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	:	DECISION OF THE
vs.	:	COMMANDANT
LICENSE NO. 86994	:	ON APPEAL
Issued to Darrell Ray Bartholomew	:	NO. 2604

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

By an order dated August 4, 1997, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Mr. Darrell Ray Bartholomew s ("Appellant") license based upon finding proved one specification of *misconduct*. The specification for the charge of *misconduct* alleged that Appellant, while acting under the authority of his license, serving as master aboard the M/V ED, did, on December 8, 1996, wrongfully test positive for alcohol, with a blood alcohol concentration of 0.041.

The hearing was initially scheduled to be held on January 14, 1997 at Beaumont, Texas. Appellant moved for a change of venue to New Orleans, Louisiana. The Administrative Law Judge granted this motion and set the hearing for March 27, 1997 in New Orleans, Louisiana. After the change of venue was granted, the Investigating Officer in New Orleans attempted to contact Appellant, but was unsuccessful. The hearing was opened in New Orleans on March 27, 1997, but the Appellant was not present. The Investigating Officer requested a continuance because the Coast Guard had been unable to contact Appellant and to gather additional evidence. The continuance was granted and the hearing was continued until April 29, 1997. The Coast Guard attempted, but was unable to contact Appellant. The hearing was again opened on April 29, 1997 and the Appellant was not present. The Investigating Officer requested a continuance in order to line up the witnesses and further attempt to reach Appellant. The continuance was granted and the hearing was continued until May 28, 1997. The Coast Guard attempted, but once again was unable to contact Appellant. On May 28, 1997 the hearing was opened. Appellant was not present. The Investigating Officer requested a continuance to organize witnesses and further attempt to reach Appellant. The continuance was granted and the hearing was continued until June 25, 1997. The Coast Guard attempted, but was unable to contact Appellant. The hearing was again opened on June 25, 1997. Appellant was not present. In accordance with 46 C.F.R. § 5.515(b), the Administrative Law Judge established that service of the charge and notice was proper, that Appellant had been apprised of all rights and possible results, including proceeding *in absentia*, and that the proceedings had been properly continued.

The hearing then proceeded *in absentia*. Appellant was charged with *misconduct*, supported by one specification. In Appellant s absence, the Administrative Law Judge entered a response of deny to the charge of misconduct and supporting specification.

The Coast Guard Investigating Officer introduced into evidence the testimony of two witnesses and four exhibits. As Appellant was not present, there was no evidence entered in his defense.

The Administrative Law Judge issued a written Decision and Order ("D&O") on August 4, 1997. The Administrative Law Judge concluded that the charge of *misconduct* and the supporting specification were proved. Upon a finding of proved, the Administrative Law Judge revoked Appellant s license.

The D&O was served on Appellant, by personal service, on October 21, 1997. Appellant, through his attorney, filed a timely notice of appeal. A transcript was not requested. The Appeal was perfected on December 3, 1997. Therefore, the appeal is properly before me.

APPEARANCE: Hearing, in absentia. Appeal, Messrs. Timothy F. Burr and Jason P. Waguespack; Galloway, Johnson, Tompkins & Burr, Suite 4040, One Shell Square, New Orleans, LA 70139.

FINDINGS OF FACT

Appellant was the holder of the above captioned license. See Investigating Officer ("I.O.") Exhibit 2. On December 8 1996, Appellant was acting under the authority of the above captioned license, assigned as master aboard the M/V ED.
See TR at 17-18.

On the evening of December 7, 1996, the Coast Guard received a report that the crewmembers of the M/V ED were consuming alcohol on board the vessel. The Coast Guard transmitted this information to METCO, the towing company that employed the M/V ED. METCO, based on reasonable suspicion, requested that Global Safety and Security and the Coast Guard board the vessel and administer a Breathalyzer test to the entire crew of the M/V ED.

A qualified breath alcohol technician conducted the test. See TR at 28. All proper procedures were followed. Appellant was properly identified. The alcohol sensor was properly calibrated. Appellant was administered the initial test and a confirmatory test. See TR at 30-32; I.O. Exhibit 4. Appellant s blood alcohol content, 0.041, exceeded the alcohol limits of 33 C.F.R § 95.020, which sets the limit at 0.040.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

The Administrative Law Judge conducted the hearing without notice to the Appellant.

The Administrative Law Judge committed error by failing to consider cure.

OPINION

I

Appellant s first contention is that Mr. Bartholomew never received notice of the change of venue, nor did he receive notice of any of the continuances. Without receiving notice, the hearing, held in absentia, violated Appellant s right to due process.

