

NTSB Order No.
EM-85

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 12th day of February, 1981

J. B. Hayes, Commandant, United States Coast Guard,

v.

ALEXANDER H. ROGERS, III, Appellant.

Docket ME-83

OPINION AND ORDER

Under 46 U.S.C. 239b, the Commandant has discretionary authority to revoke the documents of a seaman who has been convicted of a narcotic drug offense in certain courts of record. The Commandant's authority in this connection, however, is conditioned on "the conviction's becoming final" (46 U.S.C. 239b(b)(1)). Appellant was convicted on a plea of guilty in a New Hampshire court on November 23, 1977 of possession of marijuana, but that court, on November 17, 1978, entered an order annulling the record of conviction on finding that "the annulment of the applicant's record of conviction will assist in the applicant's rehabilitation and will be consistent with the public welfare" and that the "behavior of [the applicant] after the conviction has warranted the issuance of this order." The first issue presented by this appeal is the appellant's contention that the annulment order required the Commandant to rescind an order based on the state court conviction revoking his seaman document (Motorboat Operator License No. 147112)¹ Although we disagree with appellant's legal position in this case, we have concluded that the order of revocation must be reversed because of the Commandant's failure to exercise the discretion afforded him under Section 239b

¹The order of revocation was issued by Administrative Law Judge Michael E. Hanrahan in an initial decision entered on January 4, 1979, following an evidentiary hearing on November 21, 1978. The Commandant on appeal affirmed the order on May 20, 1980. Copies of the initial decision and the Commandant's decision affirming it are attached. The Board's authority to review the Commandant's decision is set forth in 49 U.C.S. 1903(a)(9)(B).

in a manner which permits effective review of his revocation decision. We discuss first the reasons for our disagreement with appellant's legal conclusion.

The thrust of appellant's position is that the order annulling his conviction record prevents his conviction from being considered "final" for purposes of section 239b(b)(1), and, therefore, the basis for the revocation order has been eliminated. We think the appellant has a mistaken view of what constitutes finality under the statute. In our view, a conviction is final under the statute so long as no court invalidates it for some error of fact or law in the proceedings that rendered the judgment. We do not believe that a conviction's finality is drawn in question by judicial action to terminate or mitigate the impact of a conviction on a defendant's enjoyment of rights the conviction or fact of it may have curtailed. Thus, a court order which speaks not to the validity of a conviction, but instead purports to extinguish the civil disabilities that ordinarily would flow from it, does not undermine the conviction's finality for purposes of section 239b. Our construction implies no disregard for the legitimate and laudable goals conviction annulment or expungement provisions may serve in the rehabilitation of drug law violators. At the same time, however, we cannot ignore the fact the factors which might warrant the annulment of a record of a drug conviction may bear no reasonable relation to the factors the Commandant would consider in determining whether a specific seaman, known to have committed a drug offense, should be permitted to return to marine duty.² Moreover, even if they did, the fact is that the statute does not bind the Commandant to a court's view concerning how a seaman convicted of a drug offense should be thereafter treated. In any event, we are persuaded that the Commandant's authority to revoke seamen documents under section 239b is not diminished by court orders which do not impugn the validity of the drug conviction, but rather seek to end or ameliorate the adverse civil or penal effects of a conviction.³ In short, the Commandant's authority under this

²This is not to suggest that an annulment or expungement decision might not reflect determinations respecting the drug offender that the Commandant could find helpful in assessing a seaman's fitness for return no duty.

³Due to the intricacies of state law, it is not always clear whether a court order primarily concerned with alleviating the penal effects of a conviction has not also affected its validity and, consequently, its finality, for purposes of the Commandant's authority under section 269b. One such case, which presented a close question in this respect, was Commandant v. Ogeron, NTSB

provision of the statute is essentially a function of the court's fact finding processes, within which are included its determinations on legal sufficiency and admissibility, not its conclusions respecting the extent or nature of punishment warranted by a conviction.

