

NTSB Order No.
EM-166
UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.
Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1th day of October, 1992
J. W. KIME, Commandant, United States Coast Guard,
v.
DAVID ORTIZ, Appellant.
Docket ME-151
OPINION AND ORDER

The appellant, by counsel, seeks Board review of a December 3, 1991 decision of the Commandant (Appeal No. 2533) affirming the July 26, 1991 refusal of Administrative Law Judge Jerome C. Ditore to reopen the hearing in a proceeding in which the law judge, after an evidentiary hearing on January 25, 1991, ordered the revocation of appellant's merchant mariner's document (No. 077-3802-D1).¹ The law judge, by order dated February 12, 1991, had sustained a charge that appellant while the holder of his document had been found to be a user of the drug cocaine. As we find no error in the Commandant's decision, the appeal to the Board will be denied.

Under Coast Guard regulations, a hearing may be reopened, assuming a request for such action is made within one year after

¹Copies of the decision of the law judge and the Commandant are attached.

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the law judge's decision, only if new evidence has been discovered or, in some circumstances, where the seaman was unable to appear at his hearing.² In this case the appellant argues that the law judge erred by not finding that appellant had identified "newly discovered evidence" entitling him to a reopened hearing. We find no error.³

The evidence the appellant contends should have been found to be "newly discovered" is, in fact, evidence that was presented by the Coast Guard at appellant's hearing. Specifically, appellant contends that a particular notation on Investigating

²Section 5.601, 46 CFR Part 5, provides as follows:

"§ 5.601 **Petition to reopen hearing.**

(a) A respondent may petition to reopen the hearing on the basis of newly discovered evidence or on the basis of being unable to present evidence due to the respondent's inability to appear at the hearing through no fault of the respondent and due to circumstances beyond the respondent's control."

³We also find no error in the law judge's refusal to reopen the hearing on the ground that appellant, who was present at the hearing on the charge against him, was not at that time represented by counsel. Apart from the fact that no reason appears for appellant's failure to raise any issue concerning the law judge's February 12, 1991 decision in an appeal he could have taken within 30 days to the Commandant, much less any challenge to the voluntariness of his conceded waiver of counsel, the lack of counsel at a hearing is simply not one of the two circumstances the regulation on reopening a hearing accepts as a sufficient basis for granting such relief. Given the availability of direct review for such issues by the Commandant, appellant, who cites no precedent for any belief that the law judge had some authority outside of section 5.601 for ordering a rehearing, cannot now reasonably argue that the law judge was required by law to expand the regulation on reopening to embrace a matter appellant could have but did not raise pursuant to the appeal procedure designed for that purpose.

Officer Exhibit 1 (I.O. Exhibit 1), a Drug Testing Custody and Control Form, constitutes new evidence because its meaning, which appellant asserts may be vital to the validity of the entire document, was not brought out at the hearing.⁴ The contention is without merit. Appellant cites, and we perceive, no support for the proposition that a party's belated realization of a possible objection to the admissibility or validity of a document received into evidence transforms that document, or the part of it that might have justified further inquiry or an objection not when made when the document was introduced, into new evidence.⁵ Rather, appellant, or, more accurately, the counsel he apparently secured some months after the hearing, has simply raised a question about the document that could have been explored at the hearing at which time a ruling on any objection that might have been pressed could have been obtained. In any event, the appellant has not persuaded us that the Commandant erred in

⁴The notation at issue is the handwritten, initialed word "error" which appears to the right of a box in Step 6 of the form that has been checked to indicate that "[t]hese results are positive." No signature follows the entry. However, in Step 7 of the form a physician's signature has been placed beneath a box checked to indicate that his "determination/verification [of the laboratory results for the specimen identified by this form] is positive." On its face, the error appears to refer to no more than the doctor's apparent mistake in marking the box in Step 6 rather than the one in Step 7. Step 6 calls for completion by the laboratory, while Step 7 contemplates completion by the medical review officer.

⁵Typically, an objection not timely presented would be deemed waived.

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sustaining the law judge's determination that a document already in evidence was not "newly discovered evidence" under the regulation.

ACCORDINGLY, IT IS ORDERED THAT:

The appellant's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.