IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22261

THOMAS JERRY YEATER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

J. B. Tietz
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Appellant

E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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JURISDICTION

This is an appeal from a judgment by the United States District Court for the Central District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to be inducted into the Armed Forces of the United States), Universal Military Training and Service Act [Tr. 4].[1]

1. Tr. refers to the Transcript of Record.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [Tr. 5].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction [Tr. 2].

Appellant pleaded not guilty and was tried by the Honorable Irving Hill, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [Tr. 4].

FACTS

The relevant facts in this appeal are found in (1) the Selective Service file [Ex. 1-154]* and in (2) the reporter's transcript of the trial [RT 1-1-4],** both being parts of the designated record on appeal.

1. Appellant claimed he had a disqualifying physical defect, to wit: one leg one-half inch shorter than the other [RT 21/16] by reason of an "old fractured right tibia." [RT 42/13-80/8, Ex. 108].

*Ex. refers to the government Exhibit #1, the complete SSS file of appellant.

**RT refers to the reporter's transcript.

The appellant had sent his local board a letter from his doctor (Ascher) which showed, by measurement, that his legs had a half-inch discrepancy in length [Ex. 133].

It was stipulated that this would be the sworn testimony of Dr. Ascher, if put on the witness stand [RT 28/3].

The senior army medical officer at the Armed Forces Examining Station in Los Angeles [RT 30/24] testified that ". . . there is nothing in the record that indicates we actually measured [the legs] . . ." [RT 54/21].

This doctor testified that the standards governing acceptability are in AR 40-51, Chapter 2, Change 15: ". . . would be that an extremity which is one-half inch shorter than the other, if it produces gross lameness or—I am groping for the word they use—limping, is disqualifying." [RT 53/5].

Appellant testified that his injured leg prevented him holding ". . . down my regular type of position from my inability to move objects . . ." [RT 84/24]; "I can't walk for long lengths of time" [RT 85/15].

The army doctor could only guess [RT 56/22] that there was no gross limping and that he had no reason to doubt Dr. Ascher's measurements [RT 56/9].

When finally asked ". . . why he was not acceptable in August of 1965 and why he is acceptable in July of 1966, based upon the criteria that you have already explained to us." [RT 59/18], he could not give an evaluation [RT 60/5].

2. Appellant claimed his mother was dependent on him.

On December 13, 1963, he answered a questionnaire (SSS Form No. 118) showing his mother was dependent on him. He was classified in Class III-A on January 8, 1964 [Ex. 13 and 63].

When he had a leg fractured in 5 places [Ex. 108] and so notified the board, in a letter they received February 8, 1965 [Ex. 64] an entry in the Minutes of Action was made on the same date "He had an accident, not work, therefore unable to support anyone" and another entry was made on March 2, 1965 showing the board voted to reclassify him in Class I-A [Ex. 13].

However, when evidence of his mother's dependency on him was presented on June 22, 1966 [Ex. 123] and on July 2, 1966 [Ex. 126] a refusal to "reopen" letter was sent, by the clerk [Ex. 128] with the notation in the Minutes of Action "Bd. members contacted—Postponement Denied." [Ex. 15].

QUESTIONS PRESENTED AND HOW RAISED

I

Was there a basis in fact for denying appellant a deferred classification? This question was raised by the presentation in evidence of the entire Selective Service System file, and the oral evidence during the trial, and the dialog between court and counsel.

II

Was there a denial of due process in the failure of the local board to reopen the classification, when, in June and July, 1966 facts not "considered" when he was classified

in Class I-A, facts which if true required classification? This question was raised by the above mentioned exhibit of the government.

SPECIFICATION OF ERRORS

I

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

1. Appellant presented a prima facie case for a IV-F (physically unfit) classification.

The evidence in the record does not rebut it.

Appellant presented a prima facie case for a III-A (dependency) classification.

There was no evidence to rebut it.

