

In the Matter of License No. 168770 Merchant Mariner's Document
No. Z-396558-D1 and all other Seaman Documents
Issued to: EDWARD LEONARD JOSE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1013

EDWARD LEONARD JOSE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 9 November 1956, an Examiner of the United States Coast Guard at New York, New York revoked Appellant's seaman documents upon finding him guilty of misconduct. A single specification alleges that while serving as Second Assistant Engineer on board the American SS PIONEER WAVE under authority of the license above described, on or about 23 April 1956, Appellant wrongfully had in his possession in his quarters lewd and lascivious films, while said vessel was at Long Beach, California.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice. He entered a plea of not guilty to the charge and specification. The Examiner denied counsel's motion to dismiss after hearing argument on the motion.

The Investigating Officer and Appellant's counsel made their opening statements. The Investigating Officer introduced in evidence two depositions of Customs Enforcement Officers who discovered the material and exhibits consisting of the films in question.

In defense, Appellant offered in evidence the testimony of a psychiatrist who had examined him and two medical documents.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard. The Examiner then announced the decision in which he concluded that the charge and specification had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served on 9 November 1956. Appeal was timely filed on 19 November 1956 and supplemental briefs were subsequently

submitted.

FINDINGS OF FACT

On 23 April 1956, Appellant was serving as Second Assistant Engineer on board the American SS PIONEER WAVE and acting under authority of his License No. 168770 while the ship was in the port of Long Beach, California.

A routine customs search disclosed eighty-nine 35 mm negatives and four 35 mm color transparencies in a desk drawer in Appellant's quarters. The subject matter of this material included closeups of female genitals and Appellant's genitals and the Appellant engaged in masturbation and others sexual practices. Appellant did not deny ownership of these films. A considerable additional number of negatives of persons, places and other varied subjects were also found.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends on various grounds that the specification fails to allege any misconduct over which the Commandant has authority to act as a matter of law.

Appearances: Lee Pressman, Esquire, of New York City
By Lester E. Fetell, of Counsel

OPINION

I concur with the Examiner that the material involved in this case is of lewd and lascivious character. It is noted that such conclusion was not contested at the hearing or on appeal.

The Commandant's policy looking to revocation or suspension of seaman's documents, as strenuously stressed on appeal by the person charged, is founded in the furtherance of the welfare of seamen, safety of life at sea, and the protection of property and aboard ship. Offenses involving moral turpitude have been declared to adversely affect these factors (46 CFR 137.03-5), the welfare of seamen being the more precise consideration in this case. Counsel argues that the Coast Guard is without statutory authority to proceed against this mariner's documents since there was no affirmative showing that the welfare of seamen was affected by the mere possession of pornographic material. That position is considered to be without merit.

Certain crimes, offenses, and conduct by their very nature are so inherently base, vicious, or evil as to detrimentally affect the

public welfare. The general acceptance of this tenet relieves the Coast Guard of any burden of establishing a direct causal relation in each case between the commission of the act and the welfare of other seamen. The statement of policy contained in 46 CFR 137.03-5 serves the very purposes of setting forth the offenses which fall in that category. Clearly the Coast Guard can revoke the license of a ship's officer found to have been smuggling aliens in utter and complete secrecy an affirmative showing of how the acts affected seamen's welfare or the safety of the vessel.

The conduct involved here, the possession of this material, is fraught with the distinct possibility of great detrimental impact upon the morals and possible actions of anyone coming in contact therewith. The potential degree of harm makes unnecessary an affirmative showing of the probability of contact.

In a recent case reviewing the constitutionality of the federal statute making punishable the mailing of obscene, lewd, or lascivious material, the Supreme Court rejects the contention that unconstitutionality was established because "convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct." (Roth V. United States (1957), 354 U.S. 476 at 486). This position is further affirmed in the concurring opinion of Justice Harlan at pages 501-502.

