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
	ON APPEAL
MERCHANT MARINER'S DOCUMENT NO.(REDACTED):	NO. 2559
Issued to: Derek H. NIELSEN, **Appellant.**	

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

By an order dated May 21, 1992, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, revoked Appellant's Merchant Mariner's Document upon finding a *use of a dangerous drug* charge proved. The single specification supporting the charge alleged that Appellant wrongfully used cocaine as evidenced by the results of a random screening test administered on or about January 19, 1992.

The hearing was held at Long Beach, California on March 24, 1992. Appellant waived his right to representation by professional counsel and appeared on his own behalf. Appellant entered an answer of "no contest" to the charge and specification as provided in 46 C.F.R. 5.527. The Investigating Officer

introduced two exhibits into evidence. The Appellant introduced no evidence on defense. After the Administrative Law Judge found the charge and supporting specification proved by the Appellant's answer of "no contest," one additional Investigating Officer exhibit and two exhibits from the Appellant were admitted in aggravation and mitigation.

The Administrative Law Judge's written decision and order revoking all licenses and documents issued to Appellant was entered on April 13, 1992. Service of the decision and order was made on April 23, 1992. Subsequently, on May 5, 1992 the Appellant filed a petition to reopen the hearing. This petition was denied on May 21, 1992. On May 19, 1992 Appellant filed a notice of appeal. After receipt of the hearing transcript, appellant perfected his appeal by timely filing an appellate brief on September 3, 1992.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned document issued by the U. S. Coast Guard. This merchant mariner's document authorized the Appellant to serve as an ordinary seaman and wiper, and as a food handler in the steward's department.

On January 19, 1992, while serving on board the vessel B. T. ALASKA, the Appellant was randomly selected to participate in a drug screening. The Appellant's urine specimen tested positive for cocaine metabolite. The assessment of the B. T. ALASKA's Medical Review Officer concluded that the urinalysis indicated a positive test. On February 19, 1992, a Coast Guard investigating officer served the Appellant with the above mentioned charge and the one supporting specification. Subsequently, the Administrative Law Judge found the charge and supporting specification proved by the Appellant's answer of "no contest."

On May 5, 1992, the Appellant filed a petition to reopen the hearing. The bases for the petition included allegations, supported by two sworn affidavits, that the investigating officer had advised the Appellant that if he answered "no contest" to the charge and specification, that he would "more likely than not" receive a suspension of his document for three to eight months rather than revocation. The petition to reopen the hearing was denied by the Administrative Law Judge "since the respondent ha[d] not alleged any new[ly] discovered evidence and was present at both [sic] sessions of the hearing."

BASES OF APPEAL

Appellant asserts several bases of appeal from the decision of

the Administrative Law Judge. In effect, the first basis is that Appellant was misled by the Investigating Officer's pre-hearing advice and consequently the Appellant's plea of no contest was improvidently entered. The second asserted basis is that Appellant ineffectively waived his right to counsel. Lastly, the Appellant asserts the statute on which the charge is based, 46 U.S.C. 7704(c), is unconstitutional because it is vague and arbitrary on its face and in its application to the Appellant.

Appearance: Howard D. Sacks, A Law Corporation, 350 West Fifth Street, Suite 202, San Pedro, California 90731.

OPINION

I

The Appellant asserts that he was misled into entering an answer of "no contest" by advice from the Investigating Officer. This advice amounted to: that if during the hearing the Appellant gave an answer of no contest to the charge, he would "more likely than not" receive a suspension of his Merchant Mariner's Document for three to eight months. Because of this, Appellant asserts his answer of no contest was not providently entered. I agree that Appellant's answer of no contest was improvidently entered, but for independent reasons.

