NO. 22261

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS JERRY YEATER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

The appellant, Thomas Jerry Yeater, was indicted on April 26, 1967. The indictment was brought under Title 50, United States Code, Appendix §462 and charged that the appellant failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do [C.T. 2]. [1/] On May 22, 1967, appellant pleaded not guilty. The case proceeded to trial before the Honorable Irving Hill on June 27, 1967, trial by jury having been waived. Appellant was

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[1/] "C. T." refers to Clerk's Transcript of Proceedings.

found guilty and sentenced on July 24, 1967 to three years imprisonment [C. T. 4].

Appellant's Notice of Appeal was timely filed on July 26, 1967 [C. T. 5].

The jurisdiction of the District Court was based upon Title 50 U. S. C. App. §462, Title 18 U. S. C. §3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28 U. S. C. §§ 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 50 U. S. C. App. §462, provides in pertinent part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the

execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

III

QUESTIONS PRESENTED

A. Is Judicial Review of Appellant's Classification Possible Where Administrative Remedies Have Not Been Exhausted?

B. Was Appellant Denied Due Process By the Failure of the Local Board to Reopen His Classification After He Had Been Ordered to Report for Induction?

IV

STATEMENT OF FACTS

At the time of the trial of this case a photographic copy of the Official Selective Service File of appellant was offered and admitted in evidence as Government's Exhibit No. 1 [R. T. 25, lines 22-23]. [2/] This copy had attached to it a certificate by Captain T. D. Proffitt, U.S.A.F. (Ret.), District Coordinator, Selective

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[2/] "R. T." refers to Reporter's Transcript of Record.

Service System, that it was a full, true and correct copy of the original file of which he had legal custody. Also attached was a certificate and seal of the Staff Secretary, Headquarters, Southern Area, Selective Service System, to the effect that Captain Proffitt was the District Coordinator and had custody of the original selective service file of the appellant.

This file revealed the following events with respect to appellant's registration status in the Selective Service System:

On June 30, 1958 appellant registered at Local Board No. 100, Los Angeles, California [pp. 1-3]. [3] On May 1, 1959 the Local Board mailed him a classification questionnaire which he completed and returned to the Board on May 5, 1959 [pp. 5-11]. In Series 6 of this form, appellant stated that he was not a minister. He did not sign the conscientious objector claim in Series 7, which instructs the registrant to sign if he claims to be a conscientious objector and tells him not to sign unless he claims exemption as a conscientious objector [p. 7]. Appellant also left blank Series 8 of the questionnaire requesting the names of any dependents who are wholly or partially dependent upon him for support [p. 7].

On August 17, 1961 appellant was classified 1-A and on August 21, 1961 he was mailed notice of that classification [p. 12]. Appellant did not appeal from this classification. On March 11, 1963 the Local Board mailed him an order to report for armed forces physical examination on April 5, 1963 [p. 23]. Appellant was

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[3] Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

examined on the latter date and found fully acceptable for induction [p. 24].

On September 10, 1963 the Local Board mailed appellant an order to report for induction on September 30, 1963 [p. 28]. On September 17, 1963 he appeared at the Local Board office and handed the Board a written request for a Form 150 for conscientious objectors [pp. 12, 29]. Appellant stated that the request was made "due to the fact that I am one of Jehovah's Witnesses and cannot accept military duty." He further said, "I did not report this information sooner as I assumed this would be taken up at examination for induction." [p. 29]. The Local Board handed appellant a Form 150 on September 17, 1963 which he completed and returned on September 23, 1963 [pp. 12, 34]. Upon receiving appellant's Form 150, the Local Board requested permission to postpone and reopen his case for the purpose of evaluating his claim [p. 31]. This permission was given [p. 41]. His induction was postponed until further notice [p. 32]. On October 28, 1963 the Local Board scheduled an interview with the appellant [p. 42]. Appellant appeared at the interview after which the Board decided that he was not a conscientious objector and classified him 1-A [pp. 12, 43-44]. Appellant did not appeal from this classification.