Appellant was properly served with the charge and specification and notice of the time, date, and place of hearing. 46 C.F.R. § 5.107(b) requires that, "The original of the charges and specifications and notice of the time, date and place of the hearing are served upon respondent, either by personal service or certified mail, return receipt requested; restricted delivery (receipt to be signed by the addressee only)." In the instant case, the original of the charge and specification and notice of the time, date and place of the hearing were personally served upon Appellant. Appellant signed the second page of the charge sheet acknowledging service and provided an address and telephone number where he could be contacted for matters regarding the hearing. The acknowledgement stated:

> I HEREBY acknowledge service of the written notice and charges and the substance of the complaint, nature of the proceedings, my rights as specified above, and the results of my failure to appear have been fully explained to me. Additionally, I hereby provide an address and telephone number where I may be contacted regarding this hearing and understand that I must inform the Coast Guard immediately of any changes how I can be contacted.

The address and phone number that Appellant provided was 16415 Buccaneer Dr., Houston, TX 77662, telephone (281) 286-1342. This was signed and dated
December 18, 1996.

Appellant then moved for a change of venue. On January 2, 1997, the Administrative Law Judge granted Appellant s motion for a change of venue from Beaumont, Texas to New Orleans, Louisiana. The change of venue order was a written order, stating the name of the Administrative Law Judge that would preside over the hearing and the time, date, and place where the hearing would be conducted. The order further reiterated that the hearing could proceed in the absence of Appellant if he fails to appear. This order was sent to the same address Appellant specified on his acknowledgement of service as the address where

Appellant may be contacted regarding matters concerning the suspension and revocation hearing. The order was sent via certified mail, return receipt requested and was signed for by a Peggy Lawson, on January 9, 1997.

46 C.F.R. § 5.509 states, "The time and place of opening a hearing may be changed by the Administrative Law Judge by written notice served on the investigating officer and the respondent." It is clear that the Administrative Law Judge has the authority to change the venue, and that the order was written. The question to be resolved is whether the order was properly served upon the Appellant.

As stated previously, service of the charge and specification and notice of the date, time, and location of the hearing must be done by personal service or via certified mail, return receipt requested, restricted delivery. This requirement ensures that notice of the charges and hearing comports with due process rights. This was complied with.
46 C.F.R § 5.509 does not specify the particular manner in which service of a change of venue order must be conducted. The presumption is that the initial service was proper and Appellant has provided a correct and proper address where he may be reached. In the instant case, Appellant provided an address where he could be contacted for matters concerning the suspension and revocation hearing.

Once Appellant was properly advised of his rights and served with the charge, it is not the Coast Guard s duty to monitor the whereabouts of the party charged. See Appeal Decision 2263 (HESTER). The Administrative Law Judge sent the order via certified mail, return receipt requested to the address provided by Appellant. The order was accepted at the address provided and the return receipt was sent back to the Administrative Law Judge. The Administrative Law Judge sent the order to the address provided by Appellant and verified that it reached that address. In the case of a change of venue order, that is sufficient to meet the due process requirements of notice.

Appellant further contends that even if he were notified of the continuance and change of venue, such notice is not reflected in the record. Parties are entitled to notice of a continuance or change of venue either at a hearing or by other appropriate notice. See 46 C.F.R. § 5.511 (1997). Appellant argues that evidence of appropriate notice must be contained in the record, and that the certified mail return receipt memorializing the delivery of the continuance and change of venue order to Appellant is not part of the record. I disagree.

Notification of a continuance of a hearing, either to a later date or a different place, may be by announcement at the hearing or by other appropriate notice. See 46 C.F.R. § 5.511 (1996). The Administrative Law Judge in Texas sent the change of venue order via certified mail, return receipt requested, to the address provided by respondent on the charge sheet. A copy of the order and the certified mail receipt are attached to the transcript of the first hearing, held in New Orleans. The order and receipt are part of the record. The record consists of the testimony and exhibits presented, together with all papers, requests, and rulings filed in the proceedings. See 46 C.F.R. § 5.803 (1997). The certified mail receipt is a paper, filed by the Administrative Law Judge in Texas. Therefore, the record adequately reflects service of the change of venue order and rescheduled hearing.

After establishing that service of the charge and specification and notice of date, time and location of the hearing was correct and Appellant was properly provided notice of the change of venue, the next consideration is whether notices of the continuations were proper. Notice for a continuance requires that the Administrative Law Judge either announce the continuance at the hearing or use other appropriate notice. See 46 C.F.R.
§ 5.511.

