

In the Matter of Merchant Mariner's Document Z-580439
Issued to: WILLIAM H. BROADBENT

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

379A

WILLIAM H. BROADBENT

This case comes before me on appeal from an order dated 7 June, 1949, by a Coast Guard Examiner at New York, dismissing charges against this Appellant under circumstances hereinafter discussed.

On 17 August, 1946, Appellant was charged with "misconduct" before a Coast Guard Hearing Officer at Naples, Italy, based upon specifications reciting that while serving as Fireman-Watertender on board a Merchant vessel of the United States, the SS ELMIRA VICTORY, under authority of his duly issued certificate, Appellant did on or about 16 August, 1946, while said vessel was *in* a foreign port

- (a) "kill an Italian civilian, Vincenzo Cottuno"; and
- (b) "have in his possession a dangerous weapon."

Appearing with a shipmate as his counsel at the original hearing, Appellant entered a plea of "not guilty" to the charge and each specification. Thereupon, the Coast Guard Examining Officer called to testify in support of the charge, an Agent of the Criminal Investigation Division of the American Army at Naples and an Italian fruit vendor, the latter being an eyewitness to the incident, which resulted in lodging said charge. Each witness was

cross-examined by counsel for the person charged and at the conclusion of the testimony given by the fruit vendor, the representative of the person charged requested permission of the Hearing Officer to withdraw as counsel because of the circumstances involved, the serious nature of the charge, and in order that the person charged might procure the services of an attorney more competent and familiar with the procedure in similar situations. This permission was granted and the hearing adjourned until other counsel might be employed or, the case is "taken out of the hearing officer's hands." (R.9)

The record shows that on 31 May, 1949, Appellant appeared with a representative of the National Maritime Union before a Coast Guard Examiner in New York for the purpose of continuing the hearing which had commenced at Naples in August, 1946. On motion of Appellant's representative, Appellant was granted additional time to obtain legal advice and assistance.

At the same hearing, the Coast Guard Investigating Officer filed a motion to dismiss, without prejudice, both specifications and the charge of "misconduct" on the ground that neither specification alleged an offense or stated a cause of action. This motion was reserved for discussion when Appellant obtained counsel and the hearing was adjourned until 2 June, 1949.

On that date, the hearing was reconvened and Appellant appeared with an attorney. The Investigating Officer renewed his motion for dismissal of the charge and specifications without prejudice, which motion was opposed by counsel for the Appellant on the grounds that the motion should only be granted (a) without any qualification, or (b) with prejudice.

It seems unnecessary to discourse upon the colloquy which ensued and the apparent confusion attending the debate on the Investigating Officer's motion, other than to observe the undesirability of "off the record discussions" which can produce most unsatisfactory and confusing results unless the subsequent transcript is carefully dictated or edited to correctly reflect those misunderstandings between the parties which should have been clarified during unreported debate.

When the Investigating Officer and Appellant's counsel finally

submitted the case for decision, the Examiner, with the agreement of counsel, announced that a written decision could not be presented forthwith but would be sent by registered mail to the office of Appellant's counsel. The Examiner thereupon returned Appellant's Merchant Marine Document to the person charged and stated "the hearing in this matter is closed."

On 7 June, 1949, the Examiner entered his findings, conclusions and order which are reproduced in *toto* as follows:

"Findings:

1. The first specification does not set forth a cause of action in law upon which a charge of misconduct can be based under Revised Statutes 4450, as amended, in view of the fact that the offense alleged, namely, killing of another person by the person charged was not alleged to have been done either wrongfully or unlawfully.
2. The second specification does not set forth an offense in law upon which a charge of misconduct can be based under R.S. 4450, as amended, since the possession of a dangerous weapon was not alleged to have been wrongful or unlawful.

CONCLUSIONS: First specification dismissed without prejudice. Second specification dismissed without prejudice. Charge dismissed.

Based upon the above findings I do, therefore,

ORDER:

Specification and charge be and the same are hereby dismissed." I have not reproduced the opinion since its substance is contained in the Examiner's findings.

From the order, *supra*, this appeal has been taken and three major points are presented which I consider unnecessary to discuss in view of the conclusion hereinafter stated.

