error committed.

Appellant further argues that the order imposed is excessive. It has been repeatedly stated in my decisions that any association with marijuana is considered to be extremely detrimental to the safety of ships and the personnel aboard them. For this reason, it has been the long established policy of the Coast Guard that persons dealing or having anything to do with narcotics or drugs are unsafe and undesirable as merchant seamen, and should have their merchant marine documents revoked. Hence, I see no justification, on this basis, for considering any modification of the Examiner's order.

By his plea of "guilty" to the desertion specification, Appellant admitted the intent to abandon the voyage and thereby breach his contract with the ship's Master. The seriousness of this offense arises from the fact that possible danger may result to the remainder of the crew, the ship and its cargo while the ship is undermanned.

CONCLUSION

For these reasons, the Order of the Examiner is considered to be very lenient, rather than excessive, and should be sustained.

ORDER

The Order of the Examiner dated 3 November 1949 should be, and it is, AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 10th day of April, 1950.

***** END OF DECISION NO. 422 *****

[Top](#)