UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Clyde S. Palmer No. (Redacted)

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2240

Clyde S. Palmer

This review has been taken in accordance with Title 46 United States Code 239(g) and 46 CFR 5.30-1.

By order dated 22 April 1980, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as Able Seaman on board S.S. THOMAS JEFFERSON under authority of the document above captioned, on or about 21 February 1980, Appellant did, while the vessel was in the port of Rotterdam, wrongfully assault and batter with a bottle a shipmate, Erick H. Sorensen, AB, Z-[REDACTED]-DI.

The hearing was held at San Francisco on 21 April 1980.

Appellant failed to appear at the hearing. A plea of not guilty to the charge and specification was entered in his behalf in accordance with 46 CFR 5.20-75, and the hearing proceeded in absentia.

The Investigating Officer introduced in evidence four exhibits.

No evidence was offered in defense.

At the end of the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 25 April 1980.

Appeal was filed on 25 July 1980. A petition to reopen the hearing was filed with the Administrative Law Judge on 27 May 1980 and denied on 27 June 1980.

FINDINGS OF FACT

On 21 February 1980, Appellant was serving as Able Seaman on board the SS THOMAS JEFFERSON and acting under authority of his document while the vessel was in the port of Rotterdam.

Appellant was personally served with the charge and specification and notice of hearing on 18 April 1980. Appellant was advised of the proper procedure to obtain a change of venue. He neither deposited his document nor appeared at the hearing. The hearing proceeded *in absentia* on 21 April 1980 after the Administrative Law Judge insured compliance with 46 CFR 5.20-25. The following day the order of the Administrative Law Judge was signed and mailed to Appellant. The order became effective upon service on Appellant on 25 April 1980.

Appellant filed a petition to reopen the hearing on 27 May 1980, which was denied on 27 June 1980. An appeal was filed on 25 July 1980.

Appellant's prior record was considered by the Administrative Law Judge in determining the order to be entered. The history of previous delinquent acts as entertained by the Administrative Law Judge reads:

Warning, 17 May 1969, Mobile, Alabama; disobeying lawful order of superior officer, SS GULF SHIPPER.

Warning, 17 Aug 1972, Galveston, Texas; failure to relieve watch on time, SS. MARGARET LYERS.

Warning, 7 June 1977, New York; failure to join vessel at Capetown, So. Africa on MORMAC TRADE.

Open Case, 5 May 1978, New York; Assault on fellow crewmember in Yokohama, Japan, aboard SS AMERICAN ASTRONAUT.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that: (1) the Administrative Law Judge erred in proceeding *in absentia* and denying a petition to reopen the hearing; and (2) the Administrative Law Judge erred in imposing revocation since the order was based upon consideration of matters improperly introduced in evidence.

APPEARANCE: R. Layton Mank, Esq., of Blackwell, Walker, Gray, Powers, Flick & Horkel, of Miami, Florida.

OPINION

I

Appellant has in effect taken two appeals; one from the decision and order on the merits, served 25 April 1980, and one from the decision and order dated 27 June 1980 denying Appellant's petition to reopen the hearing. Only the latter of these efforts is timely.

The governing regulations, in accordance with the statute, provide that an appeal by a person found guilty by an Administrative Law Judge must be taken within 30 days of the service of the order. 46 CFR 5.30-1. Since this appeal was filed 25 July 1980, the permissible time limit was clearly exceeded. Appellant does not take the benefit of 46 CFR 5.25-10(i) which tolls the running of the 30-day statutory period of appeal provided in subpart 5.30, since his petition for reopening was not filed within the 30 day period contemplated by subpart 5.25.

Appellant's challenge to the denial of his petition to reopen was timely filed within the 30 days required and will therefore be considered. 46 CFR 5.25-15.