In cases involving "admit" and "no contest" answers, Administrative Law Judges must remain constantly vigilant for statements or evidence that are inconsistent with the answer; where such statements or evidence arise, the Administrative Law Judge will suspend the current proceedings, reject the answer and enter an answer of "deny" and proceed with the hearing from that point. 46 C.F.R. 5.533; Appeal Decisions 2107 (HARRIS), 1973 (CRUZ). After the Coast Guard gave its opening statement and introduced its documentary evidence, the Appellant was advised he could then offer evidence relevant "to the finding of proved or not proved." Given the opportunity to speak on defense, the Appellant attempted to introduce an article on false positives associated with drug testing. The Administrative Law Judge then advised the Appellant that if he was alleging his urinalysis was a false positive, then his answer to the charge should have been "deny." Transcript (TR) at 11-12. The Appellant did not change his answer from no contest and instead rested his defense without introduction of any evidence. The Administrative Law Judge then found the specification and charge proved by answer.

While the Administrative Law Judge did properly counsel the Appellant that if he wanted to defend against the charge he

should change his answer, the Judge did not remain vigilant to the Appellant's continuing assertion of innocence. During argument in mitigation, the Appellant introduced a letter from a "Marriage, Family and Child Counselor." TR at 13-14. The name of this counselor was provided to the Appellant by the Investigating Officer and offered as a person that could provide an assessment of the Appellant's drug abuse. In this letter, the counselor described her interview with the Appellant and mentioned that the Appellant had appeared "open and honest" and had denied using cocaine at anytime near the time of the urinalysis. Appellant's Exhibit A1-2. The Administrative Law Judge read the counselor's letter, but did not question the Appellant concerning any of its contents, most notably his denial that he had used cocaine near the time prior to the January 1992 urinalysis. The Appellant's attempted introduction of exculpatory evidence during his defense, and his denial of cocaine use during his argument in mitigation should have alerted the Administrative Law Judge that the Appellant's answer of no contest may have been improvidently entered. In accordance with the regulations at 46 C.F.R. 5.533, the Administrative Law Judge should have rejected the Appellant's no contest answer and entered a denial on behalf of the Appellant.

Additionally, in order to be provident, answers of "admit" or "no contest" to charges and specifications must be intelligently given. Administrative Law Judges must conduct sufficient inquiry to determine the respondent's knowledge and understanding of the elements of the charges and specifications. Appeal Decisions 2466 (SMITH) ("a proper providency inquiry must be conducted when an Appellant answers "admit" or "no contest" to ensure that Appellant understands the nature of each charge and specification and the elements thereof in relation to the facts as the Appellant perceives them"); 2107 (HARRIS) ("plea was clearly based on a misapprehension of its meaning and effect, and was therefore improvidently entered and improperly accepted"). Based on the Appellant's answer of "no contest" to the specification under the charge, the Administrative Law Judge concluded that the specification was proved. Had the charge and the consequences of the no contest answer been fully explained to the Appellant, the answer could have been sufficient to support a finding of proved.

See 46 C.F.R. 5.527(c); Appeal Decisions 2107 (HARRIS), 2466 (SMITH). In this instance however, I find that the Administrative Law Judge did not adequately explain to the Appellant the consequences of his no contest answer so that the Appellant could intelligently enter that answer.

When the Administrative Law Judge explained to the Appellant the possible outcomes of the hearing, he was advised that if the charge and supporting specification were found proved, his

document would be revoked under 46 U.S.C. 7704 unless he provided satisfactory proof of cure. The Administrative Law Judge then gave a cursory explanation of "satisfactory proof." A review of the explanation is in order:

> [ALJ]: . . . If the Charge is found proved, however, Section 7704 of Title 46, United States Code states: "If it is shown that a holder has been the user of or addicted to a dangerous drug, the license, certificate of registry or Merchant Mariner's Document shall be revoked unless the holder provides satisfactory proof that the holder is cured." Now what that means, "satisfactory proof" is satisfactory evidence of rehabilitation. In the case such evidence is produced than [sic] the Order could be less than revocation, which would mean either a suspension of your document, which the suspension might be either outright or on probation or a combination, part outright and part on probation, or an admonition, which admonition becomes part of your official record in Coast Guard Headquarters.

