In the Matter of Merchant Mariner's Document No. Z-134815 and all other Seaman Documents
Issued to: ZEPHYR SEARCY

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

985

ZEPHYR SEARCY

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

By order dated 8 March 1957, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman documents upon finding him guilty of misconduct. The specification alleges that while serving as Chief Cook on board the American SS FLORA C under authority of the document above described, on or about 1 October 1956, Appellant wrongfully had a usable quantity of marijuana in his possession.

At the beginning of the hearing on 2 October 1956, Appellant was given a full explanation of the nature of the proceedings and the rights to which he was entitled. Appellant was represented by counsel of his own choice. A request for a continuance to prepare the defense was granted by the Examiner.

On 10 October, Appellant entered a plea of not guilty to the charge and specification. The Investigating Officer made his opening statement on the same date. On 12 October, counsel for

Appellant made a motion to dismiss the charge on the ground that there was no statutory authority for the Coast Guard to proceed on the basis of the above specification. The hearing was adjourned to await the submission of briefs on this jurisdictional question. After considering the opposing briefs and hearing extensive argument, the Examiner denied the motion to dismiss. This action was taken on 5 December on which date Appellant was not personally present, having returned to his home in Houston, Texas.

Counsel for Appellant had objected previously to the taking of testimony before a ruling on the motion to dismiss. On 5 December, the Examiner denied counsel's motion for a continuance to await Appellant purpose of cross-examining the witnesses. The Investigating Officer then introduced in evidence the testimony of three U. S. Customs employees as well as related exhibits. The hearing was adjourned to await an attempt to obtain Appellant's deposition by interrogatories.

The hearing was reconvened on 28 February 1957. The interrogatories had been returned since Appellant no longer lived at the Houston address which he had given to the Examiner. Counsel's motion for a further continuance, in or to obtain Appellant's testimony when he returned from a sea voyage, we denied on the ground that there was no showing that Appellant intended to return to San Francisco at any time in the future. Consequently, no evidence was offered by the defense and counsel declines the opportunity to submit argument on the merits of the case.

At the conclusion of the hearing, the Examiner announced the decision in which he concluded that the charge and specification had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served and Appellant surrendered his document on 13 March 1957. Appeal was timely filed on 12 April 1957.

FINDINGS OF FACT

On 1 October 1956, Appellant was serving as Chief Cook on board the American SS FLORA C and acting under authority of his Merchant Mariner's Document No. Z-134815 while the ship was at Oakland, California.

At 1245 on this date, a U. S. Customs party boarded the ship to conduct a routine search for contraband. Enforcement officers Ward and Paul met Appellant in the passageway outside his room. Appellant stated that he did not have any contraband and none was found in his room. Officer Ward then searched Appellant and found a hand-rolled cigarette in his right-hand trouser pocket. The cigarette was wrapped in a piece of white paper and tucked in at both ends. Officer Ward expressed his opinion that this was a "reefer" (marijuana cigarette). Officer Paul agreed and further inspection showed that the cigarette contained a brownish-green tobacco-like substance. Analysis at the U. S. Customs Laboratory in San Francisco confirmed the suspicion that the cigarette contained marijuana.

Appellant has no prior disciplinary record with the Coast Guard. The hearing record does not indicate whether any criminal action was taken against Appellant as a result of this incident.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Three points are urged by Appellant:

I. The Coast Guard has no jurisdiction to proceed in this matter under the general statute (46 U.S.C. 239(G)) because Congress limited the authority to take action against the document of a seaman for a narcotics offense by enacting 46 U.S.C. 239a-b (P.L. 500, 83d Cong.). The latter statute provides for disciplinary action only when a seaman has been convicted of a narcotics law violation or has been an addict or user of narcotics. The principle of *espressio unius est exclusio alterius* makes this statute the exclusive remedy for narcotics offenses. Mere possession of narcotics is not prohibited by 46 U.S.C. 239(g) within the meaning of "misbehavior" since possession alone is not *malum in se*. No other statute or regulation specifically prohibits the possession of marijuana.

II. Appellant has been denied due process of law. The decision in this case was made without testimony by Appellant

as a result of the Examiner's refusal to grant a continuance to obtain Appellant's testimony.

III. It was error for the Examiner to refuse to issue a temporary document to Appellant since a seaman is entitled to retain possession of his document until a valid decision is rendered. Due process militated against the denial of a temporary document pending appeal because of the grave jurisdictional question present in this case.

APPEARANCES: Messrs. McMurray, Brotsky, Walker, Bancroft and Tepper of San Francisco by Frederick D. Smith and Lloyd E. McMurray, of Counsel.

