

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Antonio THOMAS 218044

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2487

Antonio THOMAS

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

By his order dated 15 January 1988, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's Merchant Mariner's license for three months, plus an additional suspension for three months, remitted on three months probation, upon finding proved the charge of negligence. A charge of misconduct supported by two specifications was found not proved. The two specifications supporting the charge of negligence alleged that Appellant, while serving under the authority of his above-captioned license, aboard the M/V VENTURE, did, on 22 October 1986, negligently absent himself from the wheelhouse of the vesse, endangering the life, limb and property of the passengers and crew, and that on that same date, Appellant negligently failed to post a lookout. The hearing was held at Charlotte Amalie, St. Thomas, Virgin Islands on 12 February, 4 and 5 June 1987. Appellant was represented by professional counsel and introduced six exhibits into evidence as well as the testimony of three witnesses and the Appellant. Appellant entered a response of DENIAL to the charge and specifications. The Investigating Officer introduced five exhibits that were received into evidence. Four witnesses testified at the request of the Investigating Officer. The Administrative Law Judge's decision was issued on 24 October 1987 and his final order issued on 15 January 1988.

The appellant filed a notice of appeal on 16 February 1988 pursuant to 46 C.F.R. SS5.703. At Appellant's request, a transcript was prepared. Appellant field his brief with the Commandant on 8 July 1988, perfecting his appeal pursuant to 46 C.F.R. SS5.703(c).

Appearance: Maria Tankenson Hodge, Esq. No 1, Frederiksberg Gade, St. Thomas, V.I. 00801.

FINDINGS OF FACT

Appellant was the holder of Merchant Mariner's License No. 218044. That license was issued in August 1985 and authorized Appellant to operate mechanically propelled vessels of not more than 100 gross tons, upon the Atlantic Ocean, Caribbean Sea, not more than 100 miles offshore from the U.S. Virgin Islands. On 22 October 1986, Appellant was serving under the authority of that license as operator of the M/V VENTURE, an 85 gross ton passenger ferry vessel, operating underway between St. Thomas and St. John, U.S. Virgin Islands.

On board the vessel, departing from Cruz Bay, St. John, for a 6:00 P.M. passage to Red Hook, St. Thomas, were Appellant, crewmembers and several passengers. During the passage, while underway in Pillsbury Sound, a verbal confrontation ensued between passengers and crewmembers over the payment for passage by two passengers. During the confrontation, Appellant left the wheelhouse without being relieved or posting a lookout. During the confrontation, all parties were engaged in or watching the dispute and no one was maintaining station in or near the wheelhouse.

During this passage, it became increasingly dark and the weather on Pillsbury Sound was clear with a 10-12 knot wind. The seas were moderately choppy. This area is frequently used by recreational boaters and contains reefs.

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 Decision of the Administrative Law Judge is not supported by substantial evidence;
- (2) The sanctions imposed by the Administrative Law Judge's Order of 15 January 1988 must be vacated due to an erroneous statement in that Order;
- (3) The 15 January 1988 Order is erroneous and was made without the benefit of Coast Guard promised recommendations.

OPINION

I

Appellant argues that the decision of the Administrative Law Judge is unsupported by substantial evidence. I disagree.

The Administrative Law Judge dismissed the charge of misconduct in his decision of 24 October 1987, having found it not proved. Regarding the charge found proved, the law is well settled. Sitting as the trier of fact, the Administrative Law Judge's duty is to evaluate the evidence presented at the hearing. He has discretion to find the ultimate facts relating to each charge and specification. See, Appeal Decision 2471 (BARTLETT); Appeal Decision 2450 (FREDERICKS); Appeal Decision 2395 (LAMBERT); Appeal Decision 3382 (LITTLEFIELD); Appeal Decision 2424 (CAVANAUGH); Appeal Decision 2423 (WESSELS); Appeal Decision 2404 (MCCALLISTER). As a general rule, the findings of the Administrative Law Judge are consistently upheld unless they can be shown to be unreasonable or inherently incredible. See, Appeal Decision 2472 (BARTLETT); Appeal Decision 2450 (FREDERICKS); Appeal Decision 2333 (AYALA); Appeal Decision 2302 (FRAPPIER).

The record clearly indicates that Appellant left the wheelhouse of the M/V VENTURE while the vessel was underway in Pillsbury sound, ferrying passengers. See, Transcript, Vol I, pp. 75, 119, Vol II, pp. 17, 65, 110, I.O. Exhibit 4, 7. The record further clearly reflects that when the Appellant left the wheelhouse, no relief or lookout was posted. See, Transcript, Vol. II, pp. 22, 65, 111, I.O. Exhibit 7. Additionally, there is no indication in the record that the Administrative Law Judge was prejudiced or arbitrary in reaching his findings. His findings are not inherently incredible, and on the contrary, are fully supported by substantial evidence in the record. Accordingly, his decision will not be disturbed.

