
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

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| UNITED STATES OF AMERICA | : | |
| UNITED STATES COAST GUARD | : | DECISION OF THE |
| | : | |
| vs. | : | VICE COMMANDANT |
| | : | |
| LICENSE NO. 611951 | : | ON APPEAL |
| | : | |
| ISSUED TO: Robert F. ROGERS, | : | NO. 2553 |
| Appellant | : | |
| | : | |

By order dated March 18, 1992, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant Seaman's license for one month outright, plus three months suspension remitted on six months probation on finding proved the charge of negligence and one supporting specification.

The proven specification alleges that Appellant, on or about December 21, 1991, while serving as operator on board the towing vessel PORPOISE, under the authority of the above-captioned license, was negligent in his duties by colliding with the Brazos floodgates on the Gulf Intracoastal Waterway. The collision damaged the floodgates.

A hearing was held at Houston, Texas, on February 20, 1992. Appellant was represented at the hearing by the owner and

President of the towing company which employed Appellant at the time of the allision. Appellant denied the charge and the supporting specification. The Investigating Officer introduced in evidence fifteen exhibits and the testimony of three witnesses. In defense, Appellant offered in evidence his own testimony. The Administrative Law Judge, on his own, introduced in evidence five documents. After the hearing and consideration of the evidence, the Administrative Law Judge rendered a decision on March 18, 1992, in which he concluded that the charge and specification had been found proved. He served a written order on Appellant suspending License No. 611951 for a period of one month outright, plus three months suspension remitted on six months probation. The decision and order were served on March 31, 1992.

Professional counsel representing Appellant submitted a petition to reopen the hearing which was received by the Administrative Law Judge on April 13, 1992. That same attorney withdrew the petition to reopen on May 4, 1992, prior to any decision on the petition. A notice of appeal was subsequently received by the Administrative Law Judge on May 26, 1992, and separately by my staff on June 1, 1992. Appellant's brief was received by my staff on June 20, 1992.

FINDINGS OF FACT

The following Findings of Fact are relevant to this decision.

The Appellant was served with the Administrative Law Judge's Decision and Order on March 31, 1992, as evidenced by his signature on the U.S. Postal Service Form Domestic Return Receipt card. The Appellant's representative during the hearing also received a copy of the Decision and Order on or about March 31, 1992.

On April 13, 1992, the Administrative Law Judge received a petition to reopen the hearing from Appellant's professional counsel. This petition to reopen the hearing was dated April 9, 1992. On May 4, 1992, the Appellant, through his counsel, withdrew the petition to reopen the hearing.

On June 1, 1992, a notice of appeal addressed to Commandant (G-MMI), U.S. Coast Guard, Washington, DC was received by my staff. This notice of appeal was dated May 21, 1992. On May 26, 1992, a separate notice of appeal, dated that same day, was received by the Administrative Law Judge by telefax. This notice of appeal purported to amend the notice sent to my staff. The

notice of appeal, as amended, concluded that it was being filed consistent with the requirements of 46 C.F.R. 5.703(a) and that Appellant had until June 22, 1992 to complete the appeal in accordance with 46 C.F.R. 5.703(c). Appellate's brief, filed on June 20, 1992, did not amplify this conclusion that the notice of appeal had been timely filed.

BASIS OF APPEAL

Due to the disposition of this matter Appellant's basis of appeal is not addressed. The threshold issue is whether Appellant timely filed a Notice of Appeal in accordance with 46 USC 7702 and 46 CFR 5.703.

APPEARANCE: Daniel D. Pipitone of Pipitone, Schauer & Simank,
2000 First City Bank, 615 North Upper Broadway,
Corpus Christi, Texas, 78477.

OPINION

This case addresses the 30 day time requirement for filing a notice of appeal of the decision and order of an Administrative Law Judge and the effect an intervening petition to reopen a hearing, subsequently withdrawn, has on that requirement. Appellant concludes, without analysis, that the petition to reopen the hearing and the notice of appeal were timely filed on the dates they were signed and mailed. I do not agree.

The effective date of the Administrative Law Judge's decision and order begins the statutory period during which a notice of appeal must be filed. This date is the day the decision and order is either personally served on or delivered to, via certified mail, return receipt requested, the respondent or his authorized representative. 46 C.F.R. 5.571.

A notice of appeal must be filed within 30 days of the effective date of the Administrative Law Judge's decision and order. 46 U.S.C. 7702(b); 46 C.F.R. 5.703(a). The notice of appeal must be filed with the Administrative Law Judge or with any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge. 46 C.F.R. 5.703(a).