TR at 3-4. Without further discussion of the possible outcomes, the Administrative Law Judge discussed the Appellant's rights. During this exchange, the Appellant revealed himself as a young merchant mariner, new to and much intimidated by the hearing process. TR at 4-5. This should have put the Administrative Law Judge on notice that since Appellant was represented **pro se**, additional explanation of the seriousness of the offense was warranted. *See* Appeal Decision 2466 (SMITH) ("as a pro **se** Appellant, he is not expected to fully understand the legal definition of [the charges] as applied to his situation"). To fully explain the consequences of a no contest plea entered at a hearing occurring so soon after a positive drug test, i.e., occurring before any standard of cure could have been met, it would have been appropriate at this point for the Administrative Law Judge to explain the elements which may constitute proof of "cure" as mentioned in Appeal Decision 2535 (SWEENEY) **rev'd on other grounds sub nom Commandant v. Sweeney**, NTSB Order No. EM-165 (1992).

This brief discussion of the Appellant's hearing rights was followed by a discussion of the answers with which the Appellant could respond to the charge and specification. Although the Appellant was advised that the charge could be found proved by an answer of "admit" or "no contest," the consequence of the possible answers was only tied to the Coast Guard's burden of producing evidence. TR at 5-6. The import of answering "admit" or "no contest," that in this instance 46 U.S.C. 7704(c) required revocation of the Appellant's merchant mariner's document, was not explained. TR at 6.

The acceptance of an improvident answer to a charge constitutes reversible error by the Administrative Law Judge. *See* Appeal Decisions 1767 (CAMPBELL), 2107 (HARRIS). The Appellant's **pro se** representation and obvious lack of familiarity and understanding of the suspension and revocation proceedings should have alerted the Administrative Law Judge to provide a more meaningful explanation of the charge and mandatory sanction provision. In this instance, the failure of the Administrative Law Judge to detect the Appellant's assertions of innocence and in turn reject the Appellant's no contest plea in accordance with 46 C.F.R. 5.533(b), plus the Administrative Law Judge's failure to advise the **pro se** Appellant of the significance of his no contest answer in regards to the pending charge of use of dangerous drugs and its mandatory revocation provision constitute reversible error.

II

The Appellant also argued that his waiver of counsel was ineffective. I agree.

I have previously explained the requirement for Administrative Law Judges to advise respondents of their right to retain counsel. *See* Appeal Decisions 2458 (GERMAN), 2089 (STEWART), and 2119 (SMITH). In Appeal Decision 2530 (GULLEY), I summarized and explained the requirement in a hearing that also involved the charge of use of a dangerous drug. While not pronouncing a bright line test, the explanation included:

> [T]he Administrative Law Judge is required to fully advise the respondent: (1) of his right to have counsel (professional or non-professional representative) represent him at the proceedings at his own expense and (2) of the serious consequences involved in his exercise of the right to go forward **pro se**. Regarding the latter requirement, the Appellant must be informed in clear uncomplicated language of the serious nature of the charge(s) and specification(s) and the potential sanction that could be imposed. . . . In this case, it is particularly significant because the revocation of Appellant's document and potential loss of his livelihood is in issue. . . . [T]he Administrative Law Judge should also fully explain to the respondent the importance of professional counsel in the proceedings and inquire whether the respondent needs additional time (reasonable short continuance) to obtain counsel or inquire as to the availability of **pro bono** counsel.

Appeal Decision 2530 (GULLEY) at 5-6.

Here, the Administrative Law Judge did not inform the Appellant that he could choose representation by someone other than an attorney. The Administrative Law Judge did not clearly explain the possible serious consequences of **pro se** representation. Also, the Appellant was not advised that he could have time to seek **pro bono** counsel; this would have been especially appropriate as the Appellant stated he did want professional counsel, but did not obtain it because he felt it was too expensive for him. For these reasons, I conclude that Appellant's waiver of counsel was not made with full knowledge of the consequences.

An ineffective waiver of the Appellant's right to retain counsel alone does not constitute reversible error. The Appellant must show that defense of his case was prejudiced by his ineffective waiver of counsel before I can conclude that the waiver constitutes reversible error. Appeal Decision 2530 **GULLEY**. Since I have already found that Appellant improvidently entered his no contest answer, the finding of prejudice is ineluctable. By his no contest answer, the Appellant was precluded from defending against the charge. This inability to present any defense because of his improvident answer is reversible error.

