U N I T E D S T A T E S O F A M E R I C A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD vs LICENSE NO. 710272 Issued to: Mark R. Skinner, Appellant	:	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2582

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By order dated June 15, 1995, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's merchant mariner's license for one month, upon finding a charge of *violation of law* proved. The single specification supporting the charge was found proved. The specification alleged that appellant, while serving under the authority of his license, violated 46 U.S.C. § 8902 in allowing an unlicensed member of his crew to operate the small passenger vessel, M/V BONNE AMIE.

Hearings were held in Mobile, Alabama on January 27, February 24, and May 12, 1995. Appellant was represented by lawyer counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of three witnesses who were residents of and testified telephonically from Memphis, TN. The Investigating Officer also introduced three exhibits into evidence. Appellant's counsel, who was also appellant's father and owner of the vessel, testified as to the configuration of the vessel. Appellant introduced two exhibits.

The Administrative Law Judge issued a written Decision and Order (D&O) on June 15, 1995. It found the charge and supporting specifications proved, and suspended Appellant's license for one month outright with two months suspension on twelve months probation. The Decision and Order were served on Appellant on June 19, 1995. Appellant filed a timely notice of appeal on July 6, 1995, and, after an extension, perfected it on November 20, 1995.

APPEARANCE: Mr. Roland B. Skinner, [REDACTED].

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the above captioned merchant mariner's license as the master on the M/V BONNE AMIE.

The M/V BONNE AMIE was at all relevant times a United States flag vessel owned by appellant's father. The M/V BONNE AMIE is a 50 gross ton passenger vessel, 50 feet in length used for charter fishing trips in the Gulf of Mexico.

On July 2, 1994, appellant took nine passengers on a fishing trip from Biloxi, Mississippi, to fishing grounds at Chandeleur Islands in the Gulf of Mexico.

Witnesses testified that during the return trip to Biloxi, the evening of July 2, the seas were extremely rough. [TRANSCRIPT (TR) of February 24, 1995, at 91, 122]. Witness Jere Fowler testified that the boat ride back to Biloxi was "unbelievably rough, scary." [*Id.* at 32]. Witness William R. Dixon, Jr., testified:

> The table had these little bar stools . . . We couldn't sit around the table because the boat was pitching and rolling so bad. A couple guys almost fell off of them. So me and this boy, Barry Santucci, were kind of standing up holding onto either a rail on the kitchen table or walking back toward the back of the boat in the doorway just trying to hold on . . . . [*Id.* at 91].

During the return voyage, the passengers gathered in the galley of the vessel, which is immediately aft of the wheelhouse. [*Id.* at 32, 60-61]. The wheelhouse can be entered from the galley by a single interior door. During the return voyage, witness Dixon tried to open this door to go into the wheelhouse but was unable to do so as it was apparently locked. [*Id.* at 69-70, 100-101, 104]. The interior of the wheelhouse was not visible from the galley area. [*Id.* at 35].

Appellant's counsel, his father, told the Administrative Law Judge that he built the M/V BONNE AMIE. [*Id.* at 88]. The Administrative Law Judge allowed Appellant's counsel to be sworn and to testify as to the "layout of the vessel." [*Id.* at 141-150].

Appellant's counsel testified that he had instructed the crew to keep the door between the wheelhouse and the galley locked at night during rough weather so as to keep out passengers. [*Id.* at 143]. He also testified that the wheelhouse had two doors which opened onto the deck; these doors were in addition to the wheelhouse door facing the galley. [*Id.* at 149]. Appellant's counsel testified that there was an "escape" hatch off the forward deck outside the wheelhouse. [*Id.* at 140-144]. He testified that the crew members typically opened the hatch and climbed down a ladder to go below deck to the engine rooms and cabins. [*Id.* at 141-145]. The photograph and diagram of

the vessel from which he testified were both entered into evidence. [Respondent's Exhibits A, B].

On March 3, 1995, the Administrative Law Judge, investigating officer and Appellant's counsel examined the M/V BONNE AMIE in person. [TR of May 12, 1995, at 154; D&O at 6]. On the last day of the hearing, May 12, 1995, the Administrative Law Judge read the measurements of the M/V BONNE AMIE into the record. [TR of May 12, 1995, at 154].

