

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT  
Issued to: Kevin J. MCGRATH 22289

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2496

Kevin J. MCGRATH

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

By his order dated 2 November 1988, an Administrative Law Judge of the United States Coast Guard at Alameda, California, suspended Appellant's license for two months, remitted on eight months probation, having found proved the charges of misconduct and negligence. The specification supporting the charge of misconduct alleged a violation of law and regulation, that while serving as Operator on board the S/V KIALOA II and under the authority of the above-captioned license, Appellant did, on or about 3 October 1987, while said vessel was located in San Francisco Bay, California operate said vessel without a Certificate of Inspection while carrying eight passengers.

The specification supporting the charge of negligence alleged that Appellant operated the S/V KIALOA II in an unsafe condition in violation of twelve safety regulations while carrying eight passengers.

The hearing was held at Alameda, California, on 29 and 30 October 1987 and on 2 November 1987. Appellant was represented at the hearing

by professional counsel. At the hearing, Appellant entered an answer of "deny" to the charges and specifications.

The Investigating Officer introduced in evidence ten exhibits and the testimony of twelve witnesses. In defense, Appellant offered in evidence eleven exhibits, the testimony of three witnesses, and his own testimony.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been found proved. He served a written order on Appellant suspending License No. 22289 and all other Merchant Mariner licenses and documents issued to Appellant by the Coast Guard, for a period of two months, remitted on eight months probation.

The decision was served on 21 July 1988. The appeal was timely filed on 26 July 1988, and perfected on 3 February 1989 following an extension granted at Appellant's request.

#### *FINDINGS OF FACT*

On 3 October 1987, Kevin J. McGrath (Appellant) was serving as Operator on board the S/V KIALOA II under the authority of Coast Guard issued license No. 22289. The S/V KIALOA II is a 73 foot yawl owned by SAILAWAY ADVENTURES, a limited partnership consisting of two general partners as sole owner (Mr. Frank Robben and his wife).

On 17 September 1987, an informant advised the Coast Guard Marine Safety Office Alameda, California (MSO Alameda) that a yacht broker, OCEAN VOYAGE INC. (OVI), was offering the use of S/V KIALOA II and other yachts under illegal, sham bareboat charter operations. As a result, MSO Alameda initiated an undercover operation for the purpose of determining whether in fact OVI was engaging in any activity in violation of marine safety laws and regulations.

On 18 September 1987, a Coast Guard Investigating Officer, Ms. Franco, arranged for a charter of S/V KIALOA II for 3 October 1987 from 0900 to 1300. Ms. Franco, in her undercover capacity, assumed the identity of a representative of a local law firm. The representative for OVI, Ms. Jones, instructed that no financial arrangement should be made by Ms. Franco with a vessel operator and

that OVI would provide the operator. On 29 September 1987, Ms. Franco tendered acted as the spokesperson and representative of the charter party. The party arrived at the S/V KIALOA II, docked at Richmond harbor, at approximately 0900 on 3 October 1987. At that time, one of the owner's general partners, Mr. Frank Robben (Robben), appeared on the vessel and requested that someone from the party sign the "charter papers." Royce accompanied Robben below deck and was advised by Robben that the papers were signed merely as a "formality" in order to comport with Coast Guard regulations. Robben further advised that actual control of the vessel for navigational purposes would be maintained by Appellant as operator, who was announced as such for the first time. There was no mention of an inventory of equipment, or payment for insurance or fuel other than Robben's statement to Royce to "enter Only six distress signals with a current inspection date; (2) Improper deck rails; (3) No collision bulkhead; (4) No stability letter; (5) No watertight bulkheads; (6) No life float onboard; (7) Insufficient lights on personal flotation devices; (8) Improper ring life buoys; (9) No fire axe; (10) Improper cooking stove; (11) Improperly stowed Emergency Position Indicating Radiobeacon; (12) Non-approved fire fighting system.

Appearance: John E. Droeger, Esq., Hall, Henry, Oliver & McReavy, 100 Bush Street, 13th Floor, San Francisco, CA 94104-3914.

