

In the Matter of Merchant Mariner's Document No. 799455-D1 and All
Other Seaman Documents
Issued to: THEODORE VAN FERGUSON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1489

THEODORE VAN FERGUSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 19 November 1959, an Examiner of the United States Coast Guard at San Francisco, California revoked Appellant's seaman's document upon finding him guilty of misconduct. The specification found proved alleged that while serving as a messman on board the United States SS P & T FORESTER under authority of the document above described, on or about 19 September 1950, Appellant wrongfully had in his possession eight marijuana cigarettes.

At the hearing on 30 October 1958, Appellant elected to act as his own counsel. Appellant entered a plea of guilty to the charge and specification.

On 18 November 1959, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved by plea. The Examiner then entered an order revoking all documents issued to Appellant.

The decision was served on Appellant on 31 July 1964. Appeal was timely filed on 28 August 1964.

FINDINGS OF FACT

On September 1950, Appellant was serving as a messman on board the United States SS P & T FORESTER and acting under authority of his document while the ship was in the Port of San Pedro, California. During a routine search of the vessel by Bureau of Customs personnel, eight marijuana cigarettes were found in a jacket in Appellant's locker aboard ship. Appellant admitted ownership of them.

He was arrested by local police officers and charged in the Superior Court of the State of California with violation of the state narcotics law. After conviction, he was on 9 December 1950 sentenced to serve six months in the Los Angeles County Jail.

On about 9 September 1958, Appellant was served with the charge and specification referred to above, by the Coast Guard Senior Investigating Officer at San Francisco and the hearing was held 30 October 1958. At the hearing Appellant admitted to the possession of nine marijuana cigarettes. He smoked one which he said made him sick but kept the eight remaining ones in his jacket pocket aboard the vessel.

In concluding the hearing the Examiner stated he would hold up his decision because he believed the case was somewhat unusual and that he would let Appellant know later of his decision. The Examiner's decision was entered on 18 November 1959. Efforts to serve it by registered mail to Appellant's address as given in the record were unsuccessful. Service was finally made on 31 July 1964. I take official note of an application filed with the Coast Guard by Appellant for a duplicate document on 16 June 1964, at San Francisco in which he stated he lost his document the previous day.

I further take official notice of Coast Guard records which reflect that Appellant has not sailed on U. S. flag merchant vessels from September 1950 to the present, save for one voyage aboard the SS LUILANI between 28 August 1958 and 1 October 1958 and except for having received a duplicate document in May 1951, his only other contact with this agency was in connection with filing

an application for a duplicate record of service on 24 June 1958, at San Francisco. Subsequent to the hearing subject did not sail and his next contact with the Coast Guard was on 16 June 1964 when he applied for a duplicate merchant mariner's document.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

1. Appellant was not properly advised of his right by which the usual three-year period of suspension could have commenced at the time of his plea of guilty on October 30, 1958.

2. Appellant suffered hardship by reason of the Examiner's delay of thirteen months in rendering a decision.

3. Appellant suffered hardship by Coast Guard's failure to serve a copy of the decision until 1964.

4. Appellant suffered hardship because he is physically disabled from working ashore as a painter and his benefits (presumably workmen's compensation) have terminated.

5. Appellant was unaware a suspension for a 1950 offense would not start to run until 1964.

6. Fourteen years have passed during which Appellant has not committed or been accused of committing any narcotic offense.

7. The revocation imposed in 1964 for a 1950 offense is "clear and unusual" punishment and in violation of Appellant's basic constitutional rights.

8. Appellant is entitled to issuance of a new document as suggested by the Hearing Examiner.

APPEARANCE: J.J.Doyle, Esquire, of San Francisco, California by
Edward J. Reidy, of Counsel

OPINION

I

The regulations in force at the time of the hearing (as today) clearly prescribed the advice Appellant was to receive from the Investigating Officer and the Examiner before and at the hearing. This was contained in 46 CFR 137.05-15 (Revised 1952) under the caption, "Service of charges, specifications, etc." and 46 CFR 137.09-85 (Revised 1952) captioned "Notification of right to appeal." Information concerning the contents of 46 CFR 137.03-30 (Revised 1952) which dealt with issuance of a new license or document in place of one revoked or surrendered, was not required to be given since it was not concerned with the hearing per se. "Due process" does not require it either.

The foregoing regulations which contained the advice given to Appellant amply met the requirements of "due process." To meet these it was sufficient if the party affected was apprised of the nature of the hearing and was afforded the opportunity to offer evidence and to examine the opposition *Ashbury Truck Co. v. Railroad Commission of State of California*, 52 F.2d 263 (D.C.S.D. Cal. 1931) affirmed 267 U. S. 570. Therefore I do not concur with Appellant's first contention.

II

In the second basis of appeal I note no specific hardship is alleged. Even if it were, I could not agree that the period of thirteen months during which time Appellant retained his Merchant Mariner's document and was free to sail as he chose, was such cause a hardship to him to justify a reversal of the Examiner's decision. Despite the guilty plea, the Examiner gave deep thought to this case. He characterized it as "unusual" in formulating his decision to which he gave considerable thought.