On November 19, 1963 the Local Board mailed appellant an order to report for induction on December 9, 1963 [p. 45]. On December 5, 1963 the Local Board received a handwritten letter addressed to the Los Angeles Examining and Induction Station from appellant's mother in which it stated in part: "I need him home. He

has been paying the rent of $90 a month for us as my husband has been in and out of the hospital since last July and is not able to work, so the only income is his pension. I am also under the doctor's care with peptic ulcers. I don't understand the reason for taxpayers to support these men when they have means of taking care of there (sic) family." [pp. 46-47]. Also on December 5, 1963 appellant's mother telephoned the Local Board and in response to that phone call the Local Board sent appellant a dependency questionnaire to be completed by him [pp. 50-51]. On December 6, 1963 appellant telephoned the Board and requested the postponement to permit consideration of his mother's dependency status [p. 52]. The Local Board thereafter requested postponement of appellant's induction [p. 53]. His induction was postponed [p. 54].

On December 31, 1963 the Local Board received a dependency questionnaire completed by appellant [pp. 57-60]. On this form appellant indicated that he was working as an appliance repairman but did not disclose his salary or wages or his income as requested [p. 57]. In Series 3 of the form, appellant indicated that he contributed $140 per month to the support of his mother [p. 58]. Appellant's mother signed a statement that he "pays rent, utilities, and helps with my medicine." [p. 60]. On January 8, 1964 the Local Board classified appellant 3-A and on January 16, 1964 he was mailed notice of this classification [p. 13].

On January 28, 1965 the Local Board mailed appellant another dependency questionnaire which he returned on February 8, 1965 together with a handwritten letter [pp. 64-70]. In this letter

appellant stated that he was laid off from his job in April of 1964 and was injured in May of that year and therefore "I'm not able to support anyone." [p. 65]. On March 9, 1965 the Local Board requested that appellant have his physician provide the Local Board with a letter verifying his injury [p. 71]. On April 22, 1965 the Local Board wrote appellant's treating physician but received no reply and requested appellant to contact the doctor and obtain a letter from him [pp. 77-78]. No letter from the physician was forthcoming, and on June 22, 1965 the Local Board mailed appellant an order to report for induction on July 13, 1965 [p. 82]. On June 30, 1965 appellant wrote the Board asking for postponement of his induction and gave details of his injury [pp. 84-85]. On July 1, 1965 appellant's induction was postponed [p. 86].

On July 23, 1965 the Local Board mailed appellant an Order to Report for Armed Forces Physical Examination on August 18, 1965 [p. 88]. Appellant reported and subsequently was notified that he had been temporarily rejected but that he should return for further examination on or about February 1966 [p. 89]. On October 5, 1965 appellant was classified 1-Y (qualified for military service only in time of war or national emergency) and on October 7, 1965 he was mailed notice of this classification [pp. 13, 90-91]. On January 25, 1966 the Local Board mailed him another order to report for Armed Forces Physical Examination on February 10, 1966 [p. 92]. Appellant reported for the examination and was found fully acceptable for induction [p. 93]. On March 31, 1966 appellant was classified 1-A and on April 5, 1966 he was mailed notice of this

classification [pp. 14, 96-97]. Appellant did not appeal from this classification.

On April 19, 1966 the Local Board mailed appellant an Order to Report for Induction on May 24, 1966 [p. 98]. This order was returned to the Local Board by the Post Office with the notation that appellant had moved and left no address [p. 99]. The Local Board thereafter wrote several letters attempting to locate appellant [pp. 100-105]. On May 13, 1966 the Local Board received a letter from appellant stating that he had received the Board's letter telling him to prepare for induction on May 24, 1966 [pp. 106-116]. In this letter appellant stated that he had flat feet [p. 111] and that his injured leg was one-half inch shorter than his other leg [p. 112]. Appellant did admit that about a week after he was classified 3-A in January 1964 he lost his job and was out of work [pp. 107-108]. Appellant further claimed that it would be a hardship on his mother for him to be inducted since his mother had acquired obligations which he would have to pay [p. 113]. On May 16, 1966 the Local Board postponed appellant's induction until further notice [p. 118].