The record is clear that the Coast Guard Investigating Officer made several attempts to contact Appellant before the hearing in New Orleans was scheduled to begin. In accordance with the change of venue order, the hearing was opened on
March 27, 1997. Appellant was not present. The Administrative Law Judge noted on the record that Appellant was absent from the hearing. The Investigating Officer requested a continuance to further attempt to contact Appellant and continue to gather evidence for the hearing. The Administrative Law Judge announced at the hearing the date and time for the continued hearing. In addition, the Coast Guard continued to attempt to contact the Appellant. This same process was repeated at the April 29, 1997, and May 28, 1997, continuances; the Administrative Law Judge noted Appellant s absence on the record and each time the continuance was requested announced the date and time of the continuance, and attempted to contact the Appellant through the Investigating Officer. This meets the requirements of 46 C.F.R. §5.511. Unable to further reach Appellant, the hearing was conducted *in absentia* on June 25, 1997.

46 C.F.R. § 5.515 requires that the Administrative Law Judge ensure that the record contains the facts concerning the service of the charge, specification, and notice of the hearing. The Administrative Law Judge noted on the record that Appellant was absent. He confirmed on the record that Appellant was properly served with the charge and specification, that notice was proper, and Appellant was advised of his rights. The Administrative Law Judge further found that the hearing was properly continued. See June 25 TR at 5-9. Once the Administrative Law Judge confirms that Appellant was properly served with notice and advised of his rights, if the Appellant fails to appear, it is proper to proceed *in absentia*. See Appeal Decisions 2484 (VETTER); 2422 (GIBBONS); 2345 (CRAWFORD).

II

In Appellant s second issue on appeal, he asserts that because Appellant was not present and unable to present evidence of cure, the Administrative Law Judge erred in ordering revocation without first considering cure, citing Appeal Decision 2535 (SWEENEY). I disagree.

Because Appellant did not attend the hearing before the Administrative Law Judge, cure is raised for the first time on appeal. Evidence of cure regarding alcohol in a case of misconduct is evidence of a remedial action undertaken independently by the respondent to be used as a factor which may affect the order. See 46 C.F.R. §5.569. In Appeal Decision 2417 (YOUNG), Respondent was charged with misconduct (failure to perform duties, failure to obey orders, possibly because of drunkeness). Respondent did not attend his hearing, and the charges and specifications were found proved *in absentia*. On appeal, the Commandant refused to entertain evidence of mitigating circumstances related to the

offense because the evidence was not raised at the hearing. Id. at 6.

Appeal Decision 2422 (GIBBONS) follows YOUNG. In GIBBONS, Respondent was charged with two counts of misconduct, one specification each. Respondent did not attend his hearing, and the charges and specifications were found proved *in absentia*. On appeal, Gibbons claims that the charges were unjustified and fabricated were not considered because they were not raised at trial. See also Appeal Decisions 2184 (BAYLESS), 2140 (FROMICH). Following the reasoning of these decisions, Appellant likewise cannot attempt to introduce evidence of remedial action undertaken independently for the first time on appeal when it could have been raised at the hearing.

Further, Appellant s reliance on SWEENEY is misplaced. In that case, it was held that the operative statute mandated an order of revocation unless cure was proven, but the Administrative Law Judge improperly entered an order of less than revocation where no evidence of cure was presented. See Appeal Decision 2535 at 5. In this case, the Administrative Law Judge ordered revocation when no evidence of cure was presented, an action within his discretion. See 46 C.F.R. §5.569(a). Although revocation was not statutorily mandated in this case, the Administrative Law Judge s action was analogous in result to the holding in SWEENEY and ultimately proper.

The proper procedure, in this instance, would have been to seek a petition to reopen the hearing. A petition to reopen a hearing may be sought "on the basis of being unable to present evidence due to the respondent s inability to appear at the hearing through no fault of the respondent and due to circumstances beyond respondent s control." See 46 C.F.R. §5.601. However, as discussed previously, Appellant s absence from the hearing was due to his own undertaking, not by any fault of the Administrative Law Judge or the Investigating Officer. Therefore, even if Appellant followed the proper procedural approach, relief would not have been available.

If appellant wishes to have his license reinstated, he may follow the procedures described in 46 C.F.R. §§ 5.901 5.905.

CONCLUSION

Appellant had proper notice and the Administrative Law Judge properly found the charge of misconduct, supported by one specification, proved by reliable, probative, and substantial evidence.

ORDER

The order of the Administrative Law Judge dated August 4, 1997 is AFFIRMED.

/S/

J. C. CARD

Vice Admiral, U. S. Coast Guard

Acting Commandant

Signed at Washington, D.C., this 06 day of November , 1998.