

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. Z-939087-D1
Issued to: David F. FOSTER
and
MERCHANT MARINER'S DOCUMENT No. Z-1178989
Issued to: Abraham SEBASTIAN
and
MERCHANT MARINER'S DOCUMENT No. Z-1074956
LICENSE No. R-19804
Issued to: Edward S. CAMERON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2143

David F. Foster
Abraham SEBASTIAN
Edward S. CAMERON

These appeals have been taken in accordance with Title 46 United States code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By orders dated 3 January 1978 (CAMERON) and 6 January 1978 (FOSTER), an Administrative Law Judge of the United States Coast Guard at Savannah, Georgia, suspended Appellant CAMERON's and Appellant FOSTER's seaman's documents, respectively, for three months outright plus six months on twelve months' probation upon finding each guilty of misconduct. The four specifications found proved allege that CAMERON, while serving as radio Officer, and FOSTER, while serving as Chief Steward, onboard SS EXPORT CHAMPION under the authority of the respective documents above-captioned, did:

(First) "on or about 1000, 15 October 1977, while said vessel was anchored at Balboa, Panama Canal Zone, awaiting canal transit, absent himself from said vessel proper authorization;"

(Second) "on or about 1454, 15 October 1977, when said vessel departed anchorage area to transit the canal, failed to join said vessel upon its departure;"

(Third) "on or about 0900, 20 October 1977, while said vessel was moored at Garden city, Georgia, did use abusive language towards and Investigating Officer, a United States Coast Guard Officer, CWO-4 William C HENDRY and did wrongfully impede him

in the performance of his official duties;" and

(Fourth) "on or about 1100, 21 October 1977, did use abusive language towards a United States Shipping commissioner and wrongfully impeded a United States coast Guard Officer, Ensign Bruce P. MORELLI in the performance of his official duties."

By order dated 6 January 1978, the same Administrative Law Judge suspended Appellant SEBASTIAN's document for one month on six months' probation upon finding him guilty of misconduct. The two specifications found proved allege the same facts as specifications "(First)" and "(Second)", above, except to the extent that SEBASTIAN was serving as messman on board the EXPORT CHAMPION under authority of the captioned document issued to him.

In the course of proceedings leading up to the hearing in these cases, Appellants were represented by professional counsel. As discussed further herein, however, neither Appellants nor their attorney appeared at the hearing. Upon motion by the Investigating Officer, Appellants' cases were joined for a single hearing. The Administrative Law Judge conducted the hearing in absentia after ruling against Appellants' request for a change of venue to New York. Since the hearing was conducted in absentia, the administrative Law Judge entered pleas of not guilty for Appellants to each charge and specification.

The Investigating Officer introduced in evidence various documents including the charge sheets, certification of shipping articles, and extracts of the official log from the EXPORT CHAMPION, as well as his own testimony and that of four other witnesses.

Appellants did not offer any evidence in their defense at the hearing, although counsel for appellants did raise several potential issues in correspondence with the Administrative Law Judge before the hearing commenced.

The Administrative Law Judge introduced several letters and other documents in evidence, relating generally to the scheduling of the hearing, including responses to Appellants' request for a change of venue, and discussion of matters such as availability of witnesses.

At the end of the hearing, the Administrative Law Judge rendered three separate written decisions in which he concluded all charges and specifications had been proved as to each appellant. He then entered orders suspending all documents issued to Appellants CAMERON and FOSTER for three months outright plus six months on twelve months' probation, and suspending all documents issued to Appellant SEBASTIAN for a period of one month on six months' probation.

The three decisions were respectively served on Appellant CAMERON on 12 January 1978, on Appellant SEBASTIAN on 13 January 1978, and on Appellant FOSTER on 14 January 1978. The appeal on behalf of all three Appellants was timely filed on or about 18 January 1978.

As previously indicated, these three cases involve substantially the same set of operative facts; consequently, they were joined and heard at one time by the Administrative Law Judge. A single appeal brief has been submitted by counsel on behalf of all three Appellants. Since these cases were heard together, and the appeals present substantially identical issues, their review will be consolidated into this single decision.

FINDINGS OF FACT

At all times and places relevant to the charges and specifications under consideration herein, Appellant CAMERON was serving as Radio Officer, Appellant FOSTER was serving as Chief Steward, and Appellant SEBASTIAN was serving as messman on board SS EXPORT CHAMPION under authority of the respective documents above-captioned. For reasons discussed elsewhere in this decision, further findings of fact are not necessary to the conclusions I reach in these cases.

BASES OF APPEAL

This appeal has been taken from the orders imposed by the Administrative Law Judge. It is urged that:

- (1) Appellants were denied due process of law and a fair opportunity to refute the charge by the Administrative Law Judge's failure to allow discovery and by holding the hearing in absentia without acting on counsel's requests for an adjournment and for the opportunity to present depositions in Appellants' defense;
- (2) Appellants were denied due process of law and a fair opportunity to refute the charges by the denial of their application for a change of venue;
- (3) Appellants CAMERON and FOSTER were denied due process of law by being tried on new charges which were never properly served on them;
- (4) Appellants CAMERON and FOSTER were denied due process of law by the denial of their request for a bill of particulars;

(5) The fourth specification against Appellants CAMERON and FOSTER was unjustly vague and insufficient as a matter of law; and

(6) It was error to find specifications one and two proved when the Administrative Law Judge and Investigating Officer both knew that the validity of the log book entries was contested and when such log entries comprised the sole basis upon which the findings of guilt were made.

