

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD VS.
MERCHANT MARINER'S DOCUMENT No. Z-424 54 5930-D1
Issued to: Levi Jones WILLIAMS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2182

Levis Jones WILLIAMS

This appeal has been taken in accordance with Title 48 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 2 August 1977, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, after a hearing at Boston, Massachusetts, on 31 May 1977, revoked Appellant's document upon finding him guilty of misconduct. The four specifications of the charge of misconduct found proved allege (1) that Appellant while serving as Pumpman aboard SS AMERICAN EAGLE, under authority of the captioned document, was, on or about 12 and 13 May 1977, under the influence of liquor on board said vessel while at sea; (2) that Appellant, while serving as aforesaid, did on or about 12 and 13 May 1977, disobey a lawful order of the Master of said vessel, to wit, ship's standing order number 7; (3) that Appellant, while serving as aforesaid, did, on or about 12 May 1977, place his hand on the "private parts" of crewmember Cadet James Doherty; and (4) that Appellant, while serving as aforesaid, did on or about 12 May 1977, make lewd and obscene comments to a crewmember, Cadet James Doherty.

Appellant did not appear and was not represented at the hearing, which was held in absentia.

The Investigating Officer introduced into evidence the testimony of three witnesses, and eight documents.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and all specification as alleged had been proved. He then entered an order of revocation.

The decision was served on 28 November 1977. Appeal was timely filed on 8 December 1977.

FINDINGS OF FACT

Appellant was serving under authority of his merchant mariner's document as second pumpman/maintenance mechanic aboard SS

AMERICA EAGLE on 12 and 13 May 1977. Because of the disposition of this appeal, no further findings are necessary.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that Appellant wrongfully was refused a continuance and change of venue, that the date for the hearing was not timely and properly set, and that certain exhibits were admitted improperly into evidence at the hearing.

APPEARANCE: Kirby-Smith McDowell, NMU Port Agent, Houston, Texas.

OPINION

Pursuant to 16 CFR 5.20-25, Appellant's hearing was conducted in absentia. Appellant contends that the Administrative Law Judge abused the discretion conferred upon him by the cited regulation in refusing to grant a request for a continuance and change of venue. In light of my review of all the circumstances present in this case, I conclude that this contention is correct.

Appellant was served with the charges in Boston by the Investigating Officer on 16 May 1977, the day after Appellant had been discharged from his employment aboard SS AMERICAN EAGLE. The hearing was scheduled for 31 May 1977, in Boston. (It might be noted that Appellant did not reside in the vicinity of Boston.) There is no indication in the record of the reason for the fifteen day delay. However, neither is there any indication that Appellant objected, at the time of service, to the delay of to the location for the hearing. I am unable to conclude that the fifteen day delay between service of charges and schedule hearing, standing alone, was so inordinate as to require vacation of the order of the Administrative Law Judge.

II

Appellant did not appear for his hearing. Normally, the Administrative Law Judge, in the proper exercise of his regulatorily-conferred discretion, may proceed in absentia. Decisions on Appeal Nos. 1323, 1643, 1907, 1917, 1924, 1949. What distinguishes this case from the norm is that Appellant did, before commencement of the hearing, make an attempt at communicating to the Investigating Officer and the Administrative Law Judge what, upon proper examination, might have been determined to be a sufficient reason for granting a continuance. By means not revealed within the record, Appellant found himself in Mobile, Alabama, on the morning of the day set for his afternoon hearing in

Boston. He alleges on appeal, although this does not appear in the record, that he requested both a continuance and a change of venue. That which transpired later that day during his hearing is best demonstrated by the following excerpt from the record:

"INVESTIGATING OFFICER: Lieutenant Commander, Russell W. BADGER, United States Coast Guard, Investigating Officer.

ADMINISTRATIVE LAW JUDGE: Thank you Mr. Badger. The record shall show that the Respondent is not here nor is there anyone here representing the Respondent.

Now according to this Charge Sheet, a copy of which I have before me, this matter was set for hearing for 31 May 1977, at Room 1704, Post Office Building and Courthouse, Boston, Massachusetts at 2 o'clock P.M., and it appears that the Respondent is not here. Mr. Badger do you have any knowledge of the Respondent's whereabouts?

INVESTIGATING OFFICER: Your honor, when I walked into your secretary's office, this morning at approximately 0920 she said that Lieutenant Commander Buck OWENS had called from Mobile in regards to Mr. Williams, and he wanted me to call him back. Miss Evans made the phone call. I spoke with Lieutenant Commander Owens. He said that Mr. Williams was in his office at Mobile at that time which is approximately 0930 this morning, and said he lost his money, or he didn't have any money to that effect to come to Boston. This was the first communication that I have had from Mr. Williams from the time that he was charged on the 16th.

ADMINISTRATIVE LAW JUDGE: Did you talk with the Respondent?

INVESTIGATING OFFICER: No sir, I did not.

ADMINISTRATIVE LAW JUDGE: Well the standard procedure is to wait a half an hour to give the Respondent an opportunity to appear, but it's now nearly 0215, and having gotten the information that the Respondent was in Mobile this morning at 0930, the chance of his appearing sometime this afternoon between now and 2:30 doesn't seem to be, the change doesn't seem to be too great. What is your, you Mr. Badger as to how we should proceed?