On May 17, 1966 the Local Board mailed to the Armed Forces Examination and Entrance Station a copy of a letter from appellant's physician [p. 120]. The letter from appellant's physician stated: "I have seen and treated this young man because of pain in his right leg. Sometime ago he had a very severe fracture of the right leg which presently shows good healing of the tibia. He has however been left with a short right leg, the right leg measuring 35-3/4", the left measuring 36-1/4", and I have prescribed for

him a 3/16" general heel lift on the right. This injury occurred in 1964, and the patient was in a cast approximately seven months." [p. 133]. The Armed Forces Examination Station noted that despite the 1/2 inch shortness in his leg he remained acceptable for military service [pp. 120-121].

On June 21, 1966 the Local Board ordered appellant to report for induction on July 12, 1966. On June 27, 1966 the Local Board received a letter from appellant's mother stating that appellant pays $100 a month expenses on her behalf [p. 123]. On July 1, the Local Board reviewed appellant's file and decided that the facts presented by his mother did not warrant a postponement of his induction [pp. 14, 125]. On July 2, 1966 appellant's mother wrote another letter to the Local Board in which she mentioned that he was needed at home to pay $100 per month of her expenses and that he had flat feet and a leg 1/2 inch shorter than the other [p. 126]. On July 5, 1966 the Local Board notified appellant's mother that her letter had been received and the Board had decided that the facts contained therein did not warrant postponement of his induction or reopening of his classification [p. 128].

On July 12, 1966 appellant appeared at the induction station as ordered. His medical examination was brought up to date and he was given a physical inspection and an orthopedic consultation [pp. 130, 138]. Appellant had previously completed a report of medical history in which he claimed to have or have had swollen or painful joints, dizziness or fainting spells, ear, nose, or throat trouble, running ears, pain or pressure in chest, cramps in legs,

coughed up blood, frequent or painful urination, and foot trouble [p. 136]. During his examination appellant indicated that he was refusing to go into the armed services because of possible residual problems from his injured leg [pp. 130, 138]. During appellant's processing for induction he left the induction station and never returned [p. 130].

ARGUMENT

A. APPELLANT IS PRECLUDED FROM ARGUING THE IMPROPRIETY OF HIS CLASSIFICATION BY VIRTUE OF HIS FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

Appellant contends that there was no basis in fact for the denial by his Local Board of a draft deferment based on either (1) physical disability or (2) hardship [Appellant's Brief, p. 6].

It is a moot point. Appellant was classified 1-A on March 31, 1966 and was mailed a notice thereof on April 5, 1966. Appellant did not appeal from this classification, nor any prior 1-A classification [Ex. 1, pp. 12-15; R. T. 78, lines 2-7]. Subsequent to the mailing on May 9, 1966 of the Order to Report for Induction, appellant raised questions concerning his physical condition and his mother's financial dependency on him [Ex. 1, pp. 14, 15].

The general rule is that a selective service registrant who believes that he has been rendered subject to military service by an erroneous classification or arbitrary action of his local board

must exhaust all his administrative remedies before his claim may be heard in court.

United States v. Kauten, 133 F.2d 703
(2nd Cir. 1943);
Swaczyk v. United States, 156 F.2d 17
(1st Cir. 1946), cert. denied 329 U.S. 726;
Jeffries v. United States, 169 F.2d 86
(10th Cir. 1948);
Williams v. United States, 203 F.2d 85
(9th Cir. 1953), cert. denied 345 U.S. 1003;
Doty v. United States, 218 F.2d 93
(8th Cir. 1955);
United States v. Palmer, 223 F.2d 893
(3rd Cir. 1955), cert. denied 350 U.S. 873;
United States v. Nichols, 241 F.2d 1
(7th Cir. 1957).

Failure to appeal from his last classification by the local board will preclude a registrant from claiming such classification was improper.

Skinner v. United States, 215 F.2d 767
(9th Cir. 1954), cert. denied 348 U.S. 981;
Evans v. United States, 252 F.2d 509
(9th Cir. 1958);
Maddox v. United States, 264 F.2d 243
(6th Cir. 1959).