#### *BASES OF APPEAL*

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

a. Coast Guard personnel in arranging the "sting" voyage deliberately acted to prevent a demise of the vessel, and such conduct constituted an impermissible entrapment;

b. The evidence fails to support a finding that Appellant knew or should have known that the charter of the vessel might not meet the Coast Guard's guidelines for demise of the vessel;

c. The Administrative Law Judge's interpretation of 46 C.F.R. 5.535, holding that Appellant's counsel could not examine witnesses after examination by the Administrative Law Judge, denied Appellant procedural due process;

d. Conduct of Coast Guard personnel in giving false testimony requires disregard of such testimony;

e. The charge of negligence, being based upon alleged deficiencies in the vessel's equipment, is improper in that whereas the deficiencies might have supported a charge of "violation of law or regulation"; and, the vessel was not (in the opinion of the officer who brought the charge) unsafe, nor was Appellant negligent in his operation;

f. The safety inspection upon which the alleged deficiencies were grounded was discovered, having been made while the vessel was not in operation (i.e., was tied up at her berth), was ineffective to establish the deficiencies charged against Appellant while acting under the authority of his license;

g. All of the alleged equipment deficiencies were of things not required of uninspected vessels;

h. The inordinate and inexcusable delay between the hearing (November, 1987) and the Decision and Order (July, 1988) and the delay in transcription by the Coast Guard appointed reporter (November, 1988) denied Appellant procedural due process;

i. The Administrative Law Judge's ruling that Appellant's exercise of maneuvering of the vessel was inconsistent with demise control is erroneous;

j. The conduct of the Administrative Law Judge strayed so far from neutrality as to destroy the adversary nature of the proceeding.

## OPINION

### I

Appellant's argument that the conduct of the Coast Guard undercover operation constituted impermissible entrapment is without merit.

First, it must be noted that there are no identified Federal decisions concerning the applicability of the entrapment defense in administrative proceedings. At least one state jurisdiction has recognized entrapment as a defense in administrative proceedings in which revocation or suspension of a professional license is an issue. See, *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 107 Cal. Rptr. 473, 508 P. 2d 1121, 61 A.L.R. 3d 342 (1973). Even assuming, arguendo, that entrapment could be used as a valid defense in the case herein, such a defense is not supported by the facts. As stated in Appeal Decision [2490 \(PALMER\)](#), undercover "sting" operations are "simply one of the many investigative tools that the Coast Guard uses in furtherance to promote safety at sea." It is not the deception that the defense of entrapment forbids, rather it is the inducement of one by a government agent to commit an offense. See, *United States v. Russell*, 411 U.S. 423, 435-36, 93 S. Ct. 1637, 1644-45 (1973). In the case herein, as in *PALMER*, *supra*, there was no inducement or tricking of Appellant or the charter company to engage in a bareboat charter scam. As the Administrative Law Judge found, "There is no showing of any misleading conduct on the part of the Coast Guard personnel involved here...." *Administrative Law Judge's Decision and Order*, p. 21. The Coast Guard undercover personnel, represented by Royce, merely entered into a charter agreement as prepared, drafted and presented by the charter company representatives. It was one of the general partners, Robben, who advised the undercover agent that the charter agreement was merely a "formality" in order to comport with Coast Guard regulations and policy. Moreover, it was OVI that provided the Appellant as vessel operator without the opportunity for the charterer to independently select an operator. Finally, it was Robben and Appellant who controlled the navigational aspects of the vessel while underway. The Coast Guard neither induced nor tricked Appellant, Robben, or OVI representatives into these actions. Consequently, the defense of entrapment is without merit.

## II

Appellant next argues that he had no knowledge of the elements of the charter agreement or of arrangements made between OVI, Robben and the undercover agents posing as the charterer. Consequently, Appellant contends that he cannot be held responsible for misconduct without personal knowledge that a bonafide bareboat charter did not exist. Appellant's contention is without merit.