46 CFR 137.07-5(a) (Revised 1952) stated that:

"The examiners shall render their decisions without undue delay ..." I do not conclude that this period was an undue delay under the circumstances.

Neither 46 U.S.C. 239 nor the Administrative Procedure Act (5 U.S.C. 1001 et seq.) prescribes a time limit in which a decision is to be issued. In *National Labor Relations Board v. American Creosoting Co., Inc.* 139 F.2d 193 (5th Cir. 1943), the Court held that where the employer was required to contribute back pay in a case in which timely charges were filed, although the hearing was not held until four years later followed by a one year interim pending the Board's decision, that since the statute contained no time limit mandate for rendering of a decision, the court could not grant relief.

I, therefore, do not accept Appellant's second argument as being legally persuasive.

III

The delay in serving the decision while unfortunate was not due to a fault of the Examiner of the Coast Guard. When the decision was promulgated it was sent by registered mail to the address given by Appellant at the hearing. Since the hearing, he had moved without a forwarding address, and had not sailed on a W.S. merchant vessel. The decision was returned by the postal authorities as undeliverable. In any event, the delay afforded Appellant additional time to seek employment under the authority of his Merchant Mariner's Document. It follows, therefore, that the Examiner's decision which ordered revocation (a permanent cancellation of the document) should not be upset when the delay could not have increased the time the seaman's document was rescinded.

IV

Regardless of the personal hardships resulting to Appellant the order of revocation will not be disturbed since it has been the long standing policy to consider narcotics violations so serious that revocation of a document is most consistent with the statutory duty of the Coast Guard to protect life and property of U.S. merchant vessels. The fact that Appellant has not committed or been accused of a narcotics offense in the last fourteen years is not a sufficient legal argument to change the Examiner's determination.

V

There is no evidence that Appellant made any effort to learn the status of his document after the hearing and prior to being served with the Examiner's decision. Yet he had been told that a revocation would result if the charge and specifications were found proved. Had he sailed under the authority of the document or in anywise acted so that his whereabouts would have become known to the Coast Guard within the scope of its operation, he would have known prior to 1964 of the order of revocation. Hence, it appears that Appellant must bear the responsibility for the length of time between the hearing and the effective date of the order. The period of time between the offense and the hearing is discussed under VII.

VI

Appellant's statement will be commented on in my remarks concerning the eighth basis of appeal.

VII

Appellant argues that the revocation for a period of time starting to run in 1964 for a 1950 offense is "clear and unusual punishment and a violation of Appellant's basic Constitutional Rights." As a matter of law, I do not agree. Orders of revocation have been issued consistently for many years as the only ones appropriate for offenses involving narcotics and have been endorsed by Congress in cases within the purview of 46 U.S. Code 239a-b. It has been held, in *Kaspar v. Brittain*, 245 F.2d 92 (6th Cir. 1957) cert. den. 355 US 84, that punishment is not cruel and not unusual unless it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice. The foregoing is offered without determining whether an order affecting a seamen's document is a "punishment" in these remedial proceedings.

The time element has been discussed to some extent above. However one further aspect is pertinent. While the Examiner was quite correct in stating that there was no statute of limitations

in these proceedings, there was promulgated, on 5 November 1957, a self-imposed limit of ten years, by my instruction to the field, in cases of convictions for narcotics offenses. This period was the same as the Congress mandated in 46 U. S. Code 239b. It is apparent the charge was served within the limit of this time.

VIII

Counsel submits that Appellant is entitle to the issuance of a new document as suggested by the Examiner. What the Examiner stated was, "In view of the length of time since this offense was committed, however, the Commandant may be disposed to consider the issuance of a new document to the person charged before the elapse of the usual three years period ..." The Examiner thereby suggested that Appellant be permitted to file an application for the issuance of a new document pursuant to 46 CFR 137.03-30 (Revised 1952). This regulation has since been amended and is now 46 CFR 137.13. As to revocations for narcotics offenses, for the regulation provides for the filing of an application, three years or more after revocation, which is referred to a special board to make appropriate recommendations to me with respect to the applicant's request. The determination as to whether or not the issuance of a new document shall be authorized is up to me. This procedure, which is a matter of grace rather than any right to which a seaman is entitle after his document has been revoked, apparently was created the impression that an order of revocation in such cases is tantamount to a suspension for three years. Obviously, this is not true.

Nearly fifteen years have passed since the commission of the offense upon which the charge of misconduct was predicated. During this time Appellant has had ample opportunity to conduct himself as proper member of society. I have in mind his statement which is listed as his sixth basis for appeal. Accordingly, I do hereby waive the balance of the three year period from the effective date of the revocation of Appellant's Merchant Mariner's Document and will permit him to apply for the issuance of a new document as provided by 46 CFR 137.13. This is not to be construed as assurance that the action taken on the application will be favorable to Appellant.

CONCLUSION

As a matter of law, I conclude that there is not sufficient reason to modify the Examiner's order.

ORDER

The order of the Examiner dated at San Francisco, California, on 18 November 1959, is AFFIRMED.

E.J. Roland
Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 15th day of February 1965.

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