In his D&O, the Administrative Law Judge stated:

> It was observed that the outside emergency hatch which Mr. Skinner referred to is 7'4" from the port and starboard doors of the wheelhouse; the hatch cover measures 25" port to starboard and 18" fore and aft; and a 6' aluminum ladder was temporarily loosely installed in the emergency hatch. [D&O at 6].

The M/V BONNE AMIE departed the Chandeleur Islands fishing grounds at approximately 7:30 p.m. At approximately 10:30 p.m., the passengers observed Appellant come from below deck and go into the wheelhouse. [TR of February 24, 1995, at 33, 55, 61, 78, 92-97, 121-124]. Witnesses Fowler and Dixon each testified [*Id.* at 78 and 92-97] that they saw Appellant enter the wheelhouse at approximately 10:30 p.m., after the M/V BONNE AMIE had entered calmer waters. They also testified that no one went in or out of the wheelhouse for three hours after departure from the Chandeleur Islands [*Id.* at 61, 66-67, 90-99, 112, 115]. Witness Fowler testified he watched the wheelhouse door, which was in "plain view," continuously for three hours. [*Id.* at 61, 66-67, 72-73]. Witness Thomas Hughes testified he saw Appellant walk upstairs toward the wheelhouse wiping his eyes as though he had been asleep. [*Id.* at 129]. Witnesses Fowler and Dixon testified that deckhand Brian May told them he did not possess a merchant mariner's license, and that he had operated the M/V BONNE AMIE through the rough waters [*Id.* at 39, 78, 98]. Witness Fowler testified that deckhand May told him that May was alone in the wheelhouse [*Id.* at 54]. Witness Dixon testified that deckhand May said Appellant was scared to drive the boat in the rough water. [*Id.* at 98].

BASES OF APPEAL

Appellant claims five bases for "assignment of error." They are:

I. Appellant was not allowed to confront and cross-examine the witnesses;

II. The Administrative Law Judge denied appellant a fair trial by restricting cross-examination;

III. Appellant was denied due process because his license was suspended before "final adjudication of his cause;"

IV. The Administrative Law Judge refused to allow the "affidavit" of the deckhand into the record; and

V. The Administrative Law Judge's decision was "arbitrary, capricious, and unreasonable."

OPINION

I

Appellant argues that it was error for the Administrative Law Judge to permit telephone examination of the Coast Guard witnesses because the witnesses could not identify drawings, maps or pictures, and in turn, the Appellant could not properly cross-examine the witnesses. I disagree.

According to 46 C.F.R. § 5.535(f), upon motion of either the investigating officer or the respondent, the Administrative Law Judge may order that the testimony of a witness be taken by telephone conference call, when testimony would otherwise be taken by deposition. The regulations are silent, however, on how to examine a witness about physical or documentary evidence if the witness is testifying by telephone.

A respondent has no right to personally confront witnesses in a purely administrative hearing where procedural due process safeguards are in place. Brown v. Gamage, 377 F.2d 154 (D.C. Cir. 1967); Unglesby v. Zimny, 250 F. Supp. 714 (N.D. CA. 1965). This is also the rule in Suspension and Revocation proceedings. Appeal Decision 2476 (BLAKE), *aff'd sub nom.* Yost v. Blake, NTSB Order No. EM-156 (1989), *aff'd sub nom*. Blake v. Department of Transportation, NTSB, 945 F.2d 408 (9th Cir. 1991)(telephone testimony properly admitted because the procedures used by the Investigating Officer and the Administrative Law Judge were consonant with the provisions of 46 C.F.R. § 5.535(f)). Telephone testimony may capture the testimony of witnesses that may be otherwise unavailable and at the same time satisfy due process requirements. As stated in Blake, *supra*:

> 46 C.F.R. § 5.535(f) specifically permits the Administrative Law Judge to take testimony by telephone when such testimony would otherwise be taken by written deposition. Such procedures are designed to expedite the proceedings when long distances must be traveled by the prospective witness. Moreover, these procedures are consistent with the constitutional concept of due process and are sufficient to protect the legitimate interests of the Appellant.

