

NTSB Order No.  
EM-38

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

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.,  
on the 14th day of August, 1974

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

DONALD MURLEE WOODS

Docket ME-35

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming revocation of his Merchant Mariner's Document No. Z-622715-D3 for misconduct while serving, under authority thereof, as a chief steward aboard the SS OVERSEAS DINNY, a United States merchant vessel.<sup>1</sup>

The commandant's decision (Appeal No. 1935) reviewed the initial decision<sup>2</sup> of Administrative Law Judge E.N. Buddress, issued after hearings held on January 21, 1969, February 14, 1969, and continued until February 28, 1969, as a result of the absence of appellant, who nevertheless was represented by counsel. The law judge finally permitted the Coast Guard to present its evidence. The case was thereafter continued until March 3, 1969, and March 14, 1969, but at no time did appellant make an appearance.

The law judge found proved specifications that: (1) On or about November 19, 1968, while the vessel was in port, appellant wrongfully engaged in acts of sexual perversion with 16-year-old crewmember Thomas W. Dodson, a messman, after overcoming Dodson's resistance by threatening him; and (2) on or about November 27, 1968, appellant summoned 18-year-old crewmember Roland P. Miville, a pantryman, to his room, locked the door, and after encountering some resistance, was preparing to commit an unnatural act upon Miville when he was interrupted by another crewmember, knocking

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<sup>1</sup>This appeal is authorized pursuant to 46 U.S.C. 1654(b)(2).

<sup>2</sup>Copies of the decisions of the Commandant and the law judge (then acting as "hearing examiner") are attached.

at the door. The latter crewmember and the two youths testified<sup>3</sup> and were subjected to cross-examination by appellant's counsel. The law judge made a credibility in favor of these witnesses. In addition, the ship's official log for November 29, 1968, records the misconduct and appellant's reply of "Not guilty." The record also contains an exhibit of a document signed by appellant showing that, on December 2, 1968, he was fully apprised of all rights in connection with his hearing and that if he did not appear at the time and place specified in the charge sheet, the hearing may proceed to a conclusion in his absence. At the end of the Coast Guard's case, counsel for appellant admitted that he had made attempts on three occasions to contact appellant on his vessel and that he had received no answer. He concluded. "Therefore I have no evidence to present in his behalf." Counsel then not only waived argument, but he agreed that the case be submitted "on the evidence."

The law judge found that appellant's misconduct was established under 46 U.S.C. 239(g), and he entered an order of revocation.

In his brief on appeal to the Commandant, appellant contends that (1) the 26-month delay in rendering the law judge's order violated appellant's right to a speedy trial, (2) the lack of opportunity to examine certain statements not introduced in evidence constitutes grounds for reversal, (3) the law judge's final refusal to grant a continuance so that appellant might face the Coast Guard's witnesses was an abuse of discretion, (4) the evidence fails to support the law judge's findings of fact and conclusions of law, (5) the Coast Guard should not continue to enforce rules and regulations against homosexuality between consenting adults, and (6) the order of revocation is inappropriate.

In his appeal from the Commandant's decision to the Board, appellant did not file a brief but instead relied on his brief to the Commandant. Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, the Board concludes that the findings and conclusions of the law judge and the Commandant are affirmed. The findings of fact are supported by reliable, probative, and substantial evidence of record, and we adopt those findings as our own. Moreover, we agree that the sanction is warranted under 46 U.S.C. 239(g) and

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<sup>3</sup>In all, the testimony of five crewmembers was offered.

applicable Coast Guard regulations issued thereunder.<sup>4</sup>

We note that Commandant offers no explanation of the lapse of 26 months prior to the issuance of the initial decision by the law judge. However, we agree that in this case the delay does not constitute grounds for reversal, particularly since no prejudice resulted therefrom to the appellant. Rather, he had the use of his documents until issuance of the initial decision. In fact, he retained possession of his documents until February 9, 1972, notwithstanding the fact that the initial decision was dated May 21, 1971, and was served on June 10, 1971. Moreover, the judge indicated at the hearing that if he were to find one of the two specifications proved, he would order revocation. He then proceeded to find the first specification proved and reserved decision on the second. Thus, appellant knew that his documents would be revoked, but he availed himself of the benefit of additional time to sail under the authority of his papers by reason of the delay in issuing the initial decision.

Appellant's second argument concerning the unavailability of certain statements is without merit. His counsel did not request a subpoena for production of these papers, nor did he make any attempt to procure them directly from the senior investigating officer or appellant's own union representative. Had counsel considered the statements necessary for the defense, he would have done so.

The law judge did not abuse his discretion in refusing to grant a continuance. Appellant's own conduct with regard to the hearing fails to show that he placed any importance on the opportunity to face the witnesses against him. Notwithstanding adequate notice to him of the hearing, he never appeared. Under 46 CFR 137.20-10, a law judge is directed to consider the availability of witnesses in determining whether or not to grant a continuance. The law judge did so, and in addition offered to entertain a motion for reappearance or further cross-examination by interrogatories. Appellant's counsel, after cross-examining the Coast Guard witnesses, made no such motion and submitted the case without argument or defense. Refusal to grant the continuance cannot be deemed to have prejudiced this appellant in any way.

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<sup>4</sup>Offenses involving perversion are prescribed thereunder. Thus, American seamen are put on notice that action seeking revocation of their documents will be instituted and that revocation is recommended for such offenses. (46 CFR 137.03-5(a)(b); 137.20-165(b).) See also Commandant's decisions on appeal No. 1042(Molina) and No. 1421(Taurasi).

In our opinion the un rebutted testimony of the Coast Guard witnesses, whose credibility the law judge accepted, together with the logbook entries, constitutes substantial evidence of a reliable and probative nature. We see no reason warranting the reversal or modification of the law judge's findings of fact.

Appellant's contention concerning homosexuality of consenting adults is wholly inapplicable, since it is established herein that the youths involved did not consent to the unnatural acts.

Finally, we are not persuaded by appellant's contention that revocation is inappropriate or overly severe. The sanction is required for the protection of seamen from future acts of perversion by appellant, since his propensity therefore has been shown and he has employed his position of authority as chief steward, in furtherance thereof.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The order of the Commandant affirming the law judge's revocation of appellant's seamen documents under authority of 46 U.S.C. 239(g) be and it hereby is affirmed.

McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order. REED, Chairman, and HALEY, Member, were absent, not voting.

(SEAL)