

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Douglas B. Hester Z-[REDACTED]

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2263

Douglas B. Hester

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 31 October 1979, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's document for nine months, plus three months on twelve months' probation, upon finding him guilty of misconduct. four specifications were alleged to support the amended charge:

First Specification: In that [Appellant], while serving as able Bodied Seaman aboard SS TRANSCOLORADO under authority of the captioned document, did not or about the 25th of February 1978, while said vessel was in the port of Liverpool, England, wrongfully assault and batter a fellow crewmember, Mr. Gerald R. Drayney.

Second Specification: In that [Appellant], while serving as Able Seaman aboard the SS SANTA MARIA, under authority of the captioned document did on or about 4 November 1978, while said vessel was at sea, wrongfully fail to perform his duties properly due to intoxication.

Third Specification: In that [Appellant], while serving on the SS SANTA MARIA, did on or about 4 November 1978, fail to obey a lawful order of the Master.

Fourth Specification: [Appellant], while serving as

aforesaid, did, on or about the 25th of February, while said vessel was in the port of Liverpool, England, wrongfully assault and batter a fellow crewmember, Joseph C. Lisenby.

Specifications two, three, and four were found proved. The charge of misconduct was found proved. The first specification was found not proved as a result of extreme provocation.

The hearing was held at San Francisco, California from 23 May 1979, through 17 September 1979, in seven sessions.

At the session, Appellant failed to make an appearance, and a plea of not guilty to the charge and each specification was entered in his behalf. At subsequent sessions of the hearing, Appellant was represented by professional counsel.

The Investigating Officer introduced in evidence the testimony of three witnesses and five exhibits.

In defense, Appellant offered in evidence the testimony of three witnesses, including his own, and one exhibit.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and three specifications had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of nine months plus three months on twelve months' probation.

The entire decision was served on 1 November 1979. Appeal was timely filed on 21 November 1978 and perfected on 1 June 1981 after eleven extensions.

FINDINGS OF FACT

On 25 February 1978, Appellant was serving as Able Bodied Seaman on board the SS TRANSCOLORADO and acting under authority of his document while the vessel was in the port of Liverpool, England.

In the early morning hours, Appellant's roommates, Ordinary Seaman Gerald Drayney and Able Seaman Joseph Lisenby, returned from liberty with a female guest and proceeded to have drinks in their room. Another man, Able Seaman Roger Pinkham, joined the group for a drink. Later Appellant joined the group, but became incensed over some racial jokes and ordered the guests to leave so he could sleep. Pinkham left but the others stayed. Appellant left the forecandle to make himself tea in the ship's pantry. Upon completion of this activity, Appellant encountered Lisenby in the

adjacent messroom. An argument developed between them over the presence of the woman in their room, which led to an exchange of racial epithets witnessed by Pinkham. Appellant advanced on Lisenby, who attempted to interpose a chair between himself and Appellant. Appellant avoided the chair and struck Lisenby to the deck with his fist. Appellant continued to strike Lisenby, finally hoisting him into the air and dropping him upon the deck, thereby incapacitating Lisenby, who had made no effort to defend himself.

Appellant proceeded to the Master's cabin, but it was unoccupied. He returned to his own room, which was still occupied by Drayne and the woman. Appellant demanded that the woman leave, and attempted to escort her out by taking her arm. Drayne struck at Appellant, who in turn punched Drayne in the mouth, causing a split lip. Drayne's contrary evidence was not found to be credible by the Administrative Law Judge.

Lisenby and Drayne were taken to a hospital for treatment. Drayne was treated outpatient, but Lisenby required two days of hospitalization. Although Appellant was jailed by the local constabulary, he was not the subject of a complaint by any ship's personnel. Appellant failed to join the vessel when it sailed, due to his incarceration.

On 4 November 1978, Appellant was serving as Able Seaman on board SS SANTA MARIA and acting under authority of his document while the vessel was underway in the Santa Barbara Channel in close proximity to land. Appellant was assigned duties as a helmsman on the 2400-0400 watch. While Appellant was serving as helmsman, the Third Officer noted that the vessel did not respond to ordered course changes. Initially believing that equipment failure was the root of the problem, the officer summoned the Master to the bridge. It was determined that Appellant was the source of the problem, in that he was turning the wheel in a direction opposite to that to which he had been commanded. Alcohol was detected on Appellant's breath, and the Master repeatedly ordered him from the bridge. Appellant did not obey the lawful order, but loudly insisted he had not been drinking, was not drunk, and was capable of steering the vessel. The Master physically escorted Appellant below. No steering problems were encountered after Appellant was removed from the helm.

The charge sheet was served on 18 May 1979, and specified a return date of 23 May 1979, at 1000 hours. Appellant failed to appear as directed. A not guilty plea was entered on his behalf and the matter proceeded in *absentia*. At the conclusion of the session, a finding of misconduct, proved as charged, was rendered on the record, but no order issued pending a review of the

record. Regulations governing in *absentia* proceedings were complied with by the introduction of an Affidavit of Service, and the original charge sheet, signed by Appellant acknowledging his rights. Subsequently, to afford Appellant an opportunity to present a defense, the hearing was reconvened and proceeded through an additional six sessions.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is asserted that Appellant was deprived of due process of law as the result of inadequate notice of hearing and was not accorded his right to confront adverse witnesses.

