

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO Z-412601
Issued to: Arthur C. KROHN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2035

Issued to: Arthur C. KROHN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 9 April 1973, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman documents for two months outright plus three months on six months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as Second Mate on board the SS MARINE FLORIDIAN under authority of the document and license above captioned, on or about 20 January 1973, did wrongfully fail to navigate said vessel in compliance with Rule 19 and Rule 22 of the International Rules of the Road, while serving as the officer in charge of navigating said vessel.

At the hearing, Appellant did not appear. A plea of not guilty to the charge and specification was entered on Appellant's behalf by the Administrative Law Judge.

The Investigating Officer introduced in evidence his own testimony and documentary evidence consisting of sixteen exhibits.

At the end of the hearing, the Judge indicated that he would reserve decision. On 9 April 1973, he entered a Decision and Order concluding that the charge and specification had been proved and suspending all documents, issued to Appellant, for a period of two months outright plus three months on six months' probation.

The entire decision and order was served on 17 March 1975. Appeal was timely filed on 18 April 1975.

FINDINGS OF FACT

On 20 January, 1973, Appellant was serving as a Second Mate on board the SS MARINE FLORIDIAN and acting under authority of his license and document while the said vessel was at sea. While Appellant was the officer in charge of navigating said vessel, a collision resulted between the said vessel and F/V LYCO V in the Gulf of Mexico.

An investigation was conducted by a Coast Guard Officer and on 24 February 1973, at Beaumont, Texas, the Coast Guard Investigating Officer served Appellant with the charge sheet (CG Form 2639) for negligence in connection with said collision.

After due notice given to Appellant, a hearing was held in Port Arthur, Texas, at the time and place specified on the charge sheet. Neither Appellant nor any representative appeared. The proceedings were conducted under the "in absentia" provisions of Title 46, Code of Federal Regulations, Part 137.20-25.

BASES OF APPEAL

This appeal has been taken from the Decision and Order dated 9 April 1973, imposed by the Administrative Law Judge. Counsel for the Appellant raised three issues as grounds for appeal, which are in the form of questions, they are:

- A. Was Krohn (Appellant) accorded due process of law?
- B. Did the evidence and applicable law conform with the charge and decision?

C. Was Krohn wrongfully deprived of his document?

APPEARANCE: Law Offices of Richard Karl Goethel, Coral Gables,
Fla., Herbert L. Markow, Esq.

OPINION

On appeal, I have the authority to consider, in addition to those exceptions properly raised by Appellant, "clear errors in the record." 46 CFR 5.30-1 (f)(2). In this case I am invoking this authority in order to take note of the evidence introduced at the hearing. The signed statements of four witnesses were entered into the record by the investigating officer. Admission of these statements into evidence was improper on two grounds of violation of the regulations governing these proceedings. First, the four statements were obtained by the Investigating Officer as part of his investigation of the collision between the SS MARINE FLORIDIAN and the F/V LYCO V. As such they were inadmissible at the hearing without stipulation by the Investigating Officer and Appellant. 46 CFR 5-20-117 (formerly 137.20-117). Furthermore the statements were not taken under oath, and the non-availability of the witnesses was not established on the record. 46 CFR 5.20-135 (formerly 137.20-135). Violation of either of these regulations is sufficient basis for exclusion of the statements from evidence.

Although Appellant failed to appear for his hearing, I find that the resultant failure to object to the admission of these statements into evidence does not amount to a waiver of the applicability of the regulations governing these proceedings. Administrative officials are bound by the regulations to which they are subject. They must follow their own established procedures. *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954), *Service v. Dulles*, 354 U.S. 363 (1957); *United States v. Nixon*, 418 U.S. 696 (1974). Regulations are binding "even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 235 (1974). This rule has been held applicable to the extent of overturning agency action for procedural irregularities in the conduct of a hearing. *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

Without the evidence based on the statements of the four witnesses, we are left with a record supporting findings that Appellant was in charge of the watch on the burdened vessel at the time of collision, which occurred at night in heavy winds and rough seas, during a period of good visibility. No evidence remains to indicate that Appellant knew or should have known of the presence of the fishing vessel. On this record alone it cannot be found that there is substantial and probative evidence to support a charge of negligence against Appellant.

CONCLUSION

The charge and specification are not supported by substantial evidence properly admitted into evidence. Because more than 2 1/2 years have elapsed since the occurrence of the collision, it is improbable that accurate testimony could be obtained from witnesses at a new hearing. Therefore, a remand of this case would serve no useful purpose.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 9 April 1973, is VACATED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., 19th day of Sept. 1975.

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Negligence

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