In light of the above, we have no difficulty concluding that the annulment order the New Hampshire court issued in appellant's case did not concern the validity of his drug conviction. By its very terms, it was issued on the basis of appellant's "behavior after the conviction". That the court's order, under New Hampshire law, serves to insure that the conviction cannot be used to deny appellant any civil right or privilege otherwise due him under state law does not alter our view that his convictions was final under section 239b. In our opinion, the only civil disabilities stemming from appellant's conviction that the New Hampshire court's order could properly eliminate embrace only those rights which the State of New Hampshire is empowered to confer or guarantee. Appellant's right to hold a seaman document is simply not one of them.

The propriety of the Commandant's decisions are, however, subject to review on appeal to this Board, and that fact brings us to the second issue presented here. Among our responsibilities as a reviewing agency is the duty to insure not only that

Order EM-65 (1977). In that case, the Texas court had entered an order discharging the appellant from probation which dismissed the original indictment against him, permitted the withdrawal of his guilty plea to the drug charge, and set aside the judgment of conviction. While reversal of the Commandant's revocation order there was thus supported by our understanding of the state law involved, we think, in retrospect, that some of our dicta in that case could be read as construing finality as somehow dependent on the Texas court's efforts to relieve the appellant of any civil disability the conviction had occasioned. For the reasons stated in this opinion, we do not believe that to be the intent of section 239b. Our consideration in Ogeron of the state court's effort to restore to the appellant the rights he enjoyed prior to his conviction should not be interpreted as a holding that the Texas court had the authority to compel the reinstatement of Ogeron's seaman document as an incident of its jurisdiction over punishment for state law offenses. Nevertheless, we continue to believe that where a court rules in effect that its penal interests have been vindicated through a drug offender's rehabilitation, we may properly consider that circumstance in reviewing the Commandant's discretionary decisions with respect to revocation under section 239b.

discretionary authority is not exercised in an abusive way, but also that such discretion as may be entrusted to the Commandant has not been disregarded in favor of arbitrary action. Our duty in this regard cannot be fulfilled in instances where we cannot discern the basis for a discretionary decision. This case, as shown below, presents such an instance, and the appellant has accordingly been denied administrative due process.

Under section 239b, the Commandant may, but is not required, to take action to revoke a seaman's documents when it has been established, in a hearing comporting with the Administrative Procedure Act (APA), that the seaman has been convicted of a drug violation in a court of record. The fact of appellant's conviction for possession of marijuana was established in the hearing before the law judge. We have, however, absolutely no basis for assessing whether revocation for that offense was a permissible or justifiable exercise of discretion. We have before us no facts concerning the circumstances surrounding appellant's possession of the drug, the quantity involved, or any other matter illuminative of the severity of the offense, for purposes of assessing the propriety of revocation.⁴ Neither the initial decision nor the Commandant's decision contains any information regarding the offense or any discussion concerning the sanction imposed in this case.⁵

The fact that the Commandant views his discretion under section 239b to be limited to the investigating officer's decision on whether to prefer charges has no bearing on our ruling here. Our statutory review authority cannot be circumscribed by the Commandant's delegation of his discretion under section 239b to a subordinate. In any event, the record before us contains no explanation of the basis for the investigating officer's determination to prefer the charges that led to revocation here. As we are unable to review the section 239b determination in this proceeding, we will reverse the revocation order.⁶

⁴We do know, of course, that appellant received a one-year suspended sentence for the conviction and subsequent expungement of the conviction record in New Hampshire.

⁵This is not too surprising with respect to the initial decision, since 46 CFR 5.03-10(a) purports to require the law judge to enter a revocation order whenever a court conviction is proved. We are not called on here to decide whether this requirement complies with the dictates of the APA.

⁶We are satisfied that the New Hampshire court's annulment order, which the Commandant chose to ignore, provides an adequate

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal of Alexander H. Roger, III is granted;
2. The decision of the Commandant affirming the law judge's order revoking appellant's seaman documents is reversed; and
3. Appellant's seaman documents be returned to him on request.

KING, Chairman, DRIVER, Vice Chairman, McADAMS, GOLDMAN and BURSLEY, Members of the Board, concurred in the above opinion and order.

basis for finding that appellant's past offense suggests no future threat of drug law violation that might adversely affect marine safety.