Id., *citing* Appeal Decision 2252 (BOYCE) (deposition was admissible because the procedure

provided by the regulation is consistent with constitutional notions of due process and is sufficient to protect the legitimate interests of parties charged in these civil proceedings).

As applied to the facts of this case, the taking of telephone testimony was proper. On the first day of the hearing, January 27, 1995, the Administrative Law Judge informed Appellant of his due process rights as contained in 46 C.F.R. § 5.519, and informed Appellant's counsel of the procedure for requesting depositions. [TR of January 27, 1995, at 5-6]. The Investigating Officer informed the Administrative Law Judge and Appellant's counsel that all the witnesses were in Tennessee, beyond the subpoena jurisdiction of the Administrative Law Judge in Alabama, and that the Investigating Officer intended to have them testify by telephone. Appellant's counsel objected, saying, "I think under the due process clause, that we're entitled to confront those accusers, to cross-examine them, to have them identify documents we have here and also to watch their demeanor as they testify . . . ." [TR of January 27, 1995, at 7]. The Administrative Law Judge informed counsel that the regulations provided for telephone testimony and continued the case to February 24, 1995 to give counsel more time to prepare.

Appellant states that "there was no way for the examinee to identify drawings, maps and pictures." This is not true. A number of options were available to Appellant, but he chose not to pursue any of them. Among other things, he could have arranged with the Investigating Officer to send the witnesses copies of the diagrams and maps in advance, notifying them that they would be examined by telephone on those items. An alternative was to pursue depositions of the witnesses, following the procedure specified in 46 C.F.R. § 5.553, and, if granted, either go to Tennessee to participate in the depositions, or otherwise make the exhibits available to the witnesses or give them copies.

Telephone testimony was proper in this case because depositions were appropriate given the witnesses' location outside the subpoena jurisdiction of the Administrative Law Judge. Procedural due process safeguards were in place and followed. Counsel made no attempt on his own to request depositions or to secure the witnesses' presence at the hearing although he had the opportunity to do so or to make other arrangements to get the documentary evidence before the witnesses. Accordingly, the Administrative Law Judge did not err in allowing the Investigating Officer's witnesses to testify by telephone.

II

Appellant next contends that the Administrative Law Judge "restricted cross-examination to a point where Respondent did not receive a fair trial." The hearing transcript does not support this contention.

When Appellant's counsel started cross-examining the first witness, he asked the witness about

his education. [TR of February 24, 1995, at 41]. The Administrative Law Judge did not allow this question because it had "absolutely nothing to do with this charge and specification." [*Id.* at 42]. The Administrative Law Judge then disallowed questions on the witness's work and military experience, criminal record and "whether or not he's ever had any DUIs." [*Id.*]. Appellant's counsel then said he needed to cross-examine the witness "to see if he was drinking, if he was sober, what is [*sic*] his drinking habits . . . ." [*Id.* at 43]. The Administrative Law Judge disallowed this line of questioning until Appellant's counsel made it clear that he wished to cross-examine on the issue of the witness's perception on the day in question. [*Id.* at 44]. The Administrative Law Judge then permitted Appellant's counsel to cross-examine on that issue. [*Id.*]. When Appellant's counsel made an offer of proof, e.g., as to the witness's perception of roughness of the water and why the microwave fell off a bulkhead, the Administrative Law Judge allowed counsel to continue his line of questioning. [*Id.* At 50, 52].

The Administrative Law Judge at a suspension and revocation hearing is charged with ensuring the reception of relevant evidence. 5 U.S.C. §§ 556(c)(3),(d); 46 C.F.R. § 5.501(a); Appeal Decision 2333 (AYALA). Section 5.537(a) of Chapter 46, Code of Federal Regulations, states: "In these proceedings, strict adherence to the rules of evidence is not required. However, the Federal Rules of Evidence, as amended, shall be the primary guide for evidentiary matters, where applicable." Under the Federal Rules of Evidence, irrelevant evidence is inadmissible. Fed. R. Evid. 402. It is evident from the transcript in this case that the Administrative Law Judge, by his rulings, adhered to this principle and did not unfairly limit the scope of cross-examination.