APPEARANCE: Paul C. Matthews, Es., New York, New York.

OPINION

In their second basis for appeal appellants urge that they were denied due process by the Administrative Law Judge's denial of their motion for a change of venue. The arguments put forth by Appellants on this issue are deserving of close attention, and in order to address them properly a brief recounting of the events leading up to the hearing is required.

Appellants were served with the original charges and specification (First and Second) on board EXPORT CHAMPION on 20 October 1977, while the vessel was temporarily moored at Garden City, Georgia. (Garden City was an intermediate stop on a voyage which was to terminate in New York.) At the time of service, Appellants were informed that a hearing on these charges would be held three weeks later, on 10 November 1977, in Savannah. At some point after the charges were served, while the EXPORT CHAMPION was still moored at Garden City, Appellants were ordered to leave the vessel by the Master. Appellant SEBASTIAN left the ship on 20 October. Appellants CAMERON and FOSTER, expecting their voyage to end in New York, not Garden City, Georgia, begrudgingly departed on 21 October 1977. On 26-27 October, Appellants CAMERON and FOSTER appeared at the Marine Inspection Office in New York and inquired as to the procedure for requesting a change of venue from Savannah to New York. They were told that such a request would have to be directed to the Administrative Law Judge who would be hearing their cases in Savannah. Appellant CAMERON contacted the Administrative Law Judge, who was at Jacksonville, Florida, and requested the change of venue. The Judge then telephoned the Investigating Officer in Savannah to advise him of this request and to ask whether he had any objection to changing the location of the hearing to New York. The Investigating Officer said that he did object because (among other reasons) he had amended the specifications against CAMERON and FOSTER and intended to call three Coast Guard officers in Savannah as witnesses with regard to those amendments. (I note that these amended specifications

alleging incidents of "abusive language" on 20-21 October 1977 were not prepared by the Investigating Officer until 23 October -- one day after he was informed of Appellants' request for a change of venue.) The Administrative Law Judge then telephoned back to the Marine Inspection Office in New York and orally denied Appellants' request.

On 2 November 1977, the Administrative Law Judge received a letter from Appellant's counsel in New York in which he reiterated the request for a change of venue. The letter explained that Appellant SEBASTIAN was a resident of New York City; that Appellant FOSTER was a resident of a New York suburb; and that although appellant CAMERON was a resident of Florida, he too was desirous of having the hearing held in New York. Appellants' counsel, unaware at that time of the amended specifications against CAMERON and FOSTER, argued in his letter to the Judge that there were no witnesses in Savannah who could offer testimony relevant to the offenses which allegedly occurred in the Panama Canal Zone. It was also argued that since the home port of EXPORT CHAMPION was New York, any potential witnesses would most likely be available there, not Savannah. (Two of the ship's officers, the Purser and the chief Officer, were mentioned specifically as witnesses vital to Appellants' defense.) Lastly, the letter expressed Appellants' willingness to make a "good faith deposit" of their documents in New York.

Further correspondence ensued among the Administrative Law Judge, the Investigating Officer, and counsel for appellants, and on 21 November 1977 the Judge issued a written Interlocutory Order denying Appellants' motion and setting the hearing date for 12 December 1977, in Savannah. The Interlocutory Order was appealed by letter dated 29 November 1977. Appellants urged that they could not afford either to travel to Savannah or to pay counsel's expenses for such a trip. Appellants also requested a continuance so that depositions could be prepared for their defense. After the appeal from the interlocutory order was denied (6 December 1977), the Administrative Law Judge convened the hearing, in absentia, on 12 December 1977.

Section 554(b) of Title 5 United States Code, requires that in fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties. The convenience of witnesses is also an important consideration. (Decision on appeal No. 982) No hard and fast rules govern whether a transfer is appropriate for the convenience of the parties and witnesses and in the interest of justice, but each case must be decided on the basis of the facts and circumstances appearing therein. The criteria to

be considered include the relative ease and access to proof, the cost of obtaining the attendance of willing witnesses, and all other practical matters that make a hearing easy, expeditious, and inexpensive.

In the written decision accompanying his Interlocutory Order, the Administrative Law Judge based the denial of a change of venue on three grounds: First, the number of witnesses each side desired to call tipped the balance in favor of Savannah; second, Appellants' failure to make a "good faith deposit" of their documents in Savannah was not looked upon favorably; and third, the convenience of counsel was not a relevant factor to be considered with regard to Appellants' request for a change of venue.

In balancing the number of witnesses each side intended to call, the Judge noted that the Investigating Officer had specifically identified his three witnesses in Savannah, while Appellants had only mentioned their desire to call two members of the crew of EXPORT CHAMPION without revealing where those witnesses resided. Appellants did specify, however, that those witnesses were ship's personnel (Purser and chief Officer) and also expressed the reasonable assumption that those two witnesses would probably be most readily available in or near the ship's home port, New York.