OPINION

Administrative agencies are not bound by the rules obtaining in the "conventional judicial modes for adjusting conflicting claims" (*Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142); and errors of practice do not necessarily invalidate administrative proceedings (*Consolidated Edison Company et al. v. National Labor Relations Board*, 305 U.S. 197, 229). Those thoughts have been brought into the Coast Guard regulations anent correction of records (46 Code of Federal Regulations 137.09-5(c)); hence, I am somewhat concerned with the procedure followed in this case.

If any correction was deemed necessary to either or both specifications by inserting the words "unlawfully" or "wrongfully" or some other comparable adjective, that could and should have been accomplished by amendment at the resumption of the hearing instead of passing through the cumbersome process of dismissal followed by presentation of new specifications to support the same charge.

Cases of this type are far removed from criminal practice and procedure; although many of the Constitutional safeguards are preserved for the benefit of persons whose conduct is under investigation by the Coast Guard. But even in criminal cases it is not unusual for formal pleadings to be corrected by amendment in the course of the hearing or trial. In view of the specific regulation on the subject, I see no reason why that course was not followed in this case.

No question involving "double jeopardy" is or can be present in this case. The Fifth Amendment to the Constitution is addressed to the exposure of an individual to peril of "life or limb" twice for the same offense. No such peril is present here; the most serious result possible to flow from this proceeding is revocation of a document which permits this Appellant to sail as a seaman on American merchant vessels - a document which, under the law authorizing its issuance, is

"subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in

the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title." (46 USC 672h)

Adverting, unnecessarily perhaps, to the criminal jurisprudence on the subject of former jeopardy, we find in *Shoener v. Pennsylvania*, 207 U.S. 188, the following language in the opinion of Mr. Justice Harlan:

"It is an established rule that one is not put in jeopardy if the indictment under which he is tried is so radically defective that it would not support a judgment of conviction, and that a judgment thereon would be arrested on motion. So where the defense is that the accused was put in jeopardy for the same offense by his trial under a former indictment, if it appears from the record of that trial that the accused had not then or previously committed and could not possibly have committed any such crime as the one charged, and therefore that the court was without jurisdiction to have rendered any valid judgment against him - then the accused was not, by such trial, put in jeopardy for the offense specified in the last or new indictment." (pp. 195, 196)

The proceedings at New York, starting on 31 May, 1949, were merely the continuation of a hearing which had commenced in Naples on 17 August, 1946, but was adjourned for the special benefit of the person charged; that he might engage counsel more familiar with the procedure in such cases. The over-all issues in the case are (1) whether or not this person, because of his alleged misconduct in Naples while serving on the SS ELMIRA VICTORY, is entitled to retain, and use, the Merchant Mariner's Document issued to him by the Coast Guard; and (2) whether his presence on shipboard will or will not imperil that vessel as well as his shipmates or others having business with the ship; that is, whether or not his further employment as a merchant seaman is compatible with good discipline and safety of life and property at sea. In that perspective, the action is remedial, and

"* * * in civil enforcement of a remedial sanction there can be no double jeopardy." *Helvering v. Mitchell*, 303 U.S. 391, 404.

In the same case, at p. 399, the following statement appears:

"Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted."

Citing cases involving (a) deportation of aliens and (b) disbarment. See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549; *United States v. Bayer*, 331 U.S. 532, 542.

It is obvious on the face of the Examiner's action dated 7 June, 1947, that his "conclusions," which dismiss without prejudice, and his "order" which simply dismisses, without any qualification, are inconsistent and contradictory. They are, therefore, invalid and void.

CONCLUSION

The order of the Examiner dated New York on 7 June, 1949, is void and ineffective. Incidentally, it may be added that order did not issue after a trial on the merits of this case, but was addressed to a technical proposition based upon a "conventional judicial mode" (*F.C.C. v. Pottsville Broadcasting Co.*, supra) which is not essential in cases of this type.

ORDER

Said order is vacated and set aside. The case is remanded to the Examiner at New York for further proceedings not inconsistent herewith.

MERLIN O'NEILL
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 29th day of September, 1949.

***** END OF DECISION NO. 379A *****

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