III

Appellant's third basis for appeal is the Administrative Law Judge's order of suspension of appellant's license "before a final adjudication of this cause, thus denying [Appellant] due process as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States of America." I agree that Appellant is entitled to due process in a proceeding involving the suspension or revocation of his license. However, Appellant received all process that was due.

The Administrative Procedure Act, 5 U.S.C. §§ 551-559, applies to suspension and revocation hearings. 46 U.S.C. § 7702. The due process requirements of the Act are implemented through 46 C.F.R. Part 5. Conformity with the provisions of the Act and with the regulations assures due process for mariners involved in a suspension or revocation proceeding. Appeal Decisions 2557 (FRANCIS); 2476 (BLAKE), *aff'd sub nom.* Yost v. Blake, NTSB Order No. EM-156 (1989), *aff'd sub nom*. Blake v. Department of Transportation, NTSB, 945 F.2d 408 (9th Cir. 1991).

In accordance with 46 C.F.R. § 5.567, the Administrative Law Judge ordered outright suspension of Appellant's license for one month, with two months suspension on 12 months probation. [D&O at 8]. Section 5.567 of 46 C.F.R. states in part:

> (a) The Administrative Law Judge enters an order which recites the disposition of the
>
> case . . . . When a charge is found proved, the Administrative Law Judge may order an *admonition*, *suspension* with or without probation, or *revocation* . . .

(c) An order must specify whether the license, certificate or document affected is . . .

> (4) Suspended outright for a specified period, followed by a specified period of suspension on probation.
>
> (d) The order will normally state that the *license . . . is to be surrendered to the Coast Guard immediately*, if the order . . . includes a period of outright suspension.

[Emphases in original].

Because the Administrative Law Judge's order was issued after the evidentiary hearing and after consideration of the evidence in compliance with 46 C.F.R. Part 5, issuance of the order did not deny Appellant due process.

IV

Appellant's fourth basis of appeal is that the Administrative Law Judge refused to allow the "affidavit" of the deckhand Brian May into the record "as requested."

The "affidavit," which is a two page typed statement, purportedly signed by Brian May and notarized, is not listed with the other exhibits. The Administrative Law Judge did not read it into the record or otherwise enter it into evidence. It does not necessarily follow, however, that the Administrative Law Judge "refused" to allow the "affidavit" into the record. The "affidavit" does form part of the record by virtue of its attachment to a letter from the Appellant's counsel saying he would not be present in court on May 12, 1995, the date set for continuation of the defense case. Thus, it is part of the administrative record before me on appeal. *See* 46 C.F.R. §§ 5.563(c) ("The testimony and exhibits presented, together with all papers, requests, and rulings filed in the proceedings are the exclusive basis for the issuance of the Administrative Law Judge's findings and conclusions"), 5.701(b) ("The hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal").

Appellant appears to argue that the "affidavit" was not considered as part of the basis of the Administrative Law Judge's decision. For the reasons discussed below, I conclude that the Administrative Law Judge was not bound to consider the "affidavit."

For no explained reason, neither Appellant nor his counsel were present on May 12, 1995. On that date, the Administrative Law Judge read into the record a letter he had received from Appellant's attorney the same morning, and which was dated the day before. Appellant's attorney said he could not be present for the hearing on May 12, but he could be present on another day, and if he couldn't get a continuance: ". . . please submit the attached affidavit by Brian May into the record. The original is being mailed this date. Thank you for your cooperation . . . ." [TR at 153].

There is no indication from the record that the Investigating Officer received the same letter and "affidavit." There is no certificate of service showing service of the letter or "affidavit" on the opposing party. Nor does the letter itself indicate that a copy was sent to the Investigating Officer. Because no such indications exist, the letter and "affidavit" are therefore *ex parte* communications. The Administrative Procedure Act defines an *ex parte* communication as "an oral or written communication not on the public record with respect to which *reasonable prior notice to all parties* is not given . . . ." 5 U.S.C. § 551(14). [Emphasis added].