The selective service regulations expressly provide for

appeal by a registrant "if he files a written request therefor within ten days after the local board has mailed a notice of classification to him."

32 C.F.R. §1624.1(a).

The regulations further provide that "[i]f a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

32 C.F.R. §1641.2(b).

Therefore, in view of appellant's failure to appeal his 1-A classification he cannot now be heard to complain that such classification was without basis in fact.

B. APPELLANT IS PRECLUDED FROM ASSERTING DENIAL DUE PROCESS BY THE FAILURE OF THE LOCAL BOARD TO REOPEN HIS CLASSIFICATION AFTER HE HAD BEEN ORDERED TO REPORT FOR INDUCTION.

Appellant urges that the question of denial of due process was raised by the mere presentation in evidence of his Selective Service System file [Appellant's Brief, p. 5]. However, he cites no legal authority to uphold his unique theory. No such issue was raised in the trial court [R.T. 100, lines 13-17]. A reviewing court will not consider a constitutional question raised for the first time on appeal.

United States v. Miller, 316 F. 2d 81, 83
(6th Cir. 1963), cert. denied 375 U. S. 935.

A court on appeal will only review rulings made by a trial court on questions brought to its attention and passed upon by it. Error cannot be predicated upon the reception of evidence with respect to which no challenge has been made in the trial court.

Ayers v. United States, 58 F. 2d 607, 608
(8th Cir. 1932);

Lucas v. United States, 343 F. 2d 1, 4
(8th Cir. 1965).

Even if the issue had been litigated at trial, appellant's contention could not be hpheld, as explained below.

Appellant claims that the local board illegally failed to reopen his classification. Appellant was classified 1-A on March 31, 1966, and on April 19, 1966 was ordered to report for induction on May 24, 1966. This date was subsequently postponed to July 12, 1966 [Ex. 1, pp. 14, 122]. Letters from appellant's mother claiming financial dependence on her son were received on June 27, 1966 and July 5, 1966 [Ex. 1, pp. 14, 15, 123, 126], approximately three months after he had been classified 1-A.

The law is clear on the point in issue. The Board may determine whether to reopen and reclassify on its own motion unless an order to report for induction has been issued. After the issuance of such an order the local board cannot reopen "unless [it] first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no

control."

32 C.F.R. §1625.2.

This issue was considered recently in Davis v. United States, 374 F.2d 1, 4 (5th Cir. 1967) where the court stated:

> "The pertinent regulation categorically declares that the classification of a registrant shall not be reopened after an order to report for induction has been mailed unless there is a specific finding by the local board of 'a change in the registrant's status resulting from circumstances over which the registrant had no control' . . . . The Board found no such change of status. The validity of this regulation (1625.2) has been consistently upheld." (Citations omitted).

Cases where a claimed change of status is made before the induction notice is mailed must be distinguished. This was the situation in Olvera v. United States, 223 F.2d 880 (5th Cir. 1955), cited by appellant [Appellant's Brief, p. 9]. There, a claim of change of status was made before the induction notice was mailed and when the defendant first registered.

The foregoing authorities clearly indicate that a registrant's classification will not be reopened after he has been ordered to report for induction unless the board specifically finds a change in circumstances over which the registrant had no control. In the case at bar no such finding was made [Ex. 1, p. 125]. The phrase "circumstances over which the registrant had no control" implies a

sudden event - something that has not arisen before. There is no evidence in the file that appellant's mother became "suddenly" financially dependent on him. In fact the evidence points to a contrary conclusion since this question of a dependency deferment on a hardship basis for appellant was first considered by the board and granted on January 8, 1964 [Ex. 1, p. 13], and was again brought to the board's attention by appellant's letter dated May 11, 1968 [Ex. 1, pp. 106-116].

The board reviewed appellant's file and denied a postponement of induction on July 1, 1966 after receiving a letter from appellant's mother on June 27, 1966, wherein she claimed financial dependence on him [Ex. 1, pp. 123, 125]. Note that the Board did reconsider appellant's classification, in accordance with 32 C. F. R. §1625. 2, but found no change of status warranted. Appellant's brief makes no mention of this fact. Another letter from appellant's mother was received on July 5, 1966 [pp. 126, 127] reiterating her financial dependence on the appellant. The board again denied a postponement of induction on the same day [p. 128]. Appellant points to this particular denial as error [Appellant's Brief, p. 8] claiming that appellant's classification should have been reopened. In fact, as explained above, the board did reconsider appellant's classification when his mother's first letter was received.

