UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: Freddie GULLEY

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2530

Freddie GULLEY

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

By an order dated 8 January 1990, an Administrative Law Judge of the United States Coast Guard at New York, New York revoked Appellant's Merchant Mariner's Document upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 9 February 1990, Appellant was tested and found to be a user of a dangerous drug, to wit: cocaine.

The hearing was held at New York, New York on 30 October 1990. The Investigating Officer introduced one exhibit into evidence and introduced the testimony of one witness. Appellant appeared *prose* and testified in his own behalf. Appellant entered a response of "deny" to the charge and specification as provided in 46 C. F. R. 5.527.

The Administrative Law Judge's written order revoking Appellant's Merchant Mariner's Document was entered on 8 January 1990 (It is noted that this is an administrative error. The date should read "1991"). The decision and order was served on Appellant on 17 January 1991. Appellant filed a notice of appeal on 11 February 1991. Upon request, a transcript of the proceedings was served on Appellant on 8 April 1991. Appellant submitted a brief on 17 June 1991, having received an extension of the filing deadline. Accordingly, this matter is properly before the

Commandant for review.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of Merchant Mariner's Document Number [redacted], issued to him by the United States Coast Guard.

On 9 February 1990, Appellant appeared at the Examination Management Services, Inc. (EMS) at 205 Lexington Avenue, New York, New York, to give a pre-employment specimen of his urine for drug testing purposes. Appellant's specimen was collected on that same date by a designated collector who labelled and sealed the specimen in Appellant's presence. Appellant certified in writing that he provided the specimen and that the specimen was sealed in the presence of the collector in a tamperproof container.

Appellant's urine specimen was subsequently forwarded to Nichols Institute, a Department of Health & Human Services (DHHS), National Institute of Drug Abuse certified laboratory, for chemical analysis. The urine specimen tested positive for cocaine metabolite. A certified copy of the laboratory report was forwarded to Greystone Health Services Corporation, the Medical Review Officer Authority (MRO). The MRO's representative telephonically interviewed Appellant on 14 March 1991. Additionally, the MRO verified the report, the chain of custody of the specimen and conclusively determined that Appellant's specimen tested positive for cocaine.

Appellant did have a medical problem requiring prescribed medications, none of which contained cocaine.

BASES OF APPEAL

Appellant asserts two bases of appeal from the decision of the Administrative Law Judge. However, because of the disposition of this case, only the following basis of appeal is discussed.

The Administrative Law Judge failed to accord Appellant the right to counsel; denied him the right to present evidence or call witnesses; and failed to give him an opportunity to cross-examine Government witnesses.

Appellate brief submitted by: Catherine A. Grad, Esq., The Legal Aid Society, 230 E. 106th St. NY, NY 10029.

OPINION

Appellant asserts that he was not properly accorded the right to counsel, and as a result, was concomitantly denied the right to present evidence and cross-examine witnesses. The nexus of Appellant's assertion is that the Administrative Law Judge's explanation of the right to counsel wa not sufficiently detailed to enable Appellant to make an intelligent and knowledgeable waiver of that right and prejudiced his right to due process. I agree.

There is no requirement that the Government provide counsel at suspension and revocation proceedings. However, it is required that the Administrative Law Judge clearly advise the respondent of the right to be represented by counsel or any other representative at his own expense. Appeal Decisions 2466 (SMITH); 2458 (GERMAN); 2242 (JACKSON & GAYLES); 2327 (BUTTS). In this case, the Administrative Law Judge did advise Appellant of the right to be represented by counsel. A review of that advice is appropriate.

> [ALJ]: You have a right to have an attorney or anyone else you wish to represent you. Do you have anyone that you wish to have represent you?
>
> MR. GULLEY: No, but I need an attorney. I never would have come out without one. I have been sick for two years. I had a triple bypass operation and I cannot afford one.
>
> [ALJ]: We can't give you one.
>
> MR. GULLEY: I know that. He explained this to me. See, because, as far as the Lieutenant told me yesterday, see, they didn't find me guilty and everything without even a trial. . .
>
> [ALJ]: [T]his is the opening of the hearing and I have to advise you of these rights. If you wish to get an attorney and you wish to have somebody else represent you, whether it's a union official or a friend, that's up to you, but I can't make that decision for you.
>
> MR. GULLEY: That's all right.
>
> [ALJ]: You want that?
>
> MR. GULLEY: I don't know nobody. See, the union lawyers, they don't have things like that. They are just for suing. . .

[ALJ]: You wish to represent yourself?

MR. GULLEY: I have to.

[ALJ]: You waive Counsel?

