

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. Z-260-58-6002
Issued to: Steven K. Zemel

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2361

Steven K. Zemel

This appeal has been taken in accordance with 46 U.S.C. 239(g), 23b and 46 CFR 5.30-1.

By order dated 18 July 1983, and Administrative Law Judge of the United States Coast Guard at Long Beach, California revoked Appellant's seaman's document upon finding him guilty of misconduct and the charge of having been a user of a narcotic drug. The specifications found proved allege that while acting under authority of the document above captioned, on or about 14 May 1979, Appellant made a false or fraudulent statement on CG Form 719B (Rev. 9-72), Seaman's Certificate Application, by declaring that he had used a narcotic drug, which declaration was false; and that while being the holder of the document above captioned, on or about 10 September 1982 and for an unknown period of time before, Appellant was wrongfully a user of a narcotic drug.

The hearing was held at Long Beach, California on 28 May, 27 June, and 18 July 1983.

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

The Investigating Officer introduced in evidence three documents and the testimony of one witness.

Appellant offered no evidence in defense.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charges and specifications had been proved. He then served a written order on appellant revoking all documents issued to Appellant.

The Decision and Order was served on 15 August 1983. Appeal was timely filed on 17 August 1983 and perfected on 2 December 1983.

FINDINGS OF FACT

ON 14 May 1979, Appellant was the holder of a merchant mariner's document. On that date he submitted a Seaman's Certificate Application, Coast guard Form 719B, in order to obtain a Tankerman's rating. Under the section entitled "Narcotics Record," the question, "Have you ever used or been addicted to the use of narcotics?" was answered "no" by Appellant.

Appellant continued to hold a merchant mariner's document until at least 28 May 1983, when the proceedings herein commenced. On 10 September 1982, he was arrested in Los Angeles, California for possession and sale of cocaine, and possession of concentrated annabis (hashish). Subsequently he was referred for "drug diversion investigation" under a California statute which permits defendants to avoid prosecution for certain drug offenses if they satisfactorily complete the conditions of the diversion program. The investigation included an interview with Appellant, and concluded with a Probation Officers Report. The report discusses at length the circumstances surrounding the arrest of Appellant, and his general background. The report contains the following paragraph:

Substance use: Defendant states that he smokes marijuana and began when he was younger. Since this arrest he says he is trying to get away from the use of this narcotic as his arrest has shaken him up quite a bit. He says he usually smokes at least two marijuana cigarettes per day. He also mentions that he has used cocaine and states that he has definitely discontinued this narcotic since his arrest. He used to use approximately one-quarter gram once in a while and states that it was more of a social thing. Regarding alcoholic beverages defendant says that he usually drinks scotch.

The report is signed by a deputy probation officer and his supervisor. It does not state who conducted the interview with Appellant. The report was filed in Superior Court, Los Angeles County at a hearing on 11 May 1983.

The Probation Officers Report was admitted against Appellant over objection. There was no live testimony regarding the report or its contents. Based on the admissions described in the report, Appellant was found guilty of the specifications and charges.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that the Administrative Law Judge erred in admitting the Probation Officers Report in the case against him.

APPEARANCE: Scott D. Sklar.

OPINION

Appellant complains about the admission of the Probation Officers Report. However, the more serious question concerns its probative value. As set forth in detail below, it does not constitute substantial evidence of a reliable and probative character as required by 46 CFR 5.20-95(b) to support findings.

The Probation Officers Report is critical evidence in the case. The Administrative Law Judge ruled, "The Coast Guard case stands or falls on... the Respondent's admissions made in the Probation Officer's Report."

It is not apparent from the report who interviewed Appellant or who wrote the report. One could infer that the deputy probation officer, whose signature appears first at the end of the report, did both. However, that inference is by no means inevitable. Further, the report contains a mere araphrase; it does not purport to quote Appellant. Although the words seem unambiguous, there is no way of knowing what degree of ambiguity existed in Appellant's original words.

Where admissions of a party are introduced as evidence, the reliability inherent in the form of evidence is particularly important. A paraphrase, without the extra protection that might be provided by cross-examination of the person recording the admission, is suspect. In U.S. v. Felix-Jerez, 667 F.2d 1297 (9th Cir. 1982), the court disapproved the admission of a written document which contained the incriminating admissions of the defendant. The court noted the dangers of relying on a paraphrase, pointing out, "a note taker may misunderstand particular answers or statements and make an incorrect note, or the note may be correct, but in reducing it to `transcript', he may impose a different tone or emphasis on a statement." Felix-Jerez, 667 f.2d at 1300. Although the rules of evidence need not be followed as strictly in these proceedings as in a criminal trial, the personal appearance of witnesses and the opportunity for cross-examination are held in high regard. See 41 CFR 5.20-45 (a)(3).

Due to the paraphrasing of Appellant's admissions, the uncertainty of who or how many people were invoked in recording those admissions, and the lack of cross-examination of the person who made the report, the Probation Officers Report is not substantial Evidence of a reliable and probative character.

CONCLUSION

The findings of the Administrative Law Judge are not supported by substantial evidence of a reliable and probative character.

ORDER

The order of the Administrative Law Judge dated 18 July 1983 at Long Beach, California is VACAED, the findings are SET ASIDE, and the charges and specifications are DISMISSED.

B.L. STABILE
Vice Admiral, U.S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C., this 12th day of Jun, 1984.

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EVIDENCE

5.100 Substantial
 admission, paraphrased, not substantial
 lack of, basis for reversal

CASES CITED

U.S. v. Felix-Jerez