

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT  
Issued to: Thomas J. FIOCCA Z-118-18-9390-D9

DECISION OF THE VICE COMMANDANT APPEAL  
UNITED STATES COAST GUARD

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Thomas J. FIOCCA

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

By order dated 9 October 1979, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for four months, plus four months on twelve months' probation, upon finding him guilty of misconduct and negligence. The six specifications of misconduct found proved allege that while serving as Boatswain on board SS MORMACWAVE under authority of the document above captioned, Appellant: (1) on or about 11 January 1979, failed to perform his duties; (2) on 12 January 1979, failed to perform his regularly assigned duties by being absent from the vessel from 0800 to 1200 and from 1300 to 1700 without sufficient cause; (3) on 22 January 1979, failed to perform his duties in that he was absent from the vessel 0830 to 1200 and from 1300 to 1700 without proper permission; (4) on 23 January 1979, failed to perform his regularly assigned duties from 0800 to 1200 and from 1300 to 1700 without proper permission; (5) on 24 January 1979, failed to obey a lawful order in that when asked by the Master if he would obey orders, he indicated to the master that he would not obey orders; and (6) on 24 January 1979, failed to obey a lawful order of the Chief Mate in that when ordered to appear before the Master to have a log entry read to him, he refused and sent the Chief Mate a note which said, "Drop Dead. the X Bosin."

One specification of negligence found proved alleged that the Appellant while serving as Boatswain on board SS MORMACWAVE under authority of the document above captioned, on or about 22 January 1979, negligently failed to supervise the raising of mooring lines causing the starboard anchor windlass to become engaged, which resulted in damage to the hydraulic lines to the starboard capstan. Another specification of negligence found proved alleged that on 19 December 1978, Appellant caused damage to a Jumbo boom.

The hearing was held at New York, New York, on March 2, 5, and 30 1979; May 29, 1979 and 13 August 1979.

At the hearing, Appellant elected to act as his own counsel and entered a plea of guilty to the first, second, third, fourth and fifth specifications under the charge of misconduct, and not guilty to the sixth specification. He also pleaded not guilty to the charge and specifications of negligence.

The Investigating Officer introduced in evidence four exhibits: (a) an abstract of line #7 of the shipping articles, (b) a certified copy of CG form CG-735T, (c) entries on pages 23 and 27 of the official logbook of MORMACWAVE, and (d) a copy of the note sent to the Chief Mate by the respondent as alleged in the sixth specification under the charge of misconduct. The Investigating Officer also produced two witnesses, the Master and Chief Mate of MORMACWAVE.

In defense, Appellant offered no evidence.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge of misconduct and six specifications thereunder had been proved, five of them by plea. He also found that the charge of negligence and both specifications thereunder were proved. He then served a written order on Appellant suspending all documents issued to him for a period of four months plus four months on twelve months' probation.

The entire decision was served on 9 October 1979. Appeal was timely filed on 11 October 1979 and perfected on 4 January 1980.

#### FINDINGS OF FACT

On all dates in question, Appellant was serving as Boatswain on board SS MORMACWAVE and acting under authority of his document. On 11 January 1979, while the vessel was in the port of Durban, South Africa, he failed to perform his regularly assigned duties, in that, after he had been given permission to leave the vessel in order to see a doctor in the morning, he did not return to the vessel until 2120 and did not see a doctor.

On 12 January 1979 while the vessel was in the port of Durban, South Africa, he failed to perform his regularly assigned duties by being absent from the vessel from 0800 to 1200 and from 1300 to 1700 without sufficient cause.

On 22, 23 and 24 January 1979 while the vessel was in Salvador Bahia, Brazil, he failed to perform his regularly assigned duties in that he was absent from the vessel from 0830-1200 and from 1300-1700 each day, without proper permission.

On 23 January 1979, while the vessel was at Salvador Bahia,

Brazil, he failed to obey a lawful order of the Chief Mate in that when ordered to appear before the Master to have a certain log entry read to him he refused and sent the Chief Mate a note which read, "Drop Dead, the X Bosin".

