

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
License No. 492428  
Issued to: Kenneth A. McCann

DECISION OF THE VICE COMMANDANT ON INTERLOCUTORY APPEAL  
OF DENIAL OF MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE  
UNITED STATES COAST GUARD

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Kenneth A. McCann

BACKGROUND

On 14 October 1981, hearing in the captioned case was commenced at the Coast Guard Marine Safety Office, San Francisco, California, before Judge Charles J. Carroll Jr. The first order of business was the respondent's motion for the disqualification of Judge Carroll. The grounds for the disqualification as set forth in counsel's declaration and further set forth in the notice of appeal are: (1) that the physical arrangement of the Administrative Law Judge chambers is such as to unavoidably place the Administrative Law Judge in daily contact with the investigating officers with such contact creating a bias in favor of the prosecution; (2) that Administrative Law Judges in San Francisco regularly train Investigating Officers in prosecution thereby further creating a manifest bias in favor of conviction; (3) that Judge Carroll takes into account the possession by a respondent of licensing insurance in determining remedial action thereby tending to give outright suspension to officers who have insurance coverage; and (4) that the judge ordered the disqualification of the respondent's counsel, Mr. Droege from practice before Administrative Law Judges in San Francisco.

During the preliminary stages of the hearing, counsel presented an affidavit and declaration requesting the disqualification of the judge on the above stated grounds. During the course of the discussion of the merits of the disqualification issue, the judge asked counsel if he wished to put on evidence. The offer was initially declined but finally accepted at the judge's insistence. Counsel then attempted to call the Senior Investigating Officer. The record indicates surprise and reluctance to testify without prior warning on the part of the witness. After a discussion of the proposed question and whether the witness desired to be sworn and testify, the judge refused to compel the testimony and indicated denial of the disqualification motion. After making the required inquiry and continuing the case to allow time for appeal the judge told the respondent "I think in the future you better get another attorney." He then told counsel

"I think in the future you should have another attorney from the firm up here." (T-10). The record indicates that although both were unsure of the authority to do so, both Judge and counsel treated that as an order "disbarring" counsel from practicing before Administrative Law Judges in San Francisco. Finally the Judge formally denied the motion to disqualify (T-11).

The Judge did not allow the Senior Investigating Officer to testify and after denying the motion to disqualify himself allowed respondent a continuance to appeal the ruling.

#### DISCUSSION

Section 556(b) of Title 5, U.S. Code, which applies to these proceedings under 46 U.S.C. 239, provides for the filing of a timely affidavit seeking the recusal of an Administrative Law Judge based on bias or other disqualification. Also, 46 CFR 5.20-15(b) allows the person charged or the investigating officer to request, in good faith, that the Administrative Law Judge withdraw on the grounds of personal bias or other disqualification. 46 CFR 5.20-15(c) requires that the judge continue the hearing and allow the disqualification issue to be reviewed on appeal unless there is a finding that a delay in the hearing pending the determination of the appeal will not interfere with the future availability of the person charged and witnesses, or the prompt dispatch of the vessel or vessels on which the person charged and/or the witnesses may be employed. Further, the Administrative Law Judge is required to rule on the motion which is subject to appeal to the Commandant pursuant to 46 CFR 5.20-15(c). Here the affidavit was filed in a timely fashion. However, the respondent was not allowed to present evidence in support of the affidavit. Curiously this is not the first appellate review of an encounter between this judge and this counsel. Previously, on very similar facts, an order was issued explaining the correct approach. Neither counsel nor judge appear to be aware of it. In that case I held that "...[i]t was an abuse of discretion for the Administrative Law Judge to refuse to allow Appellant to adduce evidence to support the motion for disqualification without stating for the record a clear basis for denying the motion as required by 46 CFR 5.20-1(a)...." Decision on Appeal No. 2232. Here the Judge denied the disqualification motion and never stated why. That alone compels remand. There is some evidence in the record which might allow decision on the merits. However, the regulation is clear. 46 CFR 5.20-15(c) requires the Administrative Law Judge to have all matters relating to such claims of disqualification affirmatively appear in the record. I will not decide the merits of the disqualification issue because the respondent was not permitted to present evidence on the claims.

