

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: John C. SMITH 71178

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2466

John C. SMITH

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

By order dated 3 November 1987, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license for two months' probation upon finding proved the charge of negligence and misconduct. The single specification supporting the negligence charge found proved alleges that on or about 13 August 1987, Appellant, while serving as operator aboard the M/V M. T. SCHEU, under the authority of the captioned license, at approximately Mile 198.1, Arkansas River, negligently allowed an unlicensed individual to operate an uninspected towing vessel and assume direct control of the operation of that vessel. The single specification supporting the misconduct charge found proved alleges that on or about 13 August 1987, Appellant did, while serving as operator aboard the M/V M.T. SCHEU, under the authority of the captioned license, at approximately Mile 198.1, Arkansas River, wrongfully permit said vessel to be operated in violation of the manning requirements of 46 U.S.C. 8904.

At the hearing Appellant appeared without counsel. Upon reading of the charges and specifications, Appellant answered "guilty with an

explanation." The Administrative Law Judge ruled these replies to be answers of "admit".

As a result of the Administrative Law Judge's ruling with respect to Appellant's answers, the charges and specifications were found proved by answer. The Investigating Officer introduced no evidence or witnesses on the merits.

Appellant introduced no evidence in defense on the merits, however he made certain unsworn statements in mitigation.

After the hearing the Administrative Law Judge rendered a decision in which she concluded that the charges and specifications had been proved, and entered a written order suspending all licenses and certificates issued to Appellant for two months on twelve months' probation.

The complete Decision and Order was served on 10 November 1987. Appeal was timely filed and perfected on 8 March 1988. Appellant submitted a Petition to Re-Open the Hearing on 7 December 1987.

FINDINGS OF FACT

Appellant is the holder of a Coast Guard license which authorizes him to serve as operator of uninspected towing vessels.

On 13 August 1987, Appellant was serving as Operator aboard the M/V M.T. SCHEU, an uninspected towing vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant has advanced several bases for appeal. However, because of the disposition of the case, these bases are not discussed.

Appearance: Raymond L. Massey, Esq., William D. Hakes, Esq.; THOMPSON & MITCHELL, One Mercantile Center, Suite 3400, St. Louis, 63101.

OPINION

A

Upon review of the record in this matter, it does not appear from the record that Appellant was adequately advised of his right to be represented by counsel in accordance with 46 CFR 5.519. The Administrative Law Judge failed to advise Appellant that he had a right to be represented by professional counsel or any person he desired. (Transcript at pp. 10-11). Appeal Decision [2209](#) (SIEGELMAN); Appeal Decision [2038](#) (METCALFE). The Administrative Law Judge failed to ask Appellant if he desired to be represented by counsel. (Transcript at pp. 10-11). Appeal Decision [2194](#) (HARTLEY); Appeal Decision [2119](#) (SMITH); Appeal Decision [2089](#) (STEWART). An Administrative Law Judge has the discretion to grant a reasonable continuance to allow an Appellant to arrange representation if it appears that following the advisement of the right to counsel that Appellant, in fact, would prefer some form of representation. Appeal Decision [2008](#) (GOODWIN).

B

Secondly, the Administrative Law Judge did not hold an adequate providency inquiry to determine the Appellant's knowledge and understanding of the elements of the charges and specifications. Appeal Decision [2107](#) (HARRIS). The charges and specifications were found proved upon the basis of Appellant's answers alone. Appellant is required to answer each charge and specification as "admit", "deny", or "no contest" in accordance with 46 CFR 5.527. In this case, Appellant appeared *pro se* at the hearing. With respect to the charge and specification alleging negligence, Appellant answered "I'm guilty, but I want to explain it." (Transcript at p. 18). With respect to the charge and specification alleging misconduct, Appellant answered "I'm still guilty, but I'd like to explain." (Transcript at pp. 19, 20). In both instances, the Administrative Law Judge treated Appellant's statements as answers of "admit" with mitigating explanation. (Transcript at pp. 18-20).

The inadequacy of the providency inquiry is made clear from the Appellant's unsworn statements offered in mitigation:

"In regards to the charges, I definitely let Mr. Grumbles operate the M. T. Schey [sic]. I don't feel like I was negligent ... Until this

incident happened I was unaware that Mr. Grumbles did not have a license. I have towed for Mid-South on other occasions. They furnish a pilot and a crew when I move their equipment. Every other time that I've moved it for them we've had a licensed pilot." (Transcript at p. 26).

"But I had no occasion to ask Mr. Grumbles if he had a license. I just assumed when we made the deal with Mid-South that it would be like it always had been before, he would have a license." (Transcript at p. 27).

Appellant certainly admitted to allowing another individual to operate the vessel in question. However, Appellant clearly felt the individual was properly licensed at the time. As a pro se Appellant, he is not expected to fully understand the legal definition of negligence and misconduct as applied to his situation.

It is the duty of the Administrative Law Judge to query an Appellant sufficiently concerning the facts of the case prior to accepting an answer, especially in situations where the Appellant seeks to explain his answer. Appeal Decision [2107 \(HARRIS\)](#). Furthermore, the Administrative Law Judge, having accepted what amounts to an answer of "admit", must be alert to further statements or evidence that is inconsistent with the answer. In such cases, the Administrative Law Judge has a duty to suspend the current proceedings, enter an answer of "deny", and proceed with the hearing from that point. Appeal Decision [1973 \(CRUZ\)](#). In this case, the Administrative Law Judge did not perceive that Appellant's answers were improvidently made during the course of the hearing. Failure to do so in this case is reversible error. Appeal Decision [2107 \(HARRIS\)](#).

CONCLUSION

For the reasons set forth, the Decision & Order of the Administrative Law Judge must be set aside. An Appellant must be properly advised of his right to counsel and his desire in this matter elicited on the record. Secondly, 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. Absent a provident answer of admit or no contest in this case, there is not substantial evidence of a reliable and probative nature from which to find the charges and specifications proved. Further, because of the nominal sanction imposed, I feel that a rehearing would be inappropriate. The matter of Appellant's Petition to Re-Open the Hearing is moot as a result of this decision.

ORDER

The decision and order of the Administrative Law Judge dated 3 November 1987, at St. Louis, Missouri, is VACATED and the charges are DISMISSED.

CLYDE T. LUSK, JR
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 28th day of June, 1988.

3. HEARING PROCEDURE

.30 Counsel

failure to advise of regulatory right

.83 Answer/Plea

Need for providency inquiry

Withdrawal by ALJ for statements inconsistent with answer

12. ADMINISTRATIVE LAW JUDGES

.01 Administrative Law Judge

duty to advise Appellant of right to counsel

duty to conduct a providency inquiry regarding answers

Appeal Decisions Cited: 1973 (CRUZ); 2008 (GOODWIN); 2038 (METCALFE); 2089 (STEWART); 2107 (HARRIS); 2119 (SMITH); 2194 (HARTLEY); 2209 (SIEGELMAN).

NTSB Cases Cited: None.

Federal Cases Cited: None.

Statutes Cited: None.

Regulations Cited: 46 CFR 5.527, 46 CFR 5.519.

***** END OF DECISION NO. 2466 *****

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