III

The Appellant also asserts the statute which forms the basis for the charge, use of a dangerous drug, and the basis for the revocation of his document, 46 U.S.C. 7704(c), is unconstitutional. The Appellant argues the statute is vague and arbitrary on its face and as applied to himself because it does not set out a readily understandable definition of what constitutes satisfactory proof of cure. Appellant raises this issue in the wrong forum. An agency charged with the administration of an act of Congress lacks authority to decide its constitutionality. *See* 4 Davis, **Administrative Law Treatise** 26.6 (1983); Appeal Decisions 2552 (FERRIS), 2433 (BARNABY), 2203 (WEST), 2202 (VAIL). Therefore, I am without authority and decline to answer Appellant's assertions of the statute's unconstitutionality.

IV

The Appellant has raised allegations of impropriety by the Investigating Officer. Recognizing that there are at least two sides to every story and hearing only the Appellant's side, I decline to make a finding on the veracity of the Appellant's assertions; however, because of the seriousness of the allegations, a brief discussion of the consequences of this alleged conduct, if true, is necessary.

Appellant asserts that he was misled by the Investigating Officer when the Investigating Officer charged him with the named offense. This assertion is supported by affidavits from the Appellant and his mother who was also present when the Appellant was charged. These affidavits were part of the Appellant's petition to reopen the hearing. Specifically, the affidavits attested that the Investigating Officer informed the Appellant that if during the hearing he entered an answer of "no contest," he would more likely than not receive a suspension of his document for three to eight months. The affidavits further indicate an intentional or careless disregard by the Investigating Officer of his obligation to ensure a fair proceeding. According to the Appellant, the alleged representation clearly compounded his lack of understanding of the possible hearing outcomes and may have precipitated the errors noted above. Once again, the Investigating Officer has not been given an opportunity to deny or rebut the Respondent's post hearing allegations. The allegations do, however, provide an opportunity to remind all Investigating Officers that erroneous advice on their part, which is relied upon by respondents to their detriment, may be grounds for reversible error. *See generally* Appeal Decisions 1747 (CHALONEC), 2194 (HARTLEY), 2304 (HABECK). Investigating Officers must be careful in their prosecution of these cases to ensure that respondents are afforded due process and that they should approach the hearing with the attitude that they are there to seek justice, not just to prosecute. *See* **Marine Safety** Manual Volume V (Investigations) (Commandant Instruction **M16000.10 Chapter 1 Section 1.C)**.

Additionally, I note that when the Appellant submitted a petition to reopen the hearing to enter a new answer, the merit of the petition should have been addressed by the Administrative Law Judge and the Investigating Officer, rather than summary dismissal because it did not **allege** any newly discovered evidence. Because the Appellant's petition to reopen the hearing did allege that he had been under the impression that a no contest answer would probably result in a suspension of three to eight months, if the allegation were true the Appellant was **in effect** unable to submit evidence in his defense. For to defend against the charges, the Appellant would have risked his ability to stick with his no contest answer. Thus, any evidence the Appellant did want to submit, such as the article about false positives, became unavailable. Since the Appellant's allegations were supported by sworn affidavits, it would have been proper for the Administrative Law Judge to assess the truthfulness of the affidavits. Without sufficient answer by the Investigating Officer, reopening of the hearing would have been appropriate.

CONCLUSION

The Administrative Law Judge did not remain alert to the Appellant's continuing assertions of innocence and reject the Appellant's no contest answer in accordance with the regulations.

Concomitantly, the Administrative Law Judge did not conduct a satisfactory providency inquiry regarding the Appellant's no contest answer. The Administrative Law Judge did not properly advise the Appellant of the seriousness of his proceeding **pro se** and did not afford the Appellant adequate opportunity to obtain representation; this prejudiced the Appellant's defense. The Appellant's waiver of counsel was also not intelligently done and further prejudiced his case.

Because the Administrative Law Judge did not suspend the current proceedings, reject the Appellant's no contest answer, and enter an answer of "deny," the case should be remanded for further proceedings permitting the Appellant to put on a defense.

ORDER

The decision and order of the Administrative Law Judge dated April 13, 1992, is VACATED, and the findings are set aside. The charge and specification are REMANDED for further proceedings consistent with this decision.

Robert E. Kramek
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 25th day of January, 1995.

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