UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Dennis D. VETTER (REDACTED)

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2484

Dennis D. VETTER

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701, 5.607.

By his order dated 22 March 1988, an Administrative Law Judge of the United States Coast Guard at Lost Angeles, California, revoked Appellant's Merchant Mariner's license and document upon finding proved the charge of misconduct. The specifications supporting the charge of misconduct alleged that Appellant, while serving under the authority of his above-captioned license and document, aboard the SS OVERSEAS CHICAGO, did, on 3 February 1988, wrongfully report for watch in an intoxicated condition, wrongfully assault and batter the master and the chief mate, and wrongfully create a disturbance aboard the OVERSEAS CHICAGO.

The hearing was held in absentia under the provisions of 46 C.F.R. SS515.5(a) at Los Angeles, California on 9 March 1988. The Investigating Officer introduced the testimony of three witnesses and four exhibits into evidence. The Administrative Law Judge issued his final Decision and Order on 22 March 1988. Subsequently, Appellant

obtained professional counsel and on 21 April 1988, filed with the Administrative Law Judge: (1) a petition to reopen the hearing; (2) a request for issuance of a temporary license; (3) a notice of appeal. The Administrative Law Judge denied Appellant's request to reopen the hearing and his request for a temporary license on 4 May 1988. On 16 May 1988, Appellant, through counsel appealed to the Commandant. Consequently, Appellant met the filing requirements established in 46 C.F.R. 5.607(a). The Commandant upheld the denial of the request for the issuance of a temporary license and document on 2 August 1988. See, Appeal Decision 2469 (VETTER). The appeal on the merits and on the issue of reopening the hearing is now properly before the Commandant. In his petition to reopen the hearing, Appellant presented evidence that he was incapacitated due to his suffering from influenza while in the Phillipines at the time of the hearing. Appellant submitted a statement from a Phillipine physician to verify the illness. Appellant further submitted that he attempted to contact the Coast Guard via his wife, however, she did not make contact to advise the Coast Guard that Appellant could not be present at the scheduled hearing.

FINDINGS OF FACT

Appellant was the holder of a Merchant Mariner's License No. 575495 which was last issued to him on 23 September 1986 at San Francisco, California, and authorized him to serve as First Assistant Engineer of steam vessels of any horsepower. In addition, Appellant was the holder of a Merchant Mariner's Document No. Z-[redacted]-D4, which was last issued to him on 3 December 1984 at San Francisco, California, and authorized him to serve in any unlicensed rating in the Engine Department.

On 3 February 1988 at Long Beach, California, Appellant was serving aboard the SS OVERSEAS CHICAGO, Official Number 583412, a merchant vessel of the United States, in the capacity of Third Assistant Engineer, and was serving under the authority of his aforementioned license and document.

At or about 1130 on 3 February 1988, Appellant returned by launch to the OVERSEAS CHICAGO, which was anchored in Long Beach Harbor. At that time, Appellant was in an intoxicated condition. Appellant had been assigned the next watch from 1200 to 1600 hours. After an apparent argument with the First Assistant Engineer, the Chief

Engineer advised the Master that Appellant was intoxicated and wanted to quit the vessel. Following a meeting with the Master and the Chief Engineer, Appellant returned to the Master's office, entered and approached the Master. Appellant shouted an obscenity at the Master and then struck the Master with his fist. A scuffle ensued, and finally the Master was able to push Appellant through the door. As Appellant was being taken topside to await the arrival of law enforcement officials, Appellant kicked the Master and the Chief Mate on the leg.

Respondent was served with the charges on 4 February 1988 by the Investigating Officer. The charge sheet stated that the hearing would commence at 0900 on 9 March 1988, Room 721, Union Bank Bldg., 100 Oceangate, Long Beach, CA 90802, PH: [REDACTED]. Appellant personally confirmed the time and place of the hearing with the Investigating Officer by telephone approximately one week before the hearing.

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BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's bases of appeal are:

(1) The in absentia hearing denied Appellant due process, the opportunity to confront and cross-examine witnesses and to present evidence by the in absentia proceeding, in violation of the 5th and 14th Amendments to the U.S. Constitution;

(2) The Decision and Order rendered by the Administrative Law Judge was against the weight of the evidence and was excessive;

(3) The Administrative Law Judge erred in denying Appellant's petition to reopen the hearing.