MR. GULLEY: Right. [TR pp. 4-5].

The crucial issue is whether the advice given by the Administrative Law Judge enabled Appellant to make an intelligent and knowing waiver of his right to counsel.

The requirements to establish an intelligent and knowledgeable waiver of counsel have been established by Appeal Decisions 2458 (GERMAN); 2327 (BUTTS); 2089 (STEWART) and 2119 (SMITH). A review of these cases reflects that the 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 the case herein, the record reflects that while the Administrative Law Judge did fully advise Appellant of the right to counsel, he did not explain the consequences of Appellant's decision to undertake a *pro se* representation. In this case, it is particularly significant because the revocation of Appellant's document and potential loss of his livelihood is in issue. It is particularly noteworthy that Appellant clearly stated his recognition that he "need[ed]" professional counsel to undertake a defense. Appellant was of the opinion that he had no choice but to proceed without counsel, notwithstanding his recognition of the need for professional counsel. [TR p. 5].

In addition to the requirements cited above, the 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.

These requirements and considerations are not unduly

burdensome on the administration of the suspension and revocation proceeding. Any imposition is certainly equitably counter-balanced by the importance of ensuring that Appellant is given a reasonable opportunity to adequately function at the proceeding and defend against the charges.

Having found that Appellant's waiver of his right to counsel was not made with full knowledge of the consequences, it is necessary to determine if, as a result of such error, Appellant's defense was prejudiced to any degree. Appellant must show prejudice before it can be concluded that his rights were violated. The showing of a violation of an Appellant's right to counsel is not, in and of itself, cause for remand unless prejudice or unfairness can also be shown. *Smith v. Schweiker*, 677 F.2d 826 (1982); *Smith v. Secretary of HEW*, 587 F.2d 860 (7th Cir. 1978); *Sykes v. Finch*, 443 F.2d 192 (7th Cir. 1971).

Upon a full review of the record, I find that Appellant's due process rights were prejudiced on the basis that the Administrative Law Judge failed to exhaust his duty to aid Appellant in developing a full and fair record of the proceedings. As stated in *Smith v. Schweiker, supra* at 829, citing to *Cowart v. Schweker*, 662 F.2d 731 (11th Cir. 1981): "In carrying out this [Administrative Law Judge's] duty, the ALJ must scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." This standard effectively ensures the full protection of the respondent's rights. See also, *Vance v. Heckler*, 579 F.Supp. 318 (1984).

In this case, on cross-examination, Appellant questioned Mr. George Ellis, the President of Greystone Health Services Corporation (the Medical Review Authority). Appellant specifically probed into the possibility that his urine specimen had been mixed or confused with that of another individual. [TR 37-40]. Appellant indicated that the Medical Review Officer, a Dr. Katsuyama, had previously stated to Appellant that a mix-up of urine specimens was possible. In response, Mr. Ellis attempted to rebut this possibility by stating that it could not be true that Dr. Katsuyama would have told Appellant that a mix-up was possible and characterized Appellant's assertion as "incomprehensible."

Clearly, a major inconsistency regarding a crucial issue was raised during cross-examination. At this juncture in the cross-examination, it was incumbent on the Administrative Law Judge to call Dr. Katsuyama as a witness to resolve this issue. Dr. Katsuyama's testimony could have been received telephonically, as permitted by regulation, with minimum disruption to the

proceedings. In the alternative, or in addition to the testimony of Dr. Katsuyama, the Administrative Law Judge could have obtained the testimony of other witnesses from the testing facility to determine the issue of whether Appellant's urine specimen could have been mixed-up with another urine specimen.

It is noteworthy that when Mr. Ellis stated that he disagreed with Appellant's statement regarding a possible mix-up, Appellant's response, clearly indicating frustration, was: "Everything I say is based right on me. . . It was useless coming here without an attorney." [TR p. 37]. Appellant, in essence, was attempting to articulate the need, not only for professional legal assistance, but also for a witness to corroborate his assertion that a mix-up of his urine specimen was possible.

The failure to fully assist Appellant in his attempt to develop the record by obtaining the necessary additional testimony constituted prejudicial error.

CONCLUSION

Appellant failed to effect a knowing and intelligent waiver of his right to professional counsel. The record reflects that this failure prejudiced Appellant's ability to develop a full and fair record of the proceedings.

ORDER

The Decision of the Administrative Law Judge dated 8 January 199"0" (sic) is VACATED, the findings are SET ASIDE and the charge and specification DISMISSED.

MARTIN H. DANIELL
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 8th day of November, 1991.

***** END OF DECISION NO. 2530 *****

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