

NTSB ORDER NO.
EM-22

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION OF SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 12th day of April 1972

CHESTER R. BENDER, Commandant, of the Unites States Coast Guard,

vs.

ROBERT D. NICKELS, Appellant.

Docket ME-22

OPINION AND ORDER

The appellant, Robert D. Nickels, has appealed from Commandant's Decision No. 1786, affirming the revocation of his seaman's document by Coast Guard Examiner E. N. Buddress.¹ The sanction was imposed under authority of 46 U.S.C. 239 b, based on proof adduced at appellant's hearing that, on September 8, 1967, he was convicted in a court of record for violating a narcotic drug law of the State of California.²

¹Copies of the decision of the Commandant and the examiner are attached hereto.

² 46 U.S.C. 239 b, in relevant part, provides that: "The Secretary [of Transportation] may--...(b) take action, based on a hearing before a Coast Guard examiner, under hearing procedures prescribed by the Administrative Procedure Act, as amended, to revoke the seaman's document of--(1) Any person who, subsequent to July 15, 1954, and within ten years prior to the institution of the action, has been convicted in a court of record of a violation of the narcotic drug laws of the United States, the District of Columbia, or any State or Territory of the United States, the revocation to be subject to the conviction's becoming final....It is seen that the substantive provisions of the statute follow the permissive word "may," not a mandatory "shall," connoting the discretionary application of the sanction in those cases where it is warranted. Although the Commandant's regulations left no alternative to the examiner, it is plain to us that the Secretary's action under 46 U.S.C. 239 b, or the Commandant's action thereunder by delegation, is discretionary and reviewable as such by this Board under 49 U.S.C. 1654(b)(2). See Commandant v. Packard, Order

Proof of appellant's conviction consisted of certified copies of records of the Superior Court of California for the City and County of San Francisco.³ These documents establish that he pleaded guilty in that court to the misdemeanor of violating section 11556 of the California Health and Safety Code, for which he was fined \$200 and placed on probation for 2 years. The offense is defined in the California Code as follows:

"§ 11556. Presence in room or place. It is unlawful to visit or to be in any room or place where any narcotics are being unlawfully smoked or used with knowledge that such activity is occurring."

In appellant's defense, it was argued to the examiner and to the Commandant that a sanction of revocation would be excessive and disproportionate, since this is the "least opprobrious [violation] of any narcotic drug law that exists anywhere in the United States."⁴ In addition, appellant's evidence showed that his probation was terminated after some 11 months by court order, which further directed that his plea be withdrawn, that the "accusatory pleading" against him be dismissed, and that he be released "from all penalties and disabilities resulting from the alleged offense."

The intended affects of the court's subsequent order were to set aside appellant's conviction for all purposes, and particularly to avoid the loss of his seaman's documents as a disability attaching thereto. This is obvious from the fact that the order was sought within a week after appellant had been charged by the Coast Guard, signed by the sentencing judge, and filed on the same date appellant was scheduled to appear before the examiner.⁵

The examiner failed to consider the merits of the two-pronged defense. He construed a regulation of the Commandant as making revocation mandatory after proof of a seaman's conviction under any narcotic drug law, regardless of the lack of gravity in the

EM-21, adopted February 23, 1972.

³ It is not disputed that this court is one record.

⁴ Tr. 21; Appellant's brief to Commandant, 12. The Commandant failed to address this argument directly in his decision.

⁵ The hearing actually opened one week later, but no reason for the delay appears in the record.

underlying offense.⁶ His findings that section 11556 is such a law thus obviated all further inquiry. Consideration of the court order was also foreclosed as conditional in nature, not setting aside the conviction for all purposes as required under other provisions of the regulation.⁷

The Commandant, on review, adopted the same restrictive approach. WE agree with it in only one respect, wherein he held that appellant's conviction was final since a sentence was in face imposed. A contrary showing made by appellant on appeal hinges on the interpretation of the fine as a condition of probation and is not persuasive. However, we do not agree that the basis for the conviction, appellant's violation of section 11556, warrants the sanction here imposed.

