

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

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vs.

MERCHANT MARINER'S LICENSE
NO. 729532
AND
MERCHANT MARINER'S DOCUMENT
NO. [REDACTED]
Issued to: ERVIN ADAMS, Appellant

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: DECISION OF THE
:
: VICE COMMANDANT
:
: ON APPEAL
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: NO. 2580
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This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated September 28, 1994, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia suspended Appellant's license and merchant mariner's document for six months, upon finding proved a charge of *misconduct*. Two specifications supporting the misconduct charge were found proved. One specification alleged that appellant failed to perform the required duties of a deck watch officer in leaving the ship's Global Positioning System (GPS) receiver in the "locked" position instead of in the tracking mode. The other specification alleged that appellant, after being re-instructed on the operation of the GPS, acted wrongfully and responded to the master in such a belligerent, agitated and irrational manner as to require relieving appellant of his watchstanding duties. One specification of misconduct was dismissed during a hearing on July 6, 1994. Two other specifications under *misconduct*, and a charge of *incompetence* and its supporting specification, were found not proved by the Administrative Law Judge.

Hearings were held in Baltimore, MD, on April 20, 1994, and in Philadelphia, PA, on July 6, 1994. The Decision and Order with the findings noted above was served on appellant on

September 13, 1994. Appellant filed a timely notice of appeal on

October 13, 1994, and perfected his appeal on December 22, 1994. Despite efforts to locate the complete record, a complete transcript from the July 6, 1994, hearing is not available from the transcription service or any other known source.

Due to the outcome of my review, the Findings of Fact and the Appellant's bases for appeal are not discussed.

APPEARANCE: Appellant, *pro se*.

OPINION

By statute and regulation, the Appellant is entitled to appeal from the decision of the Administrative Law Judge. *See* 46 U.S.C. § 7702; 5C.F.R. § 5.701(a). The Administrative Procedures Act, which governs suspension and revocation hearings, requires that any agency decision on appeal be based on the entire record, including the complete transcript of any hearings. *See* 5 U.S.C. §§ 556(d), (e); 46 U.S.C. § 7702(a); *see also* 46 C.F.R. § 5.701(b) ("The hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal.").

As the administrative record is missing an unknown portion of the transcript from the July 6, 1994, hearing, this appeal presents a different scenario than the incomplete record in Appeal Decision 2565 (COULON). In COULON, the record was incomplete due to the absence of all of the exhibits entered. As copies of the COULON exhibits were available or could be easily replicated, the case was remanded to the Administrative Law Judge for the parties to complete the record for appeal. In the instant appeal, the missing portion of the record, i.e., part of the transcript, cannot be replicated.

In the absence of the complete transcript, the Decision and Order of the Administrative Law Judge cannot be reviewed under the standards established in applicable laws. *See* 5 U.S.C. §§ 556(d), (e); 46 U.S.C. § 7702(a); 46 C.F.R. § 5.701(b). The absence of a complete record on appeal also removes the legal basis to affirm or dismiss the Decision and Order of the Administrative Law Judge. *See* Appeal Decisions 2394 (ANTUNEZ), 2399 (LANCASTER); 2540 (ALFOLDI). Accordingly, the only appropriate order in such cases is to vacate the underlying decision. *Id.*

CONCLUSIONS

The Decision and Order of the Administrative Law Judge cannot be reviewed under applicable

law because a sufficient record of the proceedings can not be prepared.

ORDER

The Decision and Order of the Administrative Law Judge dated September 28, 1994, are VACATED and the findings are set aside.

/S/

R. R. D. HERR
Vice Admiral, U.S. Coast Guard
Vice Commandant
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Signed at Washington, D.C., this 27th day of November, 1996.