Appellant's third issue concerns appropriateness of remedial action and plea-bargaining. Administrative Law Judges are charged

with the fair and impartial adjudication of each case on its individual facts and merits. 46 CFR 5.20-165(a). They are not bound by the agreements of parties, the Table of Average Orders or any evidence not part of the record. The Administrative Procedure Act provides "...[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative, and substantial evidence." 5 U.S.C. 556(d). It is improper for Administrative Law Judges to consider anything not of record in deciding upon a sanction. License insurance or the lack of it is not a proper consideration in assessing an order unless it is properly raised by the respondent.

One other point merits discussion. An Administrative Law Judge has no authority to disbar an attorney from the representation of respondents at R.S. 4450 proceedings. Any suggestion or order of disbarment is improper and of no force or effect. A person charged may be represented by professional counsel, or any other person he may desire. 46 CFR 5.20-45(a)(1); see also 5 U.S.C. 555(b). Some agencies have procedures for screening persons who wish to practice before them. See Internal Revenue Service Regulations, Title 31 Code of Federal Regulations Part 10. These regulations provide for admission to practice, grievances against the practitioner, and for a separate hearing before an Administrative Law Judge on question of fitness to practice. Neither the Administrative Procedure Act nor Coast Guard regulations have any such provisions. One may represent a person charged merely on being asked by respondent. No qualifications are spelled out or required. I note that the respondent's counsel contends that he was peremptorily disbarred by the Judge. I disagree. The Judge told the respondent that "he (the judge) thought he (the Respondent) should get another lawyer" and stated to Mr. Droeger that "maybe he should send someone else from the firm up here". This is scant evidence of peremptory disbarment and an argument that this verbal exchange amounts to a disbarment order is frivolous. However, the question of whether to be represented by counsel and which counsel to choose is not a proper area for comment by an Administrative Law Judge except to advise the respondent of his rights in that regard. I do not approve of the comments of the judge in this case concerning this matter of personal choice.

The preceding discussion is not meant to limit the authority of the Administrative Law Judge to regulate the course of the hearing. 5 U.S.C. 556(c)(5). In fact the Administrative Law Judge is required to regulate and conduct the hearing in such a manner as to bring out all relevant and material facts and to ensure a fair and impartial hearing. 46 CFR 5.20-1(a). Through the regulations Administrative Law Judges have the authority to maintain order and

discipline in administrative proceedings. The current inability to disbar or disqualify any person or attorney from practice before this agency does not limit an Administrative Law Judge's authority to make such orders as, in his opinion, are appropriate to maintain the order and decorum necessary to afford a person charged a full and fair hearing. This authority extends to the removal from the hearing room of one whose flagrant defiance, or misconduct interrupts or is an open threat to orderly procedure.

#### CONCLUSION

In this case and all cases decided subsequent to the date of this order Administrative Law Judges shall not consider license insurance in determining an appropriate remedial action unless it is properly raised by the respondent. cf 46 CFR 5.35-20(a). The respondent's counsel has not been disqualified or disbarred from practice before Coast Guard Administrative Law Judges at R.S. 4450 hearings. There was insufficient opportunity for Appellant to present evidence on grounds 1 and 2 and the case will be remanded for hearing on these issues. After the submission of evidence, if any, the judge must rule on whether he is disqualified. Proper adherence to 46 CFR 5.20-15(c) should enable the merits of the disqualification issue to be reviewed if the Administrative Law Judge does not disqualify himself and respondent appeals. Since this case has been delayed the Administrative Law Judge, if he does not disqualify himself, should immediately proceed with the hearing. Any appeal on the disqualification issue will be considered after the hearing on the merits.

#### ORDER

This case is REMANDED to allow submission of evidence by the respondent on issues 1 and 2 and further proceedings as appropriate.

B. L STABILE  
Vice Admiral, U. S. Coast Guard  
VICE COMMANDANT

Signed at Washington, D.C. this 4 day of June 1982.