

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
License No. 26575
Issued to: Jerry J. Soileau

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

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Jerry J. Soileau

BACKGROUND

In late July 1979, the Administrative Law Judge in this case received a telephone call from an attorney, Mr. Bruce Horack, concerning the Coast Guard investigation of the 20 March 1979 collision of the M/V SILVER CITY and the M/V CORINA on the Mississippi River.

Mr. Horack advised the Administrative Law Judge that the Respondent, operator of the M/V CORINA, had been promised by the Investigating Officer that no charges would be preferred against Respondent, who testified in a proceeding against the license of Mr. W.H. Biggs, operator of the M/V SILVER CITY.

The Hearing in the Biggs case was held in May and June 1979 before another Administrative Law Judge and resulted in Mr. Biggs receiving an admonition for his negligence in causing the collision.

The Administrative Law Judge received the charge in this case on 25 July 1979, after the telephone call from Mr. Horack.

In anticipation of a motion to dismiss based on estoppel being raised as outlined by Mr. Horack, the Administrative Law Judge read

the Decision and Order of the Administrative Law Judge in the Biggs case, dated 9 July 1979, did research on the law of estoppel and concluded that a valid issue could be raised in this case.

The Administrative Law Judge on 16 August 1979, conducted a "pretrial conference" off the record with Respondent, his attorney, and the Investigating Officer present.

At the "pretrial conference", the Administrative Law Judge advised the Investigating Officer of the expected estoppel motion; of the projected expense and time to determine the case; of the findings of fact in the Biggs case that Respondent's vessel, M/V CORINA, had been stopped 20 minutes prior to the collision, and that Mr. Biggs had no prior disciplinary record.

The Administrative Law Judge then asked for and obtained the information that Respondent also had no prior disciplinary record; indicated that, in equity, the sanction in this case should not exceed admonition, the sanction applied in the Biggs case; and asked the Investigating Officer to review the decision to charge Respondent.

The Investigating Officer did not object to disclosure of Respondent's prior record and Respondent consented to its disclosure.

The Investigating Officer returned and announced the Coast Guard's decision to proceed with the charge against Respondent.

The Administrative Law Judge purported to take judicial notice on his own motion of the Decision and Order in the Biggs case (including the findings of fact) before any plea or evidence had been entered in Respondent's case. (16 August 1979 Record, pages 27 and 36).

On 31 August 1979, at the second day of the hearing, the Investigating Officer made a motion to recuse the Administrative Law Judge pursuant to 46 CFR 5.20-15(b), because he had formed a decision as to the appropriate sanction which he may render in this case, and because he had received notice of Respondent's prior record before deciding if any charge had been proved.

The Administrative Law Judge orally denied the motion to recuse him on 31 August 1979 (31 August 1979 Record, page 10) and

explained the reasons for the denial in his written Ruling of 7 September 1979.

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. The Administrative Law Judge is required to rule on the recusal motion, which is subject to appeal to the Commandant pursuant to 46 CFR 5.20-15(c).

In this case the Investigating Officer has appealed the denial of his recusal motion in accordance with 46 CFR 5.20-15(c), and that appeal is now presented for resolution by me.

First, I note that the recusal motion was filed in a timely manner. In *Marcus v. Director of Workers Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) it was held that a claim of bias must be asserted at the initial agency hearing to be considered timely. Although in this case, the motion was presented at the second day of hearing and some 15 days after the grounds for alleged bias were disclosed to the Investigating Officer, it was, nevertheless, raised at the initial hearing. See also Davis, 1980 Supplement to Administrative Law Treatise, page 49. Furthermore, it was asserted before any evidence had been properly received, before any pleas had been taken and before any rulings adverse to the claimant. Under these circumstances, the recusal motion is timely.

The record before me is full of procedural irregularities which impel me to remand this case for appropriate proceedings before a different Administrative Law Judge. I do so without deciding the merits of the bias claim raised by the Investigating Officer, for the reasons discussed below.

First, 5 U.S.C. 554(d), which applies to these proceedings under 46 U.S.C. 239(g) provides that the agency employee, who presides at the reception of evidence pursuant to 5 U.S.C. 556, may not consult a person on a fact in issue, unless on notice to the

parties, except to the extent authorized by law. See also 46 CFR 5.20-1(b). The telephone conversation between the Administrative Law Judge and Mr. Horack and other "off the record discussions" alluded to in the record raise a real possibility of a violation of 5 U.S.C. 554(d).

Also the *ex parte* discussion with Mr. Horack led the Administrative Law Judge to acquaint himself with the circumstances of Respondent's case by reading the Decision and Order in the case of the master of the vessel which collided with Respondent's vessel. Based on a reading of the findings of fact in that case, the Administrative Law Judge in this case proceeded to conduct a "pretrial conference" in this case.

In 5 U.S.C. 556(c)(6) there is authority for an Administrative Law Judge in presiding at a hearing to hold conferences for the settlement of issues by consent of the parties, subject to the agency rules allowing such practice. There is no provision in 46 CFR Subpart 5.20 for off the record conferences during these hearings. Furthermore, the hearing in this case had not even commenced at the time of the "pretrial conference". Therefore, any action taken by the Administrative Law Judge during that conference was in excess of his lawful authority under 46 USC 239 and 46 CFR Part 5. Consent by the parties could not make such an unauthorized proceeding lawful.

Moreover, the Administrative Law Judge's attempted influence on the decision charge Respondent exceeded the scope of his duties under 46 CFR Part 5. Section 5.01((a) of 46 CFR provides that the Administrative Law Judge provides over hearings. The decision to charge an individual is to be made by the Investigating Officer under 46 CFR 5.05-15, and, of course, precedes the commencement of a hearing pursuant to 46 U.S.C. 239(g). The charging decision is one left to the prosecutorial discretion of the Investigating Officer, and is not subject to review by the Administrative Law Judge.

In addition to *ex parte* communications, unauthorized "off the record" conferences, and improper interference in the charging decision, the Administrative Law Judge in this case solicited, received and considered the prior record of Respondent before he had made a conclusion as to each charge and specification. Section 5.20-118(a) of 46 CFR allows the prior negative disciplinary record to be admitted into evidence as character evidence before findings. However, here the prior

negative record was solicited and received off the record, on the request of the Administrative Law Judge, before he had authority to act at all because the hearing had not been opened. It was not "admitted into evidence" because, the hearing had not commenced and no pleas had been entered by Respondent.

Of course there is no harm to the Investigating Officer, but if the record had revealed, before hearing, that the Respondent did have and adverse disciplinary record, the Administrative Law Judge would have been precluded from imposing a valid sanction in the case. He had no legitimate way of knowing in advance that the record was negative, and he was unnecessarily jeopardizing the validity of the subsequent proceedings.

CONCLUSION

For the reasons discussed, I conclude that the record should be remanded for appropriate proceedings before a different Administrative Law Judge. In remanding this case, I expressly withhold any opinion on the alleged bias of the Administrative Law Judge. I do so because the improper preliminary procedures followed in this case led to the recusal motion in the first place. Proper adherence to the regulations in 46 CFR Part 5 by a new Administrative Law Judge and the parties upon remand should avoid any question of prejudgment of the adjudicative facts in this case.

ORDER

This case is remanded for assignment to a different Administrative Law Judge for proceedings pursuant to 46 CFR Part 5.

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

Signed at Washington, D.C. this 16th day of July 1981.

***** END OF REVIEW NO. 15 *****

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