UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT (Redacted)
Issued to: Raffaele ASCIONE

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2186

Raffaele ASCIONE

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 2 August 1978, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for two months, upon finding him guilty of misconduct. The specifications found proved alleges that while serving as Ordinary Seaman on board SS SAN FRANCISCO under authority of the document above captioned, on or about 26 January 1978, Appellant wrongfully failed to join said vessel at the foreign port of Livorno, Italy.

The hearing was held at New York, New York, on 27 April, 16 May, 19 June, and 10 July 1978.

Appellant was not present at the hearing which proceeded in absentia, nor was he represented by counsel. The Administrative Law Judge entered a plea of not guilty to the charge and specification on behalf of the Appellant.

The Investigating Officer introduced in evidence four documents: (1) an abstract of line 16 of the shipping articles of the SS SAN FRANCISCO for the voyage beginning on 25 November 1977 certified by CDR P.M. Lebet, USCG at Rotterdam, Holland; (2) an abstract of the same line 16 certified by LTJG J.A. Stamm, USCG supplying the date, place and cause of the Appellant's leaving the vessel; (3) a copy of an entry from the official log book of the SS

SAN FRANCISCO certified under the hand and seal of the American Vice Consul at Kobe, Japan; and (4) a photocopy of page 23 of the official log book of the SS SAN FRANCISCO for the same voyage certified by LTJG Stamm which includes the entry certified in the third document. There was no live testimony introduced by the Investigating Officer.

The Appellant offered no evidence in his defense.

At the end of the hearing, the Administrative Law Judge rendered an oral decision (later reduced to writing) in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of two months.

The entire decision was served on 15 August 1978. Appeal was timely filed on 18 August 1978 and perfected on 18 1978.

FINDINGS OF FACT

On 26 January 1978, Appellant was serv*in*g as Ordinary Seaman on board SS SAN FRANCISCO and acting under authority of his document while the vessel was in the port of Livorno, Italy, when he wrongfully failed to join the vessel.

The Appellant signed foreign articles of the SS SAN FRANCISCO as an Ordinary Seaman on 25 November 1977 at Rotterdam, Holland. When the SS SAN FRANCISCO sailed from the port of Livorno, Italy at 0900 on 26 January 1978, the Appellant was not aboard the vessel, as he was required to be, and missed the sailing of the vessel. The Appellant did not rejoin the vessel during the course of her voyage.

At 0900, 26 January 1978, at Livorno, Italy, the master made an entry in the official log book which stated that the Appellant failed to join the vessel at the said time and place on its departure from Livorno and listed the wages due to him. This entry is signed by both the Master and the Chief Officer.

On 23 March 1978, the Coast Guard Investigating Officer, LT C.F. Klingler, USCG, personally served the Appellant with the original of form CG-2639 which continued the charge and specification preferred against him. This form also indicated the time and place for convening the hearing. LT Klingler fully advised the Appellant as to the substance of the charge and the specification, the nature of the proceedings, his rights at the hearing (including his right to counsel), and the results of his

failure to appear at the hearing at the time and place specified.

Four sessions of the proceedings were held on: 27 April 1978, 6 May 1978, 19 June 1978, and 10 July 1978. The Appellant was not present at any of these sessions, nor did a counsel appear in his behalf. At the third session held on 19 June 1978, the Administrative Law Judge, after an inquiry to determine that the Appellant had been charged, duly served with the original of the notice of the time and place of the hearing and the charge and specification, determined that the hearing could proceed in *absentia*.

At the conclusion of the hearing, the Administrative Law Judge entered an order suspending the Appellant's Merchant Mariner's Document for two (2) months.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Appellant communicated significant circumstances to one of the investigating officers which, if presented at the hearing, could have affected the severity of the penalty imposed. The significant circumstances are contained in an affidavit executed by the Appellant on 17 August 1978.

In this affidavit, the Appellant contends that he overslept, missed the sailing of SAN FRANCISCO, and made every reasonable effort to rejoin the ship by travelling at his own expense to her next port of call where he attempted to rejoin the ship and was refused by the Master. The Appellant further contends that he related all of this information to LT Klingler, the investigating officer.

Counsel for the Appellant maintains that 46 CFR 5.20 "requires that all relevant and material facts be brought to the attention of the Administrative Law Judge at the hearing."

APPEARANCE: Edward J. Richardson, Esq., Associate Counsel, Seafarers International Union, Atlantic, Gulf, Lakes, and Inland Waters District AFL-CIO, 275 20th Street, Brooklyn, New York 11232.

OPINION

Counsel for the Appellant has, as his basic contention, the premise that certain information was communicated to the investigating officer which in turn the investigating officer

should have brought forth at the hearing held *in absentia* due to the absence of the Appellant.