Appellant's offense was considered by the Commandant only in terms of holding that a seaman may not "attempt to circumvent the effect of a conviction by showing that he is only an 'occasional' or 'inexperienced' user. Under the governing statute, it does not matter whether the conviction was for possession, sale, or use of narcotics...." There is no connection between this analysis and the point of appellant's argument.

Conceding that the violation of section 11556 was reprehensible conduct where it occurred, it would not encompass appellant's own use, possession, or sale of any narcotic drug, nor his occasional or experimental use thereof. His conviction for this offense simply establishes that he was once in a place where he knew that a prohibited drug, probably marijuana,⁸ was being used, presumably by another or others. The minor nature of this offense is readily apparent.

The Exercise of authority under the governing statute is couched in discretionary terms, and its legislative history indicated it is intended to reach those seaman who are convicted of serious narcotics offenses ashore, while not serving under

⁶ The examiner recited 46 CFR 137.03-10(a) and appears to have properly taken its meaning and intent.

⁷ 46 CFR 137.03-10(b), (c), 137.20-190(b).

⁸ Appellant's counsel argued throughout these proceedings that his conviction involved a place where marijuana was being used, rather than so-called "hard-drugs. This is nowhere disputed and may well be taken for granted herein.

authority of their seaman's documents.⁹ Revocation of documents is a remedial measure obviously designed to assure competence and disciplined behavior among seamen, and the safety of operations, aboard United States merchant vessels. In protecting these interests, it is reasonable to apply the sanction to convicted drug users or traffickers. To view in the same light appellant's conviction for knowingly associating with marijuana users, in a passive role, is not reasonable. It does not at all reflect his potential incompetence aboard ship and only remotely suggests his lack of the proper sense of discipline for a seaman. We find, therefore, that appellant's conviction is an insufficient ground for revocation, and the sanction under 46 U.S.C. 239 b was misapplied to him.

Our holding is aligned with Commandant v. Packard, where we refrained from applying the sanction but affirmed findings that the seaman, while unemployed, was convicted of possession of one and one-half marijuana cigarettes.¹⁰ Our action there followed the precedent of previous Commandant's decisions under 46 U.S.C. 239 b, allowing the findings to be considered in the event of future misconduct by the seaman.¹¹

We are led to the same conclusion upon consideration of the court's subsequent order setting aside appellant's conviction. This was nullified as a final order solely because it was entered pursuant to section 1203.4 of the California Penal Code, which contains the proviso "that in any subsequent prosecution...for any other offense, such conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation...dismissed." Another previous decision of the Commandant was cited in support of this determination.¹²

By affirming the findings herein, we will be observing the very practice followed by the sentencing court. We thus perceive no difficulty with regarding the court order as final for all relevant purposes under the Commandant's regulation, and no valid reason for rejecting its intended effect of removing any disability affecting appellant's right to serve as a seaman. Accordingly, while vacating the revocation order, we also affirm the finding

⁹(1954) U.S. Code Cong. and Admin. News, 2558-2560.

¹⁰ Footnote 1, supra.

¹¹ Commandant's Appeal Decisions Nos. 1513, 1514, 1594.

¹² Commandant's Appeal Decision No. 1223. The decision in No. 1746 is to the same affect.

that appellant was convicted of a narcotic drug law violation in 1976, involving his knowing association with marijuana users. The Coast Guard records of this finding are not expunged by virtue of this decision.

Counsel for the Commandant has objected to the late filing of this appeal. We have concluded that the ends of justice would not be served in this instance by entertaining such objection.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied, except insofar as modification of the Commandant's order is provided for herein; and

2. The revocation order of the Commandant be and it hereby is vacated and set aside, and shall terminate as of the date of service appearing on the face of this order.

REED, Chairman, LAUREL, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

(SEAL)