In the case herein, "knowledge" is not a *prima facie* element. The charge and specifications do not allege scienter and consequently, knowledge and intent do not have to be proven. Indeed, the Commandant has determined in precedent cases that specific intent is not a prerequisite element of a charge of misconduct or a violation of law or regulation in Suspension and Revocation Hearings which are by their nature remedial in nature. Appeal Decision [2490 \(PALMER\)](#); Appeal Decision [2286 \(SPRAGUE\)](#); Appeal Decision [922 \(WILSON\)](#); Appeal Decision [2445 \(MATHISON\)](#); Appeal Decision [2248 \(FREEMAN\)](#).

It is also reasonable to assume that since the general partner, Robben, personally hired Appellant and personally gave him navigation directions, Appellant knew that this was not a bonafide bareboat charter.

### III

Appellant urges that the *Administrative Law Judge's* announcement at the hearing that he would not permit further examination of a witness after he had finished his questioning denied Appellant his procedural due process rights. I do not agree.

Appellant cites portions of the transcript (pp. 280-282) out of context to attempt to demonstrate that Appellant was denied the opportunity to question the witness following examination by the Administrative Law Judge. A thorough review of the transcript clearly indicates that in fact the Administrative Law Judge accommodated every request of Appellant to question the witness. The pertinent portion of the transcript in its entirety is as follows and begins after the Administrative Law Judge had completed the examination of a witness following direct and cross examination by the Investigating Officer and Appellant's counsel.

THE COURT: All right. Thank you, Miss Bucaro.

MR. DROEGER: They've had a chance to question two or three times. If something arises from the questioning of the Court, I think I have a right to follow-up on it.

THE COURT: I'm going to permit it this time, but ordinarily I don't ask questions until I considered you've both had the opportunities you wish.

MR. DROEGER: I understand that sir.

THE COURT: When I ask the questions, then I'm going to excuse the witness as a rule. You've had a number of times at it, so I'll permit you this time, but my procedure is to give the attorneys, the parties, plenty of opportunity to ask their questions.

MR. DROEGER: If your Honor please, yours is in the nature of cross, and in some instances it can be adverse to the Respondent. If it generates a response that requires a further clarification --

THE COURT: I'm pretty lenient on allowing questions, but the regulations require that I'm to elicit the facts that I consider that are pertinent to determination of the issues, and I don't think I've exceeded that in any case.

MR. DROEGER: I didn't suggest that, your Honor.

THE COURT: I'm not saying you suggested it. I'm just giving you the guidelines I follow and giving you some guidelines to limit your questioning. And basically I'd like to see both parties ask all of the questions they feel necessary, and then I ask what I feel is left over and we excuse the witness, but I'll let you ask of this witness.

MR. DROEGER: Thank you, sir.

Transcript, p. 281.

Based on the foregoing, it is clear that the Administrative Law Judge, while explaining an orderly method of questioning witnesses and promoting judicial economy, still permitted Appellant to question the witness even after the questioning by the Administrative Law Judge.

On at least two occasions during the proceeding, the Administrative Law Judge granted the the preceding, the Administrative Law Judge granted the request of Appellant to question a witness out of order or following examination by the Administrative Law Judge. See, Transcript, pp. 139, 152. In fact, a careful review of the record fails to reveal a single instance in which Appellant was denied an opportunity to examine a witness following questioning by the Administrative Law Judge, when Appellant made such request. Consequently, Appellant's assertion is not supported by the record of the hearing and is therefore without merit.

#### IV

Next, Appellant urges that at the hearing, the Coast Guard personnel gave "demonstrably false testimony" when stating that they were not told the charter party was in fact a bareboat charter. I do not agree.

It is the duty of the Administrative Law Judge to evaluate the credibility of witnesses and resolve inconsistencies in testimony or evidence. See, Appeal Decision [2424 \(CAVANAUGH\)](#); Appeal Decision [2386 \(LOUVIERE\)](#); Appeal Decision [2340 \(JAFFEE\)](#); Appeal Decision [2333 \(AYALA\)](#); Appeal Decision [2302 \(FRAPPIER\)](#); Appeal Decision [2116 \(BAGGETT\)](#); Appeal Decision [2460 \(REED\)](#); Appeal Decision [2474 \(CARMENKE\)](#). "Conflicting evidence will not be reweighed on appeal if the findings of the Administrative Law Judge can reasonably be supported." Appeal Decision [2472 \(GARDNER\)](#).