Limitations on time periods for exercising procedural rights have been viewed by the federal courts as jurisdictional provisions, waivers of sovereign immunity, or as express limitations on rights created by Congress. **Coles v. Penny,**

531 F.2d 609, 613 (D.C. Cir. 1976). Such provisions are strictly enforced. As the **Coles** court noted, the Supreme Court has well stated the general rule on such provisions. "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. (Citations omitted). Remedies for resulting inequities are to be provided by Congress, not by the courts."

Coles at 613, *quoting* *Kavanagh v. Noble*, 332 U.S.

535, 539; 68 S.Ct. 235, 237; 92 L.Ed. 150, 153 (1947).

I have previously considered timeliness as essential for me to have jurisdiction to consider an appeal. **Appeal Decision 1161 (DOROBA)**. Only in cases of extraordinary or extenuating circumstances will the Coast Guard deviate from its practice of strictly adhering to the 30 day provision. See, *Jennings v. Smith*, 280 F.Supp. 1022, 1023 (S.D.N.Y. 1967).

The date a notice of appeal is filed with the Administrative Law Judge is the date such notice is received at the office of either the Administrative Law Judge or an Officer in Charge, Marine Inspection. This is similar to appellate procedure in federal court in which the notice of appeal must actually be received by the clerk of the court before the notice is considered filed. **Rothman v. U.S.**, 508 F.2d 648, 652 (3rd Cir. 1975); **City of Chicago v. U.S. Dept. of Labor**, 737 F.2d 1466, 1471 (7th Cir. 1984). Simply mailing a notice of appeal to the prescribed address within the 30 day period is insufficient; it must actually be received. **Kahler-Ellis Co. v. Ohio Turnpike Comm.**, 225 F.2d 922 (6th Cir. 1955). 46 C.F.R. 5.703(a) is clear that the notice of appeal must be **filed with** the Administrative Law Judge or an Officer in Charge, Marine Inspection; the date of mailing is not offered in the regulations as an alternative.

Appellant's conclusions that the petition to reopen the hearing and the notice of appeal were filed on the dates they were signed and mailed is erroneous. There is nothing in the regulations indicating that a petition to reopen a hearing is effective when mailed to the Administrative Law Judge. Consequently, Appellant's petition to reopen the hearing, dated and presumably mailed on April 9, 1992, did not have any tolling effect until it was actually received by the Administrative Law Judge on April 13, 1993.

When a petition to reopen a hearing has been filed within 30 days of the effective date of the Administrative Law Judge's

Decision and Order, 46 C.F.R. 5.601(b) provides that the 30 day statutory period for filing a notice of appeal is tolled or deferred until the Administrative Law Judge acts on the petition to reopen. The tolling of the 30 day period only stops the advancement of that period; a new 30 day period for filing a notice of appeal on the decision and order is not started after the Administrative Law Judge rules on the merits of a petition to reopen a hearing. [Appeal Decision 1426 \(IRIZARRY\)](#). Where a petition to reopen the hearing is withdrawn by an appellant, the effect is the same. A new 30 day period for filing a notice of appeal is not started.

In this instance, the 30 day period for filing a notice of appeal commenced upon service of the Appellant with the decision and order on March 31, 1992. The period was tolled from April 13 through May 4, 1992, starting when the petition to reopen the hearing was received by or "filed" with the Administrative Law Judge, through the date when the petition was withdrawn by the Appellant. Appellant had used 13 days, i.e., April 1 through April 13, of his 30 day period when the petition was filed. Thus, 17 days remained for the Appellant to file his appeal with the Administrative Law Judge or Officer in Charge, Marine Inspection. On May 26, 1992, 22 days after Appellant withdrew his petition, the Administrative Law Judge received a notice of appeal by telefax. Therefore, not counting the period tolled by the petition to reopen the hearing, the notice of appeal was not received or filed until 35 days after the effective date of the Administrative Law Judge's decision and order.

Since the notice of appeal in Appellant's May 21, 1992, letter directly mailed to my staff offices in Washington, D.C. was also not received until June 1, 1992, a date well outside the 30 day limit, I need not address the question of whether providing the notice of appeal directly to me, rather than the Administrative Law Judge or an Officer in Charge, Marine Inspection, constitutes proper filing of a notice of appeal within the meaning of 46 C.F.R. 5.703(a).

CONCLUSION

The notice of appeal was not timely submitted. Taking into account the tolling effect of Appellant's petition to reopen the hearing, the notice of appeal was submitted thirty-five days after the effective date of the Administrative Law Judge's decision and order. Without a timely notice of appeal, I lack the jurisdiction to hear this appeal on its merits and the appeal

is not accepted.

ORDER

The APPEAL of the decision and order of the Administrative Law Judge dated in Houston, Texas on March 18, 1992, is not ACCEPTED.

Robert T. Nelson

Vice Admiral, U.S. Coast Guard

Vice Commandant

Signed at Washington, D.C., this **4th** day of **November**,
1993.

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