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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
vs. LICENSE NO. 705703 and MERCHANT MARINER'S DOCUMENT NO. [redacted]	:	DECISION OF THE COMMANDANT ON APPEAL NO.2609
Issued to David J. Domangue	:	

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

By an order dated May 22, 1996, an Administrative Law Judge (ALJ) of the United States Coast Guard at New Orleans, Louisiana revoked Mr. David Domangue's license and document upon finding proved one charge of *misconduct*. The charge was supported by two specifications. The first specification alleged that Appellant failed to comply with Seacor Marine, Inc.'s ("Seacor") written substance abuse policy, in that he arrived for work on January 11, 1996, as mate onboard the M/V BIGORANGE 30 with a blood alcohol level over 0.04%. The second specification alleged that Appellant, a crewmember of the M/V BIGORANGE 30, acting under the authority of his document and license, did, on January 11, 1996, exceed the standards of intoxication as specified in 33 C.F.R. § 95.020.

The hearing was opened at 0930 on March 12, 1996 in New Orleans, Louisiana. Appellant requested, via letter, a continuance. The continuance was granted and the hearing was continued until 1000 on March 28, 1996. The hearing proceeded on
March 28, 1996. Prior to the start of the continued hearing, Appellant contacted the Investigating Officer to inform him he that he was running late but was on his way to the hearing. The hearing was further continued until 1115 to accommodate Appellant. Appellant failed to arrive at the hearing. The hearing proceeded in his absence.

Appellant was charged with *misconduct*, supported by two specifications. In Appellant's absence, the ALJ entered a plea denying the charge of *misconduct* and two supporting specifications.

The Coast Guard Investigating Officer introduced into evidence the testimony of five witnesses and 13 exhibits. Appellant was not present, therefore, no evidence was offered in his defense.

The ALJ issued a written Decision and Order ("D&O") on May 22, 1996. The ALJ concluded, based on reliable, probative, and substantial evidence, that the charge of *misconduct*, supported by two specifications, was proved. The ALJ revoked Appellant's license.

The D&O was served on Appellant on May 29, 1996. Appellant filed a timely notice of appeal on May 29, 1996. The notice of appeal described with particularity the grounds for the appeal. Appellant submitted a supplemental statement on May 30, 1996. In the case of a *pro se* Appellant, this is sufficient to constitute an appeal brief or memorandum. The appeal is considered perfected.

APPEARANCE: *Pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the above captioned document. See Investigating Officer ("I.O.") Exhibit 1. Appellant was assigned as mate onboard the M/V BIGORANGE 30 on January 11, 1996. See I.O. Exhibit 12.

When Appellant arrived onboard the M/V BIGORANGE 30 on January 11, 1996, he appeared highly intoxicated, smelled of alcohol, and his speech was slurred. Appellant was administered a breath alcohol test. His blood alcohol level was 0.188%. See I.O. Exhibit 13. Appellant's blood alcohol level exceeded Seacor's company policy. See TR at 79. Appellant's blood alcohol level also exceeded the federal standards contained in 33 C.F.R. § 95.020.

Appellant was properly served with the charge and specifications, advised of his rights, and advised that the hearing would proceed without him if he failed to appear. See TR at 9-12.

BASES OF APPEAL

Appellant asserts the following basis of appeal from the Decision and Order of the ALJ: That the sanction of revocation is unduly harsh.

OPINION

Because appellant contends that the sanction of revocation is unduly harsh, he seeks to have the sanction reduced to a suspension with a subsequent period of probation. The sanction imposed at the conclusion of a case is the responsibility of the Administrative Law Judge and an ALJ has broad discretion in determining appropriate sanctions. See 46 C.F.R. §5.569(a). An order imposed at the conclusion of a case will only be modified on appeal if that order is clearly excessive or an abuse of discretion. See Appeal Decision 2256 (BURKE).

Appellant claims that the sanction of revocation is excessive, unduly harsh, and that the ALJ only heard one side of the story. Appellant further contends that there is evidence in mitigation that would demonstrate that a lesser sanction is appropriate.

Matters that will be considered on appeal are "(1) Rulings on motions or objections which were not waived during the proceedings; (2) Clear errors on the record; and (3) Jurisdictional questions." 46 C.F.R §5.701(b). If the evidence is to be considered on appeal, it must have been presented at the hearing. Appellant can not attempt to introduce evidence in mitigation for the first time on appeal when it could have been raised at a hearing that Appellant chose not to attend. See Appeal Decision 2604 (BARTHOLOMEW); 2345 (CRAWFORD); 2289 (ROGERS); 2184 (BAYLESS); 1977 (HARMER).

The major theme of Appellant's request for leniency is that he has a previously unblemished record with the Coast Guard. This evidence was introduced at the hearing and will be considered on appeal. However, Appellant's claim of collusion by the Captain of the M/V BIGORANGE 30 and Seacor's personnel manager and the
M/V BIGORANGE 30's inability to get underway are issues that could have been raised at the hearing. It would be inappropriate to consider those assertions here.

In determining the appropriate sanction, the ALJ, as required by 46 C.F.R
§ 5.569(b), took into consideration the violation itself, the Appellant's record, and evidence in mitigation or aggravation. See D&O at 8. Appellant's previously unblemished record was also taken into consideration. However, the ALJ also weighed Appellant's high level of intoxication, his California conviction for Driving Under the Influence, and his denial of the Investigating Officer's offer to permit Appellant to enter an alcohol rehabilitation program and seek cure. See D&O at 8. Based on the seriousness of the offense and the evidence in mitigation and aggravation, the ALJ concluded that the only appropriate sanction was revocation. I agree.

If Appellant wishes to regain his license, he should follow the procedures outlined in 46 C.F.R. § 5.901.

CONCLUSION

The ALJ properly found the charge of misconduct, supported by two specifications, proved by reliable, probative, and substantial evidence in accordance with 46 CFR § 5.63. Based on the evidence before me I find that the sanction of revocation is not clearly excessive nor an abuse of discretion.

ORDER

The D&O of the ALJ dated May 29, 1996 is AFFIRMED.

//S//

J. C. CARD

Vice Admiral, U. S. Coast Guard

Acting Commandant

Signed at Washington, D.C., this 24th day of June, 1999.