II

Appellant next asserts that the sanctions must be vacated because the Administrative Law Judge erroneously stated in his 15 January 1988 order that the charges of misconduct and negligence had been proved when in fact the charge of misconduct had been found not proved.

I agree that an error was made by the Administrative Law Judge in his order, however, it was harmless error. Appellant's argument stems from the 15 January 1988 Order which states:

Upon due hearing held on 12 February 1987, before me, the undersigned duly designated Administrative Law Judge, on the charges and specifications made against ANTONIO THOMAS and the Investigating Officer having established the case in accordance with the provisions of 46 U.S.C. 7703, and the regulations promulgated pursuant thereto, and a finding of PROVED having been entered as to the charges of misconduct and negligence. (emphasis supplied)

This oversight on the part of the Administrative Law Judge does not constitute reversible error nor does it render the findings of the Administrative Law Judge invalid. As a remedy, the order could be modified on appeal or the case could be remanded for appropriate action. See, 46 C.F.R. 5.705(a) and Appeal Decision 1574 (STEPKINS). The Administrative Law Judge's decision of 24 October 1987 is controlling. That decision sets forth in detail all of the evidence, the findings of fact and conclusions of law. The subsequent two page order of 15 January 1988 to which the Appellant refers constitutes harmless error.

Finally, a review of the entire record provides no indication that the Administrative Law Judge predicated his order in whole or in part on the dismissed charge of misconduct. The sanction imposed was justified by the charge of negligence found proved. The record reflects that Appellant left the wheelhouse at twilight, in a moderately choppy, reef-spotted sound that was frequently travelled by pleasure craft. His actions endangered the lives and property of his passengers and crewmembers and were not the actions of a prudent mariner.

III

Appellant contends that the Order was issued without the fulfillment of an alleged promise made by the Commanding Officer, U.S. Coast Guard Marine Safety Office San Juan, Puerto Rico, that he would recommend probation for Appellant. Appellant urges that in reliance on this promise, he submitted only one letter of recommendation, but that all he received from the Coast Guard was the Investigating Officer's detrimental recommendation.

The order of the Administrative Law Judge is appropriate and will

not be disturbed.

The record is void of any mention of this issue. In accordance with 46 C.F.R. 5.701(b), only errors on the record, rulings or objections not waived during the proceeding, or jurisdictional questions may be considered on appeal. This issue was raised for the first time on appeal, does not present a jurisdictional question, and consequently is not subject to review on appeal.

It should be noted that even if this issue were reviewed on appeal, the Administrative Law Judge's order would be upheld. The selection of an appropriate order is the sole responsibility of the Administrative Law Judge. See, 46 C.F.R. 5.569(a). He is not obligated by any promises or representations made by any party. In fact, recommendation and/or argument as to an appropriate order by either the Investigating Officer or the respondent is strictly optional. See, 46 C.F.R. 5.569(a). An order will not be disturbed unless it is obviously excessive or unless an abuse of discretion is proven. See, Appeal Decision 2423 (WESSELS), Appeal Decision 2391. (STUMES), Appeal Decision 2313 (STAPLES). In this case, the Administrative Law Judge's order is not excessive and reasonably could have been issued even if the alleged positive recommendation had been made. I find no abuse of discretion. Consequently, the order, except as modified, will stand.

1. Notwithstanding the justiciability of this issue on appeal, it is noted that if the Appellant had been concerned that sufficient evidence in extenuation and mitigation was not immediately obtainable at the time of the hearing for any reason whatsoever, he could have requested an enlargement of time from the Administrative Law Judge in order to obtain further evidence. This was not done in this instance.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. The Administrative Law Judge's Order of 15 January 1988 is in error in citing the charge of misconduct as having been proved and in not stating that hearing proceedings were also held on 4 and 5 June 1987 as well as on 12 February 1987. This constitutes harmless error that may be remedied accordingly.

ORDER

The Administrative Law Judge's order dated 15 January 1988 is

MODIFIED to reflect that a finding of PROVED was entered as to the charge of NEGLIGENCE and a finding of NOT PROVED was entered as to the charge of MISCONDUCT, and to reflect that hearing proceedings were held on 12 February, 4 and 5 June 1987.

The decision of the Administrative Law Judge dated at Norfolk, Virginia on 24 October 1987 and the order dated 15 January 1988 are otherwise AFFIRMED.

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

Signed at Washington, D.C. this 12th day of July, 1989

***** END OF DECISION NO. 2487 *****