OPINION

I

Appellant argues that it was error to conduct the hearing on 9

March 1988 in absentia, said hearing violating Appellant's Constitutional rights under the 5th and 14th Amendments to the U.S. Constitution. I disagree.

Appellant's argument is without merit. On 4 February 1988, Appellant was formally informed of the time, place and nature of the suspension and revocation proceedings to be held on 9 March 1988. The signature of Appellant on the reverse of the charge sheet attests to his receipt of the charges and notification of the proceedings. See, Charge Sheet. Additionally, the Investigating Officer confirmed the time and place of the hearing in a telephone conversation with Appellant approximately one week before the hearing. See, record, pp. 3-6.

46 C.F.R. 5.515 states that:

> (a) In any case in which the respondent, after being duly served with the original of the notice of the time and place of the hearing and charges and specifications, fails to appear at the time and place specified for the hearing, the hearing may be conducted "in absentia."

The Investigating Officer complied with the requirements of this regulation. It was Appellant's responsibility and burden to appear at the hearing. In the alternative, Appellant could have arranged for authorized representation at the hearing or to advise the Investigating Officer in advance of his inability to appear. Failing to do either, the decision of the Administrative Law Judge to proceed in absentia was not a denial of due process. Appeal Decision 2234 (REIMANN), Appeal Decision 2263 (HESTER). Once the Administrative Law Judge determines that a respondent has notice of the time and place of the hearing, it is a proper exercise of authority to convene the hearing in absentia where he has failed to appear. Appeal Decision 2422 (GIBBONS), Appeal Decision 2345 (CRAWFORD). Here, the Administrative Law Judge made the proper inquiries and determination. See, record, pp. 3-6. The charge sheet itself, states clearly in bold print that:

> IF YOU FAIL TO APPEAR AT THE TIME AND PLACE SPECIFIED, THE HEARING MAY PROCEED IN YOUR ABSENCE AND YOU WILL FORFEIT OPPORTUNITY TO

BE HEARD AND FURTHER NOTICE.

This warning is repeated on the reverse of the charge sheet in greater detail. Furthermore, below the warning are instructions on how to request a change in time or place of the hearing. Appellant's signature appears directly below these warnings and instructions, acknowledging the substance of the charges and the repercussions of failing to appear at the scheduled hearing. The notice of hearing appearing on the charge sheet provides simple and explicit instructions concerning requests to change time and/or place of the hearing, and it describes the results of a failure to appear at the specified time. The record demonstrates that Appellant made no effort to reschedule the hearing. Appellant's failure to make this request bars him from challenging the Administrative Law Judge's decision to conduct the hearing in absentia. Appeal Decision 2263 (HESTER), Appeal Decision 2422 (GIBBONS). Consequently, the hearing in absentia was proper, was in accordance with applicable regulations, and did not violate Appellants due process rights.

II

Appellant contends that the Decision and Order rendered by the Administrative Law Judge was against the weight of the evidence and was excessive. I disagree.

The three witnesses who testified at the hearing, Chief Engineer Rex Scott, Master Cecil Smith, and Chief Mate William Miller all were on board the SS OVERSEAS CHICAGO on 3 February 1988. All three witnesses personally observed the intoxicated state of Appellant and his disruptive behavior. The Master and the Chief Mate testified that they had been assaulted by Appellant while he was in an intoxicated condition. See, record pp. 30, 47. All three witnesses testified from personal observation and direct knowledge of the incident.

It is the duty of the Administrative Law Judge to determine witness credibility and to weigh the evidence. Appeal Decision 2424 (CAVANAUGH), Appeal Decision 2423 (WESSELS), Appeal Decision 2404 (MCALLISTER). The testimony of the witnesses as reflected in the record is consistent, reliable, and sufficiently detailed for the Administrative Law Judge to have reasonably found the charge and specifications proved. Absent evidence that the Administrative Law Judge was arbitrary or capricious in his determinations, I will not disturb his decision.

The Administrative Law Judge's order of revocation was not excessive. The Administrative Law Judge's order is within the guidance provided in the Table of Average Orders set forth in 46 C.F.R. 5.569. The entry of an appropriate order is peculiarly within the discretion of the Administrative Law Judge absent special circumstances. Appeal Decision 1585 (WALLIS), Appeal Decision 2240 (PALMER), Appeal Decision 2313 (STAPLES), Appeal Decision 2344 (KOHAJDA). I do not find this case to be one of special circumstance and consequently will not disturb the Order of the Administrative Law Judge.

