

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-366 201 AND ALL
OTHER SEAMAN'S DOCUMENTS

Issued to: Stanley S. ORKWISZEWSKI

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1900

Stanley S. ORKWISZEWSKI

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 11 June 1970, an Administrative Law Judge of the United States Coast Guard at Philadelphia, Pennsylvania, suspended Appellant, seaman's documents for two months out-right plus three months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a wiper on board SS COMMANDER under authority of the document above captioned, on or about 17 May 1968, Appellant, while the vessel was at the Foreign Port of Amsterdam,

- 1) wrongfully created a disturbance in the crew's messroom;
- 2) wrongfully assaulted and battered the Chief Engineer; and
- 3) wrongfully used threatening words to a fellow crewmember, Able Seaman Edwin Davis.

On the first day of the hearing, Appellant appeared, but his attorney did not. The Administrative Law Judge entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence testimony by the Chief Engineer and Able Seaman Edwin Davis with the stipulation that Appellant's attorney would be furnished a transcript of this testimony and an opportunity to cross-examine at a later date.

In defense, Appellant offered no evidence. The Administrative Law Judge adjourned the hearing instructing him to maintain contact with his attorney and the Investigating Officer. He did not do so and approximately one year later, a registered letter to his last known address having returned marked "addressee unknown", the hearing continued *in absentia* at the Investigating Officer's urging. The Investigating Officer introduced in evidence the returned registered letter, a letter from Appellant's attorney stating that he no longer represented Appellant, and a certified extract from the official log book of COMMANDER.

About one year after the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and the above specification had been proved. The Administrative Law Judge then entered an order suspending all documents issued to Appellant, for a period of two months outright plus three months on twelve months' probation.

The entire decision was served on Appellant on 10 June 1971. Appeal was timely filed on 18 June 1971.

FINDINGS OF FACT

On 17 May 1968, Appellant was serving as a wiper on board the SS COMMANDER and acting under authority of his document while the ship was in the port of Amsterdam.

Due to the procedural nature of the appeal, further findings of fact are unnecessary.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- 1) Appellant was provided neither notice of the continued hearing date nor opportunity to cross-examine the government witnesses;
- 2) Appellant has a true and just defense to the merits; and
- 3) Imposition of the suspension is unwarranted so long after the original hearing date, especially in view of the procedural defects and Appellant's apparently clear record since that time.

APPEARANCE: Goldstein & Goldstein, Philadelphia by Paul M. Goldstein.

OPINION

The original examination of the transitory witnesses in the absence of Appellant's counsel and the agreement for later cross-examination were apparently reasonable under the circumstances. The problem lies in the fact that Appellant was never *actually* afforded the opportunity to conduct such cross-examination or to introduce evidence on his behalf. The reason for this procedural flaw is that he was never given notice of the continued hearing date. 46 CFR 137.05-25 requires actual notice of the time and place of hearing to the person charged. An unsuccessful attempt to serve notice does not fulfill the requirements for a hearing in *absentia*. Such a hearing is justified only when a party, having received notice, fails to appear at the proper time and place. (46 CFR 137.20-25)

It is true that Appellant contributed to the lack of notice by his failure to maintain communications with his attorney and the investigating officer. However, the responsibility is more properly placed on the Administrative Law Judge. 46 CFR 137.20-10 provides that the "may ... adjourn such hearing to a later date ... by announcement at the hearing or by other appropriate notice." The former approach is direct and simple and should probably be utilized whenever possible. If the Administrative Law Judge elects

the latter method, however, he assumes the risk that the party charged will be difficult or impossible to locate. Appellant should not have been permitted depart the hearing without a set date for his return.

This failure of notice amounts to a lack of due process which calls for a remand. This is especially obvious in light of Appellant's assertions of a "true and just defense." However, one must take into account the fact that the alleged misconduct and the original hearing occurred more than four years ago. The two hearing dates were separated by one year. The Administrative Law Judge's order was entered one year later and served upon Appellant still another year later. Thus, a three year delay occurred as a result of the failure to set a definite reappearance date at the close of the first day of hearing. Considering the remedial nature of suspension proceedings (46 CFR 137.01-20) and Appellant's apparently clean record since May 1968, no purpose would be served by further proceedings in this case.

ORDER

The order of the Administrative Law Judge dated at Philadelphia, Pennsylvania on 11 June 1970, is VACATED and the charges are DISMISSED.

The findings are SET ASIDE.

C. R. BENDER
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 14th day of December 1972.

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