Contrary to the suggestion contained in a brief amicus curiae filed with this appeal, the Coast Guard process of action against documents does not operate in complete isolation from moral conduct, standards, and character. This is necessarily true because the term "seamen's welfare" encompasses a concern for the morality and character of individuals. The issuance of officers' license is predicated in part on showing of good moral character (46 CFR 10.02-, 10.02-5(i)(2)). Good moral character is of course a continuing obligation. The mere possession of lewd and lascivious material is clearly evidence which should be considered with respect to the requisite degree of moral character desired of Merchant Marine officers.

Pornographic pictures, literature, and other matter are universally treated by public sentiment as detrimental to public welfare. The term "seamen's welfare" does not necessarily denote items, ideas, and standards peculiar exclusively to seamen. That pornographic and obscene material is considered harmful generally is exemplified by statutes in forty-eight states making its manufacture, display, sale, showing, uttering, transportation, or possession criminal. (Roth V. United States, supra, at 485).

The Coast Guard has authority to proceed against licenses

where the holder is guilty of misbehavior or misconduct. Misconduct may be the violation of a prohibition not amounting to a crime or statutory violation. (Appeal No. 408, Decisions of the Commandant of the United States Coast Guard). The mere possession of lewd and lascivious material is conduct involving moral turpitude and may be misconduct.

That pornography, lewd and lascivious pictures, involves the element of moral turpitude is too well settled to warrant extended discussion. Difficulty in application of the term sometimes ensues because it refers more to moral character and state of mind than to legal standards. The definition cited from Corpus Juris Secundum by the Examiner is commonly accepted by the Courts as a workable connotation. An act or conduct involving moral turpitude is basically a breach of the moral code of society, conduct which offends the moral senses, independent of any law against it. (58 CJS 1203). The standard is public sentiment, the expression of public conscience State V. Malusky, 230 N.W. 735, 59 N.D. 501). The Supreme Court in Roth V. United States, supra, at page 490, notes with approval the language of the trial judge in instructing on the standard to be used in the definition of obscenity:

"You may ask yourselves does it offend the common conscience of the community by present-day standards."

I am not unmindful of the argument on record and appeal suggesting that a distinction be made concerning the moral standard to be applied in the case of seamen. It is not my intention to attempt the establishment of a norm of moral conduct which is so unrealistic in view of the nature of their environment as to make its application an absurdity. If this case is treated as the establishment of a rule, then the rule is to be limited in application. The flexibility of the term moral turpitude decries that each case must be carefully decided on its individual facts.

The subject here is charged with possession of lewd and lascivious films. Nevertheless, more than mere pictures of nudity or suggestive poses is involved. The charge is amplified by the record. Even the mere possession of negatives and transparencies by a ship's officer of himself as the subject engaged in unnatural sexual practices is conduct involving moral turpitude by the application of any accepted standard. Further description is unnecessary. Let it suffice to say that the degree of lewdness and obscenity of the material has a definite bearing on the determination of whether misconduct is established by mere possession. Since the films in this case are such as to literally shock the conscience, it is my conclusion that misconduct is established within the meaning of 46 U.S.C. 239 and regulations pursuant thereto.

There are further considerations for proper determination of this case. Portions of the record strongly suggest that often the scope of the charge was overlooked and unfair emphasis was placed on the private habits of the person charged. It is conceded that the nature of this matter makes its insidious permeation into the minds of those participating in the case almost inevitable. As a result, it is my opinion that considerable evidence which otherwise would have been considered in mitigation was not afforded sufficient weight. Justice requires that all the equities be balance in order to reach the fairest result in light of the offense charged.

There is a complete absence of any public manifestation of any sexual perversion or deviation. No evidence of any kind disclosed that the negatives were ever shown, proffered, or made available to anyone whatever, or even left the privacy of the officer's stateroom. The person charged was a camera enthusiast and the objectionable film was but a small portion of hundreds of otherwise innocuous negatives on file in the desk. These considerations are buttressed with Appellant's fourteen years service without offense of this nature or any other kind. In view of the foregoing, it is felt that the fairest disposition in the exercise of justice is to modify the order of revocation to an outright suspension of six months.

ORDER

The order of the Examiner dated at New York, New York, on 9 November 1956, is modified to provide for a suspension of six (6) months.

As so modified, the order is

AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 4th day of April, 1958.