In any event his request for a reopening of his classification was mishandled and he was illegally deprived of his administrative opportunities for relief, namely, an Appearance Before Local Board and an appeal.

ARGUMENT

I

There Was No Basis-in-Fact for Denying the Registrant a Deferred Classification.

Appellant made two claims that were ignored: one for a physical unacceptability classification and one for a hardship classification. Why they were ignored will be discussed below, in "B", "A" being devoted to the prima facie quality of these two claims.

A. His prima facie claims.

1. In our FACTS, above, we recited the details of appellant's showing concerning his physical unacceptability. These made out a prima facie case.

2. In our FACTS, above, we referred to the details concerning his revived dependency situation and the evidence in support. Here, too, he made out a prima facie deferred classification showing.

It would appear, therefore, that he was entitled either to one of such classifications or to have his claims and evidence handled by the local board according to another of the regulations, that is, the one that (1) gives the local board the right to form an initial, adverse judgment but that (2) preserves the right of the registrant to his subsequent administrative remedies, 32 C.F.R. § 1625.2.

B. When and how they were ignored.

We can sympathize with the local board in the long and burdensome processing required by this registrant. However, none of the lengthy processing was due to any stalling, evasion or just plain stubbornness on his part.

Therefore, there was no legal excuse for the board ignoring the applicable law. That all are required to know that the law applies with even more force to officialdom and, especially, to a body dealing with very young men.

The board had once given him a III-A classification, on the dependency of his mother. We do not contend he had a vested right in a III-A, forever. However, assuming, (but not conceding) that the board was justified in ratifying

the 1965 conclusion of its clerk [we refer to the entry in the Minutes of Action, under date of February 8, 1965, that he "Had an accident, not working, therefore unable to support anyone," Ex. 13] at its next meeting, what rationale is there for its subsequent, 1966 conduct, when his leg had healed to the extent that he could again work and his mother again showed her needy condition? This was in both June and July of 1966.

No reason was given this time. There was no basis in fact for it.

II

The Local Board Illegally Failed to Reopen His Classification.

There are two further reasons to consider the conduct of this agency illegal.

A. Its regulations *require* a consideration by the board.

The presumption of official regularity (that this was done) is overcome by its own records.

First, the regulations, 32 C.F.R. § 1604.56:

1604.56 Organization and Meeting.—Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. In case of a tie vote on any question or

classification, the board shall postpone action on the question or classification until it can be decided by a majority vote. If any member is absent so long as to hamper the work of the local board, the chairman of the local board shall recommend to the State Director of Selective Service that such member be removed and a new member appointed.

Next, the record. The Minutes of Action of the Local Board, on page 15 of the Exhibit recites: "Jul 6, 1966 Bd. Members contacted—Postponement Denied. July 6, 1966 Letter to registrant's mother, cc to registrant."

The Exhibit, on page 128, shows there is more to this event than just the above two lines. There is a letter on page 128 showing that a "reopening of his classification" was also denied. The date of this letter is July 5, 1966!

Our point is not that this is government by the clerk; it may be that but, in addition it is clear enough that the board never met to consider the evidence; that they were "contacted." This justifies the conclusion it was a telephone call, a polling of the board. We assert that the board members should have had the evidence before them, not predigested (or even read) by a clerk. "Business" may operate in such a manner but the regulations of this agency require that a quorum be *present at a meeting.*

Our conclusion is buttressed by further inspection of the Minutes of Actions. In several instances where relatively innocuous decisions were made there is a vote entered. Here, on a crucial question, there was no vote.

Finally, since this is a criminal case the benefit of any doubt that may exist is due the defendant.

The observations of various courts on the principle involved may be of help.

In *Olvera* v. *United States,* 5 Cir., 1955, 223 F.2d 880, 882 the Fifth Circuit pointed out that—

> "The Supreme Court has, in a line of cases[3] starting in 1955, sought to reconcile the fundamental principles of liberty and due process with the failure of the Universal Military Training and Service Act (50 United States Code, App., Section 451 et seq.) to make specific provision for judicial review of board action and for a jury trial on the controlling issues of fact."