The Judge's conclusion that just the number of witnesses "tips the balance in favor of Savannah" called for the selective emphasis of only one of the several factors necessary to a consideration of whether a change of venue ought to be granted. The convenience of appellants, as parties to the hearing, also should have been of considerable weight. The bare statement that Appellant "CAMERON is a resident of Florida" is indicative of the selective emphasis which was utilized, as CAMERON was the first to request a transfer of the hearing to New York. If Appellants, as parties to the hearing, had been included in the Administrative Law Judge's numerical equation, the "balance" would have "tipped" decidedly in favor of New York. The administrative difficulties in transferring the cases to New York were not shown to be prohibitive. Other factors important to the circumstances of these cases, such as the comparative financial status of the parties and the expense of procuring the attendance of witnesses at the hearing, were not addressed by the interlocutory Order at all.

Appellants' failure to make a "good faith deposit" of their documents in Savannah should have been of little, if any, weight in the decision on their request for a change of venue. Aside from the fact that there is no formal requirement for such a deposit, Appellants clearly demonstrated their "good faith" by offering to deposit their documents at the Marine Inspection Office in New

York.

The denial of Appellants' request because "convenience of counsel" was not a proper factor for consideration is also demonstrative of an exercise in selective emphasis. Appellants' application for a transfer was not based on the convenience of counsel, but, rather, on Appellants' inability to bear the expense of a trip to Savannah and the reasonably expected availability of defense witnesses in New York.

One final matter, deserving of mention in this case, is the manner in which the amended specifications against Appellants CAMERON and FOSTER were served. The record states that these additional specifications were mailed to Appellants' counsel. Both 46 U.S.C. 239(g) and 46 CFR 5.05-25(b) require service of the charges and specifications upon the person charged. The record is devoid of any evidence tending to show either that service could not have been reasonably made upon Appellants themselves, or that Appellants waived their rights and authorized their attorney to receive such service on their behalf. Consequently, jurisdiction over Appellants CAMERON and FOSTER with respect to the Third and Fourth specifications never existed, and the granting of the Investigating Officer's motion to amend the specifications at the hearing was erroneous.

Strongly influential in the disposition of this case is the method of selection of the date and place of hearing as initially undertaken. It is noted that when the basic notices of charges were served on Appellants on 20 October 1977 the following important factors for consideration were present:

- (1) There was no expectation but that the three persons charged were to complete the voyage to New York.
- (2) At that time, no charges were contemplated except such that the witnesses, as well as the parties, would be available at New York at the completion of the voyage. No witnesses (indeed, not even the primary voyage records of the vessel) were expected to be available in Savannah.

Except for the purposes of the hearing, the only person who would reasonably have been in Savannah three weeks later, on 10 November, was the Investigating Officer, even an administrative law judge was required from a distance. But for the fixing of a time and place which was inconvenient and irrelevant to the purposes of the hearing on notice, the problems which arose in this case might well have been avoided.

CONCLUSIONS

The factual circumstances of the instant cases, outlined in the opinion above, heavily favored a change of venue to New York. Appellants were abruptly put off their ship in an unfamiliar port hundreds of miles from their anticipated destination. (The record does not indicate whether they were paid.) The three week delay between the service of charges and the hearing placed Appellants in an onerous position from which their request for a change of venue was a natural and reasonable result. To have later denied this request by selecting out certain factors for consideration (some of questionable propriety), and ignoring others, was such an abuse of discretion as to be clearly erroneous.

When hearings are conducted, the interest of justice can always best be served by the presence, not absence, of the person charged. In the instant cases, the presence of Appellants at their hearing could have been reasonably and practically provided for, but was not. Upon careful consideration of all the circumstances presented in these cases, I find that holding the hearing in Savannah, in absentia, was violative of Appellants' rights to due process. Accordingly, the orders issued as a result of that hearing cannot be allowed to stand.

Owing to the dispositive nature of Appellants' second basis for appeal, other issues raised by Appellants need not be addressed. Furthermore, because of the relatively minor gravity of the offenses charged in the instant cases, and in consideration of the effort and expense which these cases have already consumed, I find that the interest of justice would not best be served by the re-institution of proceedings against Appellants.

ORDER

The orders of the Administrative Law Judge dated 3 January 1978 (CAMERON), 6 January 1978 (FOSTER), and 6 January (SEBASTIAN) are VACATED, and all charges, with respect to each Appellant, are DISMISSED.

R.H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C. this 24th day of November 1978.

INDEX

Abuse of discretion

denial of motion for change of venue

Change of Venue

factors to be considered denial of as abuse of discretion

Charges and Specifications

service, sufficiency of; 46 U.S.C. 239(g)

Due Process

presence of accused at hearing request for change of
venue, denial of

Hearings

date and place, convenience of parties

Service of charges and Specifications

"upon person charged", 46 U.S.C. 239(g), 46 CFR
5.05-25(b)