A review of the instant case indicates that the findings of the Administrative Law Judge are in fact reasonably supported by evidence. There is ample evidence in the record that neither OVI nor Robben advised the prospective charter party of the nature of the agreement until Robben presented the written contract to Royce immediately before sailing. The Administrative Law Judge, in his Decision and Order, succinctly addressed this issue. Administrative Law Judge *Decision and Order*, Conclusion of Law 3, p.44. Although other testimony from Appellant's witnesses presented differing evidence, the matter was clearly within the discretion of the Administrative Law Judge and will not be reconsidered on appeal.

#### V



Appellant seems to argue (in a somewhat confusing basis of appeal) that the charge of negligence is improper in that the alleged safety deficiencies upon which the negligence charge was based also formed the basis of the charge of misconduct. In other words, Appellant seems to be urging that the alleged course of misconduct does not support the additional charge of negligence. I agree with Appellant that the charges are multiplicitious, but only for the purposes of awarding a sanction. The exigencies of proof may require multiplicitious or alternative charging in a particular case. See, Decision on Appeal [2491 \(BETHEL\)](#).

The *Administrative Law Judge* recognized this matter wherein he stated: "[s]ince in this instance Respondent's violation of the law and negligence are similar, they are considered jointly rather than separately in setting the sanction here." *Administrative Law Judge Decision and Order*, p. 43.

It is further noted that the charges are not multiplicitious for findings purposes. The charge of misconduct is based on the violation of law in operating a passenger vessel without a Coast Guard Certificate of Inspection. The charge of negligence is based on the Appellant's failure to act as a prudent mariner by carrying eight passengers while the vessel was in an unsafe condition (non-compliance with twelve safety regulations). While the charges emanate from essentially the same course of conduct, they are composed of different elements. Accordingly, both charges will stand, however, they were properly considered as multiplicitious for awarding a sanction.

## VI

Appellant urges that the safety inspection which discovered the safety deficiencies was "ineffective" because the vessel was "tied up at her berth", not "in operation." Based on this analysis, Appellant urges that Appellant could not have been acting "under the authority of his license" at the time the safety violations occurred. I do not agree.

Appellant had just finished his underway cruise when the vessel was boarded. The conditions onboard while underway were the same as when dockside. Additionally, it is noted that a vessel does not have to be underway or away from a berth or mooring to be considered "in operation." In defining the term "operate" for the purposes of the

recodification of Subtitle II of Title 46 U. S. Code, the House Report stated:

The words "operate on" or "on" are. . . intended to cover all operations of a vessel when it is at the pier, idle in the water, at anchor, or being propelled through the water.

H. R. REP. NO. 338, 98th Cong. 121 (1983)

The Coast Guard has consistently given the terms "operate" and "in operation" the broad meaning set forth in the House Report. Consequently, in the case herein, the S/V KIALOA II was "in operation" at the time that the safety violations occurred and the safety inspection was not "ineffective" or improper as urged by Appellant.

#### VII

Appellant urges that the safety equipment violations pertain only to equipment not required of uninspected vessels. While that statement may be true of a bonafide uninspected vessel, here, the S/V KIALOA II was not in fact operating under a valid bareboat charter since as stated, supra, the vessel was carrying passengers for hire. Consequently, the vessel was required to have a Certificate of Inspection pursuant to 46 U.S.C. 3311. Accordingly, the safety violations discovered were not improperly charged and will stand.

#### VIII

Appellant argues that the delay between the hearing (November, 1987) and the Decision and Order (July, 1988) denied him procedural due process. I disagree.