The court went on to state (p. 882):

> "This principle, that when every requirement of due process has been observed by the board, its fact decisions, unless wholly unsupported are not subject to review. . . . Under this principle, it is of the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon.
>
> "The reaction against and retreat from the rigors of the Falbo decision, that board orders on which conviction of crime and deprivation of liberty are based, convictions in effect by administrative fiat, are unreviewable, was to some extent begun in the earlier decisions. It remained however for these latest cases to bring the reaction almost full circle around by pointing out the essentiality to due process of the recognition of principle that if the deprivation of liberty is to be in effect accomplished by the action, in the stress and

pressure of a war effort, of administrative bodies of laymen, strict compliance with every procedural requirement is essential to the board's jurisdiction and the validity of its orders. . . ."

In *U. S.* v. *Adragna,* No. 26196, S.D. Calif., January 27, 1958, Judge Harry Westover decided this, and other, submitted cases, he had tried in the Fall of 1957. Counsel has a 12 page reporter's transcript of the January 27, 1958 proceedings.

In this *Adragna* case the same ("phony meeting") point was raised. There was some preliminary rehashing of other points involved and then the following took place:

"Now, Your Honor, my point is that that is no meeting. That is no reconsideration.

THE COURT: Is this the phone case?

MR. TIETZ: Yes, that is the phone case.

THE COURT: I will ask the United States Attorney, can you have a meeting of the board by phone and just asking them? They are supposed to consider the problem. They are not supposed to take the report of somebody over the phone, a hearsay report as to what is in the file, what is in the report.

* * *

THE COURT: I don't think some clerk can call up a local board and say so-and-so has filed a form and this is what it contains. I think the board should consider the evidence, not the statement of what the evidence is from somebody else."

He then found the defendant not guilty.

In *U. S.* v. *Nelson,* CR. No. 45202, E.D.N.Y. decided March 19, 1958, Byers, Ch. J., said:

"This defendant was tried to the court on February 27, 1958, a jury having been duly waived, on an indictment charging him with violating the Selective Service Act (Title 50 U.S.C. App. § 456 (j)) being the offense comprehended in § 462 (b) (6) of that statute."

* * *

"The only important argument made for the defendant is that his local board did not adequately consider his application for a reclassification, because it was not made the subject of a hearing before the board at which he could have an opportunity to be present and offer the testimony of witnesses concerning his alleged change of status within the hierarchy of his sect.

"It is undisputed that the unanimous vote of the local board denying the application, was the result of a canvass of all members taken over the telephone by the clerk of the board, who read to each member the defendant's letter dated August 11, 1957. Therein he asserted that he had been appointed a full-time Pioneer Minister on August 1, 1957 in consequence of which his former status as a part-time minister had been superceded, wherefore a reclassification was sought.

"This court is of the opinion that the taking of the vote over the telephone did not accord to the defendant the process contemplated by the Regulation 1604.56 which in material part reads:

> '* * * A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification * * *.'

"Regulation 1625.1 specifies that no classification is permanent, and subsequent paragraphs deal with

the procedure involved in the various aspects of the matter.

"Regulation 1625.2 seems to cover the situation involved in this case.

"The local board was here confronted with the duty of examining into the subject of the registrant's actual vocation and his alleged avocation, with a view to reaching a decision based upon evidence. That function could not be, and was not adequately discharged in the manner here employed.

See *U. S.* v. *Diercks,* 223 F. 2d 12;
U. S. v. *Ransom,* 223 F. 2d 15."

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant

February 19, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant

APPENDIX

Plaintiff's Exhibits:	For Identification	In Evidence
1. SSS File	13	25
2. Vol. App.	13	26
3. Waiver of Rights	14	26