On 19 December 1978, Appellant negligently ordered a seaman to release the brake to the port jumbo boom vang, which resulted in the jumbo boom swinging dangerously and uncontrollably to starboard and damaging the jumbo boom.

Finally, Appellant, on 22 January 1979, while the vessel was in Salvador Bahia, Brazil, negligently failed to supervise the raising of mooring lines causing the starboard anchor windlass to become engaged, which resulted in damage to the hydraulic lines to the starboard capstan.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that a union lawyer should have represented the Appellant. The appeal is taken to be a complaint that there has been a denial of due process.

APPEARANCE: Appellant, pro se.

#### OPINION

The issue in this case concerns itself with the right to counsel possessed by a person charged in a revocation and suspension proceeding. If the Appellant has been afforded his appropriate right to counsel by the government, then no error has occurred and the order of the Administrative Law Judge will be affirmed. If on the other hand, the Appellant has been denied his right to counsel by the government, then the order of the Administrative Law Judge would require reversal.

These proceedings are administrative in nature. The proceeding is in fact administrative, not criminal, and is directed solely against the Merchant Mariner's Document and not the individual. In addition, 46 CFR 5.01-20 provides that "the suspension and revocation proceedings are remedial and not penal in nature." The respondent in an administrative hearing is not entitled to the same right to counsel as a person charged with a crime and appearing before a criminal tribunal. The Sixth Amendment to the Constitution, which is paramount in the criminal arena, has little or no effect in an administrative proceeding. Appellant is entitled to have representation by professional counsel (see 46 CFR 5.20-45), however, "the Administrative Procedure Act [only] grants the plaintiff the right to employ

counsel if he so desires. The government is not obligated to provide a claimant with counsel." Grover v. United States, 200 Ct Cl 337 (Ct Cl 1973). In other words, although Appellant is entitled to be represented by professional counsel of his choice, that counsel must be at the expense of Appellant.

Having determined that the Appellant is entitled to be represented by professional counsel provided at his own expense, it is necessary to next determine whether the government has discharged its responsibility in ensuring that Appellant's right to counsel was protected. It was held in Decision On Appeal No. 2008 that "while the person charged in a suspension and revocation proceeding has a right to be represented by counsel of his choice, the responsibility of the government in this regard is fully exercised when the person charged has been duly informed of that right and given reasonable opportunity to procure such representation."

A review of the record in this case reveals that Appellant was advised of his right to counsel by the Investigating Officer, on 12 February 1979, and again by the Administrative Law Judge at the opening session held on 2 March 1979. In fact, the Administrative Law Judge granted a three day adjournment on 2 March 1979 to allow Appellant time to procure a counsel. When the proceeding reconvened on 5 March 1979, the Administrative Law Judge again reminded Appellant of his right to counsel. Appellant had nearly three weeks in which to obtain the services of a lawyer to represent him and failed to do so. It was at this point (5 March 1979) that the Appellant ceased his efforts to procure an attorney and elected to represent himself.

The government has fully discharged its responsibility to the Appellant vis-a-vis his right to counsel. Unlike the criminal trial at which under the right circumstances a defendant is entitled to a government appointed lawyer, the respondent in a revocation and suspension hearing is only entitled to counsel furnished at his own expense. Whether or not the union should have furnished the Appellant an attorney is a matter between the union and Appellant. There has been no denial of due process. Appellant's appeal must therefore be denied.

#### CONCLUSION

The government's duty to a person charged in a suspension and revocation proceeding is to ensure that he is duly informed of that right and is given a reasonable opportunity to procure such representation. An examination of the record reveals that the government's duty has been discharged. In addition, there is substantial evidence of a reliable and probative nature to support

the Administrative Law Judge's findings.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 9 October 1979, is AFFIRMED.

R. H. SCARBOROUGH  
Vice Admiral, U.S. Coast Guard  
Vice Commandant

Signed at Washington, D.C., this 21st day of July 1980