The first question for examination is whether allowing the hearing to proceed *in absentia* was proper. In this case, LT Klingler the Investigating Officer, served the Appellant with the original of the charge sheet on 23 March 1978. The charge sheet, CG Form 2639, contained a notice of the time (10:00 AM on 27 April 1978), and the place (Room 608, 6 World Trade Center, New York, New York) of the hearing and the charges and specifications. In addition, the charge sheet contained a provision warning the Appellant that if he failed to appear at the time and place specified, the hearing would proceed in his absence and the Appellant's opportunity to be heard would be forfeited. The regulations governing Suspension and Revocation Proceedings provide in 46 CFR 5.20-25 that:

> In any case in which the person charged, after being duly served with the original of the notice of the time and place of the hearing and the charges and specifications, fails to appear at the time and place specified for the hearing, a notation to that effect shall be made in the record and the hearing may then be *conduct*ed `in absentia'.

The requirements of 46 CFR 5.20-25 were met and the Administrative Law Judge's action in allowing the hearing to proceed "in absentia" was appropriate.

The Appellant failed to appear at the hearing because he elected to sign on as crew aboard another U.S. Merchant Vessel. As a result, the Appellant was at sea at the times that the hearings were held. This fact, however, does not operate to excuse the Appellant's absence and render improper the hearing "in absentia." Decision on Appeal No. 1917, dated 30 March 1973, provides that "voluntary service aboard another vessel after having received adequate notice of the hearing does not excuse Appellant's failure to appear therein." Therefore, the fact that the Appellant was at sea at the time when he was supposed to be in New York for the hearing in this case does not make his absence excusable. As held in the Decision on Appeal No. 1785, dated 8 April 1970,

> A seaman may choose to sail during the pendency of a hearing if he wishes, but when he has been given proper notice of proceedings he cannot complain that an obligation later undertaken prevented him from appearing in his own behalf.

Counsel for the Appellant seems to be asserting that the

Investigating Officer had an affirmative duty to present matters in defense on behalf of a respondent who is voluntarily absent. I do not agree. While it is true that 46 CFR 5.20-1(a) provides that the "Administrative Law Judge shall regulate and conduct the hearing in such a manner so as to bring out all the relevant and material facts," it is reading far too much into that section to say, as did Counsel for the Appellant, that "46 CFR 5.20 requires that all relevant and material facts be brought to the attention of the Administrative Law Judge at the hearing." The regulation speaks to an obligation on the part of the Administrative Law Judge to conduct the hearing in a certain manner, not to an obligation on the part of the Investigating Officer to *ferret out* on behalf of a respondent, who has voluntarily chosen not to appear, all relevant and material facts. The Administrative Law Judge did conduct the hearing in an appropriate manner, particularly in light of the fact that the Appellant's absence was voluntary.

As to any duty on the part of the Investigating Officer to conduct a defense on behalf of an absent person, I have held in Decision on Appeal No. 1764, dated 16 May 1969, that "the Investigating Officer has no duty to produce or offer evidence which a party deigns not to offer for himself." Furthermore, in Decision on Appeal No. 1917, dated 30 March 1973, it was held that "by failing to appear at the hearing as scheduled, the appellant has waived any defenses he may have had." When the Appellant voluntarily absented himself from the hearing, he waived his right to present any evidence in his own behalf. Therefore, since the Appellant elected to not present the evidence contained in his affidavit, the Investigating Officer was under no duty to present the evidence. Nothing improper has occurred.

Even if the Appellant's contention were to be treated as a request for a rehearing due to newly discovered evidence, his appeal must be denied. Newly discovered evidence was defined in Decision on Appeal No. 797, dated 1 October 1954, as "matter that was not known to the applicant at the time of the hearing and that the applicant, with due diligence, could not have discovered prior to the date the hearing was declared closed by the examiner." In this case, all of the matters contained within Appellant's affidavit are matters which are within his knowledge and were known prior to the hearing. None of the material in his affidavit could qualify as "newly discovered evidence." Accordingly, there is no reason to grant a rehearing.

The Appellant has been afforded his opportunity to present a defense and matters in mitigation at the hearing. He voluntarily declined to appear and thus waived his right to present matters in

his own behalf. As was held in Decision on Appeal No. 1723, dated 23 September 1978, "Affirmative defenses must be raised at the hearing and cannot be considered for the first time on appeal." It is therefore too late in the proceedings for the Appellant to assert a defense or matters in mitigation which he could have easily raised at a hearing which he voluntarily chose not to attend.

CONCLUSION

The Administrative Law Judge's decision in this case to hold the hearing "in absentia" was proper. The Investigating Officer is under no affirmative duty to present any matter in defense or mitigation which could have been presented by the Appellant had he elected to attend the hearing.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 2 August 1978, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 22rd day of February 1980.

INDEX

***** END OF DECISION NO. 2186 *****

Top