In the Matter of Merchant Mariner's Document No. 136608 and all other Seaman Documents

Issued to: WILFRED NELSON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1063

WILFRED NELSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

After reopening the original hearing of 27 June 1957, an Examiner of the United States Coast Guard at Mobile, Alabama, issued an amended decision, dated 30 October 1957, revoking Appellant's seaman documents upon finding him guilty of misconduct and perjury. The two misconduct specifications allege that while serving as an oiler on board the United States SS HIGH POINT VICTORY under authority of the document above described, on or about 20 May 1957, Appellant failed to obey two lawful orders of superior officers. A third finding made by the Examiner states that the Appellant, during the hearing on the misconduct specifications, on 27 June 1957, committed perjury by giving false testimony with respect to his prior record with the Coast Guard. There was no specification relating to this third finding by the Examiner.

At the beginning of the original hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to

which he was entitled and the possible results of the hearing. Although advised of his right to be represented by counsel of his own choice, Appellant elected to waive that right and act as his own counsel. He entered a plea of guilty to the charge and two specifications. At the conclusion of the original hearing, Appellant testified concerning his previous offenses. Both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced the decision in which he concluded that the charge and two specifications had been proved by plea. An order was entered suspending all documents issued to Appellant for a period of 6 months on 18 months' probation. The original decision was served on Appellant on 27 June 1957 and no appeal was taken.

The Appellant was not present when the hearing was reopened on 30 September 1957 to consider Appellant's prior record, which was not known to the Examiner at the time of the original hearing, and Appellant's false testimony with respect to his prior record. At the conclusion of the reopened hearing, the Examiner amended the order by revoking all documents issued to Appellant. The amended decision was served on 19 November 1957. Appeal was timely filed on 29 November 1957.

FINDINGS OF FACT

On 20 May 1957, Appellant was serving as an oiler on board the United States SS HIGH POINT VICTORY and acting under authority of his Merchant Mariner's Document No. Z-136608 while the ship was in a foreign port. He refused to obey lawful orders issued by the First Assistant Engineer and by the Master.

After the Examiner found these two offenses proved by plea at the original hearing on 2 June 1957, the Investigating Officer announced that he had not yet received information relative to Appellant's prior record from Coast Guard Headquarters. At the suggestion of the Examiner, Appellant agreed to testify under oath as to that information. He stated that only one instance, in June 1955, had been reproached by the Coast Guard, and that was an admonition for failure to join his vessel. In answer to questions, he denied ever having been the subject of a hearing of the nature now confronting him, or ever having had his document suspended, suspended on probation, or revoked.

On 23 July 1957 the Investigating Officer at Mobile filed a petition with the Examiner to reopen the hearing on the grounds that Appellant gave false testimony about his prior record at the original hearing; that Appellant's documents were suspended for six months on twelve months' probation at New York on 26 July 1956. The Appellant was advised in New York that the petition for reopening the hearing was to be considered on 28 August at Mobile. He declined to be present and notified the Examiner prior to 28 August. The motion was granted and the reopening was set for 30 September 1957. A return receipt of a registered letter shows that Appellant was advised in New York, on 27 September, when the hearing would be reopened in Mobile. When the Appellant did not appear on 30 September, the reopened hearing was held in absentia and the Appellant was found guilty of perjury in addition to the two original offenses. The original order was amended to provide that all documents issued to Appellant were revoked.

Appellant has been going to sea since 1940.

BASES FOR APPEAL

This appeal has been taken from the order imposed by the Examiner on the following grounds:

1. It was improper to reopen the hearing in Mobile when Appellant was in New York.

2. There is no evidence that the hearing of July 1956 was final.
3. The record is insufficient to prove perjury without having obtained Appellant's testimony.

4. The Investigating Officer was obliged to advise the Appellant that he had a right to ask for a change of venue to New York.

5. Perjury constitutes a completely different offense from the offenses charged and, therefore, should have been the subject of a new hearing with the services of charges and

specifications on Appellant.

Appellant prays that the amended order of 30 October 1957 be reversed and set aside.

APPEARANCE: Cooper, Ostrin & De Varco, 655 Madison Avenue, New York 21, New York, by Lawrence P. Ashley, Esq.

OPINION

Several of the contentions presented by Appellant on appeal have substantial merit. I agree with the Appellant that the offense of perjury has no relation in time, place, or type of offense originally charged, failure to obey lawful orders. Perjury always arises from some other proceeding or instance requiring an oath. In any event, a person committing this offense normally is tried separately for it. In this respect, administrative proceedings under R. S. 4450 are not so different from other judicial processes that a completely alien method of hearing the matter should be utilized. A new hearing, and not a reopened hearing should have been held on the perjury issue.