Other than his bare statement, Appellant does not state with specificity or in general how his due process rights were prejudiced. "Speedy trial, as that concept is embodied in the Speedy Trial Act of 1974, 18 U.S.C. 3161(g) does not attach in an administrative proceeding . . . . Bare assertions of prejudice are insufficient to establish that the government's action in the proceedings were unduly

delayed or worked to the injury of the charged party." Appeal Decision [2202 \(VAIL\)](#). Although the hearing was concluded on 2 November 1987, the record was not closed until 28 April 1988 because of various briefs and filings made by Appellant and the Investigating Officer. Considering the Administrative Law Judge's docket, the complexity of the case and the issues involved, an unreasonable amount of time was not taken in this case. It should be noted that even if an unjustified delay existed in this case, that alone would not constitute reversible error. Appeal Decision [1510 \(HILDRETH\)](#).

Since there is no proof that the delay was unjustified or unreasonable or that Appellant in fact suffered any actual unfair prejudice as a consequence of the delay, Appellant's argument is without merit.

## IX

Appellant asserts that the Administrative Law Judge's ruling that Appellant's exercise of maneuvering the vessel was inconsistent with demise control was erroneous. Appellant contends that this determination means that a bareboat charterer must control every aspect of maneuvering (e.g., rudder position, engine speed, compass heading, sail trim, etc.). I do not agree.

Appellant's interpretation of the Administrative Law Judge's finding is a mischaracterization at best. In his written Decision and Order (pp. 23-28), the Administrative Law Judge clearly and in detail elaborated on all of the elements of control that were retained by OVI and/or Robben. The Administrative Law Judge explained that it was the general partner's directions and control over the Appellant as well as other indicia that made it apparat that a bonafide bareboat charter did not exist in this case. While the operator of a vessel may in fact control the "hands on" operation of the vessel, once that operator takes his orders or directions from the owner rather than the demisee/charterer that situation is indeed contrary to the principles of a bareboat charter. Such were the facts of the case herein. A detailed reading of the above-cited portion of the Decision and Order will illustrate that this is the proper characterization of the Administrative Law Judge's finding.

## X

Appellant asserts that the Administrative Law Judge was prejudiced

against him and was biased to the point of "destroying the adversary nature of the proceeding." Appellant's assertion keys on the questioning conducted by the Administrative Law Judge. Appellant urges that the bulk of the questioning done by the Administrative Law Judge elicited testimony adverse to Appellant, ergo, he was prejudiced. Under the provisions of 46 C.F.R. 5.535, the Administrative Law Judge is permitted to question witnesses at any time, at his/her discretion. There is no restriction as to the nature of questions that he/she may ask. In the case herein, a close reading of the record of the proceedings illustrates no bias or prejudice on the part of the Administrative Law Judge. On the contrary, the Administrative Law Judge gave counsel for Appellant every opportunity to cross-examine witnesses following his questioning. The questioning performed by the Administrative Law Judge is reasonable and thorough - a thoroughness certainly expected and appreciated in a complex case such as this.

Bias or prejudice must be affirmatively demonstrated for corrective action to be taken. Appeal Decision [2365 \(EASTMAN\)](#); Appeal Decision [2299 \(BLACKWELL\)](#); Appeal Decision [1554 \(McMURCHIE\)](#). Appellant has failed to make such a demonstration in this case. The Administrative Law Judge's findings are supported by reliable, probative and substantial evidence as required in 46 C.F.R. 5.63. See, Appeal Decision [2468 \(LEWIN\)](#); Appeal Decision [2477 \(TOMBARI\)](#). Consequently those findings will not be disturbed.

#### *CONCLUSION*

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the provisions of applicable regulations. The sanction awarded is neither unjust nor disproportionate for the charges and specifications found proved.

#### *ORDER*

The order of the Administrative Law Judge dated in Alameda, California on 20 July 1988, is AFFIRMED.

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

Signed at Washington, D.C., this 8th day of April 1990.

1. ENABLING AUTHORITY

1.02 Administrative Procedure Act  
CG administrative proceedings governed by

3. HEARING PROCEDURE

3.39 Discovery  
not generally available as of right in administrative proceedings

3.44 Due process  
denial of, not shown  
no denial for curtailment of irrelevant direct examination

3.47.5 Evidence  
evaluation of, duty of ALJ

3.64 Jurisdiction

\*\*\*\*\* END OF DECISION NO. 2496 \*\*\*\*\*

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