OPINION

POINT I.

Prior to the enactment of 46 U.S.C. 239a-b (Public Law 500, 83d Congress), the Coast Guard consistently revoked the documents of any seaman who, while acting under the authority of his document, was found guilty on a charge of "misconduct" involving narcotics. The reasons for this policy are set forth in detail in Commandant's Appeal No. 338, dated 5 July 1949. Among other things, it is stated therein that this policy is considered to be in furtherance of the statutory duty of the Coast Guard, contained in 46 U.S.C. 239, to take action against conduct which is incompatible with safety of life or property on shipboard; any involvement with narcotics is in the latter category because the possible use of narcotics presents a constant threat to safety; and this policy applies whether or not there is a violation of a statute. but in order to take action under 46 U.S.C. 239, it is a prerequisite that the seaman be acting under the authority of his document; that is, acting in some employment relationship to a merchant vessel.

The enactment of 46 U.S.C. 239a-b on 15 July 1954 was simply an extension of the authority granted under 46 U.S.C. 239 since the former permits action against narcotics offenders without regard to whether the seaman was acting under the authority of his document at the time of the offense. It is apparent from the legislative history of the new law that this was the purpose rather than to

limit the jurisdiction of the Coast Guard as Appellant contends. See Senate Report No. 1648, House Report No. 1559, 83rd Congress; 1954 U. S. Code Cong. and Adm. News, p. 2558. Hence, there is no basis for the application of the principle that the expression of one thing implies the exclusion of another.

Going back to 46 U.S.C. 239, I do not agree with Appellant's contention that mere possession of narcotics is not *malum in se*. The Supreme Court has stated that the use of narcotics, except for medicinal purposes, is rigidly condemned by universal sentiment. *Yee Hem v. United States* (1925), 268 U.S. 178. The use of narcotics by somebody is a short step removed from possession. The considerable amount of recent legislation pertaining to narcotics indicates the increasing recognition of the fact that narcotics are inherently evil. Therefore, its possession by merchant seamen is well within the meaning of "misbehavior," as used in 46 U.S.C. 239, or the synonym "misconduct." This is even more evident when considered in the light of the statutory duty of the Coast Guard mentioned above and the many incidents of danger created by the use of narcotics on board our merchant ships.

Apparently, Appellant has overlooked the regulation which requires an order of revocation to be entered after a seaman has been "found guilty of misconduct by virtue of the possession, use, sale, or association with narcotic drugs." 46 CFR 137.03-1. This regulation was effective on 9 January 1954 and emphasizes the previous policy of the Commandant with respect to narcotics. The promulgation of this regulation, which is applicable to proceedings under 46 U.S.C. 239, is consonant with the trend, indicated by the enactment of 46 U.S.C. 239a-b and other laws, toward recognizing the insidious nature of narcotics, including marijuana. It would be grossly inconsistent with this trend to conclude that the Congressional intent with respect to 46 U.S.C. 239a-b was to limit, rather than to extend, the authority of the Coast Guard to take action against the documents of merchant seamen.

It is concluded that there is no doubt that the Coast Guard had jurisdiction to proceed in this case conducted pursuant to 46 U.S.C. 239.

POINT II.

Appellant's contention that he was denied due process of law because the decision was made without his testimony is without merit. Although the progress of the hearing was considerably delayed by the consideration of the jurisdictional question presented by counsel, it was incumbent upon Appellant to keep his counsel informed as to Appellant's whereabouts and to make himself available at the hearing within a reasonable length of time. Nevertheless, the unsuccessful attempt to take Appellant's testimony by interrogatories was due to the fact that he was not at his last known address. As indicated above, counsel had from 5 December 1956 until 28 February 1957 to obtain Appellant's testimony. It was during the latter part of this extended interval that counsel learned about Appellant being on a voyage. I agree with the Examiner that, by the time counsel asked for a further continuance on 28 February, Appellant has been given ample opportunity to submit his testimony for consideration.

POINT III.

The Examiner properly refused to issue a temporary document to Appellant pending this decision on appeal. The governing regulation makes it clear that such a document is not to be issued in a case where "public health, interest of safety requires otherwise." 46 CFR 137.11-15. The above discussion pertaining to the policy of the Coast Guard in narcotics cases shows that his case is in the category where no temporary document should be issued. The jurisdictional question involved did not call for an exception to this policy.

ORDER

The order of the Examiner dated at San Francisco, California, on 8 March, 1957 is AFFIRMED.

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

Dated at Washington, D. C., this 25th day of September 1957.

***** END OF DECISION NO. 985 *****

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