INVESTIGATING OFFICER: Your honor, I recommend that, that we proceed in absentia, in that Mr. Williams did not make any attempt to get in touch with us. Either yourself nor myself until this morning, when he wandered into the Marine

Investigation Office in Mobile and talked to Lieutenant Commander Owens.

ADMINISTRATIVE LAW JUDGE: Well, one of the problems here, of course----

INVESTIGATING OFFICER: We have witnesses that have been subpoenaed here, the company went to great expense, take them off the ship, and it's expensive to them they're losing time, and they are here.

ADMINISTRATIVE LAW JUDGE: Allright, Mr. Badger,...."R.3-4.

Several factors lead me to conclude that the Administrative Law Judge abused his discretion by proceeding in absentia, and not granting at least a short continuance in order that Appellant's request for continuance and change of venue might be explored further.

Appellant was charged with, inter alia, an act of perversion, for which the Coast Guard expressly will seek revocation. See, 46 CFR 5.03-5. In light of this policy, it was incumbent upon the Administrative Law Judge to be especially certain that the discretion vested in him to proceed in absentia not be exercised without good reason. Here, the Administrative Law Judge, in his decision, stated that "[a]t the hearing, the Investigating Officer objected to a Change of Venue or continuance because he had subpoenaed three witnesses from the vessel and had caused them to miss its sailing. After consideration of the matter, the presiding Judge decided to go forward with the hearing in absentia." Neither the excerpted portion, nor any of the remainder, of the record discloses that SS AMERICAN EAGLE had sailed, or that the three witnesses called to the hearing had missed a sailing. To the contrary, a discussion between the Administrative Law Judge and the Investigating Officer about the availability of the chief engineer, R. 15-16, could lead one reasonably to conclude that the vessel was in port in Boston, although not all of the possible witnesses were to be called by the Investigating Officer. In any event, the record establishes that AMERICAN EAGLE had been sailing on "Coastwise Articles," R.50-51; hence, it is not unreasonable to presume that the witnesses could have been made available at a later date, perhaps even at a different location, were a change of venue to be granted. Cf. Decision of Appeal 1935 ("government witnesses were available only upon the date on which they testified and there was little reason to believe that these witnesses and Appellant could be assembled together at some future time.") I am unable to discern that the Administrative Law Judge gave "careful consideration to the future availability of witnesses and the

prompt dispatch of vessel or vessels on which the person charged and/or witnesses may be employed," as required by 46 CFR 5.20-10, before he summarily decided against granting any continuance whatsoever.

The Investigating Officer's characterization of Appellant's actions when requesting a continuance as "wander[ing] into the Marine Inspection Office in Mobile" appears totally unwarranted upon this record, especially in light of the Investigating Officer's failure to speak personally with Appellant when the opportunity presented itself on the morning of the hearing. Had the Investigating Officer discussed with Appellant the reason for his request, the record now might reflect a more convincing reason for the Investigating Officer's objection to the granting of any continuance.

Unlike Decision on Appeal No. 1323, where Appellant's contention, that his lack of finances prevented his appearance, was rejected because Appellant failed to make "this situation known to the Coast Guard [before the hearing] in order to make other arrangements," Appellants here did communicate with the Coast Guard in a timely fashion. Although an earlier communication perhaps was in order, because there is no indication on the record of the circumstances which led Appellant to make his request at the time he did, I am unable to conclude that the request was made too late for Appellant to have at least received more consideration from the Administrative Law Judge and the Investigating Officer that he actually did receive. (I take notice of the fact that in many hearings, even where witnesses have been subpoenaed and are present, continuances are granted for good cause shown. I am unable to say that "good cause" here was shown; nevertheless, in light of the serious nature of the charges, summary dismissal of a presumptively valid request for a continuance, and the holding of Appellant's hearing in absentia, amounted to an abuse of the discretion vested in the Administrative Law Judge and a denial of Appellant's right to due process of law.) I am mindful that a respondent properly give notice of a hearing should not be able arbitrarily to frustrate its commencement. However, I believe that the decision I reach today was fore-shadowed by obiter dictum within an earlier decision. In Decision on Appeal No. 1747, it is stated, "Appellant was on notice of the date, place, and time of hearing. It has been a frequent practice, of which I may take notice, that in these proceedings investigating officers have notified Examiner of communications from persons charged stating reasons for postponement of hearings. when request have been reasonably presented they have been granted."

In consideration of all the circumstances addressed herein, I conclude that Appellant is entitled to a new hearing.

ORDER

The order of the Administrative Law Judge, dated at Boston, Massachusetts, on 2 August 1977 is VACATED. The findings are SET ASIDE. The charges are DISMISSED without prejudice to the institution of further proceedings.

J. B. HAYES
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 22nd day of February 1980

INDEX

Administrative Law Judge

abused discretion in proceeding in absentia

Continuance

request for should be given due consideration by ALJ

Hearings

in absentia hearing denied due process to respondent

Service of Charges

delay between service and date of hearing not excessive per se

Sexual Perversion

revocation sought as sanction