> "This is not a case where the registrant had presented new facts to the board for the first time in support of his prayer for reopening . . . . We hold that a local board does not act arbitrarily and unreasonably in

> refusing to consider a claim of exempt status by a conscientious objector when the same claim has previously been considered and rejected and the registrant has not invoked the administrative remedies which would have brought about a thorough investigation and hearing of all aspects of his claim." [Emphasis added]
>
> Woo v. United States, 350 F.2d 992, 995 (9th Cir. 1965).

While the claim in question in Woo was conscientious objection and not hardship, as here, the logic is quite applicable to this situation.

A review of appellant's selective service file indicates an almost frantic last minute attempt to avoid induction. Appellant's reaction on this occasion appears to have been largely a duplication of a past effort, in that on September 17, 1963, after being ordered to report for induction on September 30, 1963, he appeared before his local board and requested a conscientious objector form. Classification as a conscientious objector was subsequently denied and appellant again ordered to report for induction on December 9, 1963. Appellant then requested a dependency deferment and this was granted. "Simply by refusing or neglecting to invoke the administrative machinery for thorough investigation, such a registrant could always create a one-sided record before the board which would enable him to require reconsideration whenever induction became imminent." Such conduct would create a shambles of this area of selective service classification.

Woo v. United States, supra, at 995, 996.

In view of these events, it is difficult to comprehend how appellant can claim that "new facts" were presented to the board on July 5, 1966 so as to make a "prima facie case for a new classification", within the purview of Miller v. United States, 9th Cir., December 29, 1967, No. 21,417. It is equally incredulous that appellant can allude to a foreclosure of his administrative rights when he never appealed any of his 1-A classifications [Appellant's brief, p. 12a].

One remaining point must be considered. Appellant makes a strong and serious implication of a "phony meeting" by the local board, in connection with the above-discussed issue of the reopening of his classification [Appellant's Brief, p. 10]. In a case where the board has refused to reopen a registrant's classification, ". . . the local board by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required." 32 C. F. R. §1625.4 (Emphasis added).

Since §1625.2 of the Selective Service regulations is silent as to what action a board must take following a finding of no change in registrant's status resulting from circumstances beyond his control, after an Order to Report for Induction has been mailed, it is logical to read §1625.4 in conjunction with it, since the latter section deals generally with a refusal to reopen and reconsider a registrant's reclassification.

The purport of the regulations when read together is that members are not required to be present at a meeting of the board to specially consider the question of reclassification when no new facts arising from circumstances over which the registrant had no control which would justify a change in status have been adduced, as here. The board in this instance went beyond its record-keeping requirements: it recorded its decision in the minutes, while the only requirement was to place a copy of the letter to the registrant in his file. No other record of the action taken was required. It follows that if no other record is required than no entry in the minutes is required. A fortiori, if no entry in the minutes is required then no board meeting, of which the minutes are a record, is required.

> "Each local board shall keep a record of each meeting of the board on Local Board Actions and Minutes (SSS Form No. 112) which shall be filed by the local board as minutes of its meetings."
>
> 32 C.F.R. §1604.58.

It is important to note that the board did review appellant's file in response to the first letter from his mother, received by the board on June 27, 1966 [Ex. 1, pp. 123, 125]. While the board's response to the second letter from his mother does not say that the file was again reviewed [Ex. 1, p. 128], to do so would be of no effect since appellant was urging the board to reconsider a matter it had just reviewed a few days previously. To require a board to

hold a meeting each time a registrant wrote a letter to it, where the information presented was non-cumulative in effect and had been previously considered, would be inconsistent with the goal of an orderly, efficient selective service system. A contrary conclusion would place an undue burden on local boards.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 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.

/s/ Arnold G. Regardie
ARNOLD G. REGARDIE