II

The grounds for reopening an R.S. 4450 proceeding are enumerated at 46 CFR 5.25-10(b) and state that the petition "shall only be granted when new evidence is described which has a direct and material bearing on the issues, and when valid explanation is given for the failure to produce this evidence at the hearing." Appellant, by his own petition, has admitted that "the evidence to be presented was known to the [Appellant] at the time of the hearing...." Appellant has not met his burden of demonstrating that this is "new evidence" to justify reopening. Appeal Decision No. 2186. Appellant's anticipation that the original hearing would be transferred to Miami was inappropriate. Appellant was advised of action necessary for a change of venus, namely that he must either appear at the hearing to request a change of venue or make a good faith deposit of his document. Since Appellant neither deposited his document with the Coast Guard office in San Francisco, nor appeared to request a change of venue, he can not rely at a later date on his "reasonable anticipation." The Administrative Law Judge was correct in noting that the charge sheet, receipt of which was acknowledged by Appellant's signature thereon, clearly states the obligation of the party charged to appear before the "Examiner." Under these circumstances, and considering that 46 CFR 5.20-75 and 5.20-25 were complied with, it was permissible for the hearing to proceed *in absentia*.

I therefore conclude that the Administrative Law Judge properly considered Appellant's petition to reopen and was correct in denying the petition.

III

In light of the preliminary discussion above of the appeal process, it is not appropriate to consider Appellant's appeal on the merits. However there is an aspect to this matter which deserves some comment.

Appellant makes much of the fact that two of the three

warnings included as part of his disciplinary record were more than three years old at the time of the hearing. He asserts that they may not be considered because of their age, and that in addition, the third warning involved a matter so minor as to be beyond the discretion of the Administrative Law Judge to take notice of. Appellant is incorrect on both these points. The entire record of a documented mariner may be considered by the Administrative Law Judge. The Table of Average Orders, 46 CFR 5.20-165, merely notes that certain offenses will when committed during given intervals be specially considered as repeated offenses. Certain other offenses are specifically excluded from such automatic "repeater" status irrespective of the lapse of time. Since the table is merely for guidance purposes it would be folly to read more authority into its pronouncements than would be accorded by the Administrative Law Judge in a case. As I have stated before, the entry of an appropriate order is peculiarly within the discretion of the residing Administrative Law Judge, absent some special circumstances. Decision on Appeals Nos. 1989 and 1936. Thus an order of revocation may, in some circumstances, be entered even in the event of a first offense when deemed appropriate.

If the Administrative Law Judge had considered the "Open Case" on Appellant's record as an adjudication of misconduct he would have been in error, since such a designation applies to allegations not yet resolved. Appellant apparently is unaware that the Administrative Law Judge expressly recognized that such an entry could not be considered, when he stated on the record "[w] ell, a pending case has no significance in these proceedings because we consider only the closed cases." He further elaborated"... the man is presumed to be innocent of these matters until they have been determined. So, any record as far as we are concerned, has to be concluded proceedings. I am going to disregard this data in here so far as any determination to this case that has been presented today." Transcript at 13.

In light of these remarks I can find no prejudice to Appellant in the mere fact that the "open case" was noted on the disciplinary record as recited in the opinion of the Administrative Law Judge. It does not appear that the "open case" was utilized by the Administrative Law Judge in arriving at an appropriate order. In consequence, I reject Appellants effort to challenge the order as being founded on improper consideration of the "open case".

CONCLUSION

The Administrative Law Judge properly denied the petition to reopen the hearing in the absence of new evidence or an adequate explanation of why with the exercise of due diligence the evidence proffered could not have been presented at the original hearing. I further conclude that the Administrative Law Judge considered only the permissible items included on Appellant's disciplinary record, in conjunction with the Table of Average Orders, to arrive at an appropriate order in these proceedings.

ORDER

The order of the Administrative Law Judge dated at San Francisco on 22 April 1980, is AFFIRMED.

R. H.SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
ACTING COMMANDANT

Signed at Washington, D.C., this 1st day of April 1981.

***** END OF DECISION NO. 2240 *****

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