It follows from this, that it was not necessary to hear the perjury charge in Mobile when the Appellant was in New York. The Examiner is not required to advise the person charged that he has a right to ask for a change of venue but under the circumstances of this case, New York would have been the proper place to hear the perjury charge. An undue hardship was placed upon the person charged when he received notice in New York that the hearing was to be reopened in Mobile only three days after receipt of notice. In any event, it was improper to proceed against Appellant for perjury without having drawn up a charge and specification alleging this offense. This is similar to the type of offense stated in 24 Op. Atty. Gen. 136 (1902) to be a proper subject for these proceedings.

Assuming arguendo that the hearing was properly conducted, we next consider whether the charge of perjury was properly found proved. The evidence introduced consisted of a message, dated 27 June 1957, from Coast Guard Headquarters stating that Appellant had been given a suspension on probation on 26 July 1956 for refusing to obey a lawful order, a copy of this decision and a letter stating that the original of this decision was served on Appellant

on 26 July 1956. Nothing more was introduced.

Certainly the evidence shows that statements given by the Appellant at the original hearing were not true. The Headquarters message shows that the probationary suspension was still effective since it had not been vacated or modified. But 1, U.S.C. 1621 states, inter alia, that to be guilty of perjury the person under oath must, willfully and contrary to such oath, state as true a material matter which he does not believe to be true. It can be seen that an intentional falsification is a vital element of perjury. The Hearing Examiner inferred that Appellant had committed perjury merely because the statements of the Appellant at the original hearing were not true. The Examiner did not consider the necessary element of intent in his decision. The offense perjury was never intended to encompass all statements made under oath which are not true. There must be a reasonable conclusion drawn from the evidence that the false statement was given with intent to deceive. There being no such reason given by the Examiner for finding that Appellant was guilty of perjury, an essential element of the offense is missing. Concerning this, I agree with Appellant's contention that his testimony would be an important factor to be considered in resolving the issue of willfulness on his part.

In considering Appellant's request that the amended order of 30 October 1957 be set aside, it is necessary to look at the entire amended decision. This makes it perfectly clear that the original probationary suspension was changed to an order of revocation because of two factors: Appellant's prior record and his alleged perjury at the original hearing. The Examiner specifically stated this in the last paragraph of his amended decision (R.21). The hybrid nature of this reopened proceeding is apparent. Having eliminated the perjury issue from consideration, the remaining question is whether it was proper for the Examiner to have reopened the hearing to reconsider the order after he was informed that Appellant was on probation at the time of the two offenses found proved at the original hearing.

It is my opinion that this was quite proper. A court may exercise its discretion to revoke an order of probation for good cause but this discretion must be exercised fairly and must not be abused. *Hamilton v. United States* (C.A. 10, 1955), 219 F.2D

364; *Reed v. United States* (C.A. 9, 1950), 181 F.2d 141. It is responsible that the same general principles should apply to these proceedings. It is not necessary to have a formal hearing in order to revoke a probation. 24 *C.J.S. Criminal Law*, sec. 1572b(3). Since it was Appellant's testimony which led the Examiner to believe that there was no outstanding order against Appellant's documents, it was within the authority of the Examiner to reopen the hearing and reconsider the order regardless of whether Appellant intentionally or innocently concealed his prior record. In either case, the resulting probationary suspension was brought about by Appellant's false swearing. It would not be fair to permit Appellant to profit from this by reinstating the original order of six months' suspension on eighteen months' probation. Therefore, Appellant's request that the amended order be set aside is denied. Instead, this order of revocation will be modified to an appropriate one without consideration of the alleged perjury.

The order of 26 July 1955 was a six months' suspension on probation as also was the original order imposed in this case. In view of the fact that both hearings were based on charges of refusal or failure to obey lawful orders, it is my opinion that the fairest disposition is to reduce the revocation to an outright suspension for one year. This represents the total of the two prior suspensions, disregarding the fact that in both cases Appellant was place on probation.

ORDER

The order of the Examiner dated at Mobile, Alabama, on 30 October 1957, is modified to provide for an outright suspension of all Appellant's documents for a period of twelve (12) months.

As so MODIFIED, said order is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 20th day of August, 1958.

***** END OF DECISION NO. 1063 *****

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