Section 5.501(b) of 46 C.F.R. states that the Administrative Law Judge shall be governed by 5 U. S.C. § 557(d)(1) of the Administrative Procedure Act regarding *ex parte* communications. Subsection (A) of 5 U.S.C. § 557(d)(1) prohibits interested persons outside the agency in question from making *ex parte* communications relevant to the merits of the proceeding. Paragraph (C) requires an Administrative Law Judge who is in receipt of such communications to place on the public record of the proceeding "all such written communications."

"If any *ex parte* communications do occur, disclosure of these communications must be placed in the public record of the proceeding. 5 U.S.C. § 557 (d)(1)(C); Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C.Cir.1977). This requirement covers both written and oral communications . . . ." *See* North Carolina Envtl. Policy Inst. v. EPA, 881 F.2d 1250 (4th Cir.1989). The Administrative Law Judge in this case did, therefore, what the law authorized him to do, namely, identify the *ex parte* communications sent to him. The Administrative Law Judge was not required to admit the "affidavit" into evidence. Indeed, the Administrative Procedure Act allowed him to require Appellant "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected." 5 U.S.C. § 557(d) (1)(D).

In the instant case, Appellant did not offer a reason for his failure to appear. Where the respondent has notice of a hearing and fails to appear at the time and place specified for the hearing, the hearing may be conducted *in absentia*. 46 C.F.R. § 5.515. The granting of a continuance is discretionary with the Administrative Law Judge. 46 C.F.R. § 5.511. The Administrative Law Judge was therefore justified in proceeding with the hearing in Appellant's

absence. Failure to appear at the hearing constitutes a waiver of defenses. Appeal Decision 2422 (GIBBONS). No error was committed by the Administrative Law Judge as the affidavit was not required to be entered into evidence and Appellant was not present at the hearing to offer it into evidence.

V

Appellant's final basis for appeal is that the Administrative Law Judge's decision was "arbitrary, capricious, and unreasonable." Appellant makes non-specific arguments that the Administrative Law Judge did not rule objectively in his case. Appellant appears to argue that the Administrative Law Judge's decision is unsupported by the record. I disagree. The Administrative Law Judge's decision is supported by reliable, probative and substantial evidence.

The Administrative Law Judge concluded from the totality of the testimony that the first time Appellant entered the wheelhouse on the return voyage was when the witnesses saw him coming up the stairs from below deck. *See* Findings of Fact above. The Administrative Law Judge concluded therefrom that Appellant must have been below deck at the start of the return voyage. Appellant must therefore have allowed the only other crew member, Brian May, who did not have a merchant mariner's license, to drive the boat between the time of the M/V BONNE AMIE's departure from the Chandeleur Islands and the time of Appellant's entrance into the wheelhouse. The Administrative Law Judge believed the testimony of the three witnesses, including the hearsay testimony regarding deckhand Brian May's statements. The Administrative Law Judge did not, however, find credible the defense contention that Appellant exited the wheelhouse through an apparently adjoining escape hatch to gain access to the engine room: "It was obvious that this emergency hatch would not have been selected as a means of entrance to the engine room from the wheelhouse, particularly in a storm." [D&0 at 6].

The Administrative Law Judge determined the Investigating Officer's witnesses were credible. Credibility of the witnesses is a determination for the administrative law judge presiding over the hearing. Appeal Decisions 2578 (CALLAHAN), 2452 (MORGANDE). The Administrative Law Judge's determinations of credibility and the weight to be given the evidence will be upheld on appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), 2541 (RAYMOND), 2546 (SWEENEY), 2522 (JENKINS), 2492 (RATH), 2333 (AYALA). It is not clear from my review of the record, and the Appellant has not shown, how the Administrative Law Judge's determinations were clearly erroneous, arbitrary, capricious or based on inherently incredible evidence.

CONCLUSIONS

The findings of the Administrative Law Judge are supported on the record by substantial

evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The decision and Order of the Administrative Law Judge dated June 15, 1995, are affirmed.

/S/

R.D. HERR
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, DC, this Fifth day of May, 1997.