III

Appellant next asserts that the Administrative Law Judge erred in not granting Appellant's petition to reopen the hearing.

46 C.F.R. 5.601 provides:

> (a) A respondent may petition to reopen the hearing on the basis of newly discovered evidence or 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 the respondent's control.

Appellant asserts that his physical incapacitation due to influenza while in the Phillipines, as verified by a physician, is sufficient basis to justify reopening the hearing. I agree.

Appellant, in his 20 April 1988 petition to the Administrative Law Judge, provided verification from Dr. Ernesto L. Luis, M.D., R.P.I., that commencing on 5 March 1988, Appellant was treated for acute influenza. The physician stated that Appellant suffered from headaches, high fever, and muscular and joint pains. The Physician certified that Appellant was incapable of travel. Appellant further stated that he had attempted to contact the Investigating Officer through his wife in order to change the date of the hearing, however, through mixed communications, his wife failed to contact the Investigating Officer.

I find Appellant's incapacitation and excuse for not contacting the Investigating Officer credible. The illness coupled with the distances involved, makes it reasonable to believe that an honest mistake was made in attempting to reach the Investigating Officer. Appellant's statement of the facts is particularly credible in light of the fact that only one week prior to the hearing, Appellant telephoned the Investigating Officer from the Phillipines, advising him that Appellant would be able to attend the hearing. This fact was verified by the Investigating Officer. See, record, p. 4. Appellant consequently demonstrated the ability and the initiative to attend the hearing in earnest.

The Administrative Law Judge, adopted the Investigating Officer's argument in opposition to the granting of Appellant's petition to reopen the hearing. In that argument, the Investigating Officer stated:

> I believe that Mr. Vetter had ample opp-
> ortunity to request a postponement of his
> hearing, which certainly would have been
> granted, and he has presented nothing to in-
> dicate that he has any new evidence to present
> which would materially effect (sic) the outcome of
> the present hearing. P. 2 of Encl. 3 of Admin-
> istrative Law Judge letter of 20 May 1988.

However, the Administrative Law Judge misses the point that under present regulations, failure to request a continuance is not a bar to reopening a hearing. Section 5.603(b)(iii) states that the petitioner must only provide a statement as to why he was unable to appear including the reasons why he did not seek a change (emphasis supplied) in the time or place for the opening of the hearing. In this case, Appellant provided this information in detail. See, Appellant's Petition to Reopen Hearing dated 24 March 1988, filed with the Administrative Law Judge on 21 April 1988. Based on the totality of the circumstances, the supporting evidence provided by Appellant, and Appellant's previous diligence in keeping in contact with the Investigating Officer regarding the hearing, the petition as advanced by Appellant is adequate to support his request to reopen the hearing.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. The Administrative Law Judge's denial of Appellant's petition to reopen the hearing is in error.

ORDER

Appellant's petition to reopen the hearing is GRANTED. The Administrative Law Judge is directed to WITHDRAW the original decision and render a new decision based upon the record of the original hearing and any new or additional evidence received.

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

Signed at Washington, D.C., this 3rd day of May, 1989.

3. HEARING & PROCEDURE

3.57 In absentia proceeding

Proper, does not violate due process rights

3.94 Reopening

Failure to request continuance not a bar to reopening

Incapacitation to request continuance is relevant

5. EVIDENCE

5.23 Credibility of evidence

determination by ALJ accepted

CITATIONS: Appeal Decisions 2469 (VETTER); 2234 (REIMANN); 2262 (HESTER); 2422 (GIBBONS); 2345 (CRAWFORD); 2424 (CAVANAUGH); 2423

(WESSELS); 2404 (MCALLISTER); 1585 (WALLIS); 2240 (PALMER); 2313 (STAPLES); 2344 (KOHAJDA).

STATUTES: 46 USC 7702.

REGULATIONS: 46 CFR 5.701; 46 CFR 5.607; 46 CFR 515.5(a); 46 CFR 5.607(a); 46 CFR 5.569; 46 CFR 5.601; 46 CFR 5.603(b)(iii).

OTHER: U.S. CONSTITUTION, 5th Amendment, 14th Amendment.

***** END OF DECISION NO. 2484 *****

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