OPINION

I

Appellant correctly notes that R.S. 4450 requires that a charged party be given reasonable notice of the time, place, and subject of an investigation and an opportunity to be heard in his own defense.

Applying this statutory principle to the instant proceeding, Appellant contends that his assigned duties precluded his appearance, and that officers of the United States Coast Guard advised him that the hearing *could* be continued. Brief at 10. Examination of the record indicates that Appellant was fully advised as to his right of appearance by the charging officer. Record at 150-51; Exhibit 1. Further, Appellant attested to the receipt of the charge sheet by affixing his signature on the reverse thereof. The charge sheet contains simple yet explicit instructions concerning "requests to change time and/or place or hearing," and the results of a failure to appear at the time specified. Attachment To Record, Charge Sheet. If Appellant's argument, that his "assigned duties" precluded his appearance, were accepted, persons charged could with impunity ignore administrative efforts to consider the propriety of their conduct. To avoid this result, while still affording due process to the person charged, provision is made for the person charged to seek a change to the time and place a hearing will be held by application to the Administrative Law Judge - not to the officer serving the charge sheet. The record demonstrates that Appellant made no effort to effect a rescheduling of his hearing. The officer who advised Appellant that the hearing could be continued (Brief at 10) was quite correct; the hearing could have been continued if Appellant had followed the mechanism explained to him and to which he

attested.

Once Appellant was properly advised of his rights and served with the charges, it was not the duty of the Coast Guard to monitor or whereabouts of the party charged. Absent appearance at the hearing of the party charged or his authorized representative, the Administrative Law Judge is authorized to proceed in *absentia*. 46 CFR 5.20-25. That the requirements of 46 CFR 5.20-25(b) were complied with is manifest from the record. Record at 3; Exhibit 1.

It is also apparent from Appellant's testimony that he rendered himself unavailable to appear by shipping out. The Coast Guard can hardly be gainsaid for not preventing his signing articles, since the officers would have no way of knowing if Appellant had arranged to be represented by counsel, as apparently he attempted to do. Record at 134. It was Appellant's burden to appear at the time specified, or to arrange for authorized representation; failing that, it was his responsibility to seek a continuance. His failure to do so does not render the decision of the Administrative Law Judge to proceed a denial of due process. The regulation cited by Appellant, which guides an Administrative Law Judge in granting continuances is thus inapposite, since no continuance was requested. See 46 CFR 5.20-10.

Appellant also contends that his notice was insufficient to justify amendment of the charges to add a fourth specification, to wit: that he assaulted and battered Joseph Lisenby. It is clear, however, that the issue encompassed in the fourth specification is merely a refinement of the original first specification, which alleged assault and battery of "crew member aboard said vessel." The amendment occurred at the third session of the hearing when Appellant's counsel was present, and was based on evidence adduced from a witness presented by the Coast Guard. Record at 71-72. The amendment, in essence, addressed an offense which was fully litigated during the proceedings, and served only to allow greater accuracy in determining whether Appellant assaulted and battered either of two individuals. Under the principles enunciated in *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839 (D.C. Cir. 1950), I am convinced that Appellant was neither surprised nor injured by these conforming amendments. See also Appeal Decision No. [1574](#).

II

Appellant makes reference to the fact that the hearing was "reopened" in order that he might present a defense to the charges.

This is not entirely true. A petition to reopen a hearing is only appropriate after completion of the hearing. 46 CFR 5.20-185; 5.25-1. To be complete, delivery of the decision and order, as well as notification of appeal rights must have occurred. In the instant proceedings, despite a decision being taken at the end of the first session, these critical procedures had not been completed prior to the Administrative Law Judge reconvening the proceedings for the presentation of further evidence. Additionally, it should be noted that even a "reopened" hearing is not a hearing *de novo*; although new evidence is adduced, prior testimony is still in effect and the final decision is based on the original hearing and the new evidence.

The label applied to the proceeding after the first session, is actually not of critical significance here. Although Appellant deprived himself of the opportunity to cross-examine two government witnesses, he was not prevented from recalling those witnesses. Appellant waived his right to cross-examine the government witnesses, not only by his stipulation on the record to the effect that the Coast Guard would not be required to "reproduce" the witnesses (Record at 29-30), but also by his failure to appear at the first session after due notice. Appeal Decision Nos. [1883](#) and 1831; See also Appeal Decision No. [689](#). The record of the second session is clear as to the understanding of the parties, and the condition, based on Appellant's prior conduct, which led to the reconvening.

CONCLUSION

I find that proper deference was given by the Administrative Law Judge to the law governing the conduct of R.S. 4450 proceedings. Substantial evidence of a reliable and probative character appears in the record to support finding the charged misconduct proved.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California on 31 October 1979, is AFFIRMED.

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

Singed at Washington, D.C., this 8th day of Sept. 1981.

***** END OF DECISION NO. 2263 *****

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