

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 529 150
Issued to : William H. McDermott

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2326

William H. McDermott

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 14 May 1982, an Administrative Law Judge of the United States Coast Guard at Long Beach, California suspended Appellant's license for two months on six months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as person in charge of oil transfer operations on board the United States SS SANTA MAGDALENA under authority of the license above captioned, on or about 6 May 1981, Appellant negligently allowed oil to be transferred to number 4 deep tank, thereby allowing a discharge of approximately one gallon of oil into the navigable waters of the United States.

At the hearing on 22 July 1981, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of one witness and three exhibits.

In defense, Appellant offered in evidence two exhibits,

testimony of three witnesses and testified in his own behalf.

Subsequently, it was discovered that the recording equipment had malfunctioned during Appellant's closing arguments. The hearing was reopened on 19 March 1982 for the sole purpose of completing the record.

After the hearing on 19 March 1982, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending License 529150 and all other valid licenses issued to Appellant for a period of two months on six months' probation.

The entire decision was served on 19 May 1982 by certified mail. Appeal was timely filed on 21 May 1982 and perfected on 14 July 1982.

FINDINGS OF FACT

On 6 May 1981, Appellant was serving as Chief Engineer on board the United States SS SANTA MAGDALENA and acting under authority of his license while the vessel was in the port of Wilmington, California. Appellant was the person in charge of oil transfer operations aboard the vessel during bunkering.

At the hearing at Long Beach, California, Appellant was charged with negligence and two specifications thereunder. The first specification was dismissed by the Administrative Law Judge at the end of the Investigating Officer's case. The second specification alleged that Appellant negligently failed to insure that #4 port overflow discharge vent was adequately and securely blanked off in compliance with 33 CFR 156.120(e), thereby causing a discharge of oil of a harmful quantity upon navigable waters of the United States.

After the Coast Guard had rested its case, the Administrative Law Judge, *sua sponte*, amended the second specification. The amended specification alleged that on 6 May 1981, while the vessel was docked at Berth 150, Los Angeles, California, Appellant, as

person in charge of oil transfer operations, negligently allowed oil to be transferred to #4 deep tank, there by allowing a discharge of approximately one gallon of oil into the navigable waters of the United States.

Appellant objected to the amendment. The Administrative Law Judge agreed that the change was substantial, but stated that he was authorized to make such a change. The Administrative Law Judge offered Appellant the opportunity for a continuance to prepare after the specification was amended.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant sets forth various bases for appeal. Because of the disposition of the first, the others will not be discussed. Appellant urges that the Administrative Law Judge committed prejudicial error when he, *sua sponte*, redrafted the specification.

OPINION

The question that must be answered is to what extent "amending" a specification should be permitted. The Administrative Law Judge cited *KUHN v.C.A.B.*, 183 F .2d 839 (D.C. Cir. 1950) as authority for an administrative law judge to amend pleadings to conform to the proof. The complaint against *Kuhn*, an Eastern Air Line pilot, alleged that Kuhn deviated from the route authorized, failed to alter the course of his aircraft upon overtaking another aircraft and flew within 500 feet of another aircraft without prior arrangements with the pilot. The complaint further alleged that by virtue of the above facts and by colliding with the other aircraft, Kuhn operated his aircraft in a reckless and careless manner. The complaint did not address maintaining a proper lookout. The Hearing Examiner apparently felt that the duty to maintain a proper lookout was encompassed by the broader duty owed by the pilot of an overtaking aircraft. The lookout issue was examined at the hearing where the examiner recommended a suspension of Kuhn's license. The Civil Aeronautics Board suspended his license for 40 days and Kuhn appealed.

One of the arguments presented by Kuhn on appeal was that the original complaint did not allege a failure to maintain a proper lookout. The court concluded that the issue of a proper lookout had been actually litigated below and the rigid formalism of common law pleading was not required. The thrust of modern pleading, especially in administrative proceedings, is toward fulfillment of a notice requirement. The court cited Fed. R. Civ. P. 15(b) which provides that pleading may be amended to conform to the proof.

In conjunction with Kuhn, 46 CFR 5.20-65 provides additional guidance in determining the limits of the applicability of the case. This regulation permits:

"...the amendment of charges and specifications to correct harmless errors by deletion or substitution of words or figures: *Provided*, That a legal specification is left remaining...."

After the amendments were made to the specification by the Administrative Law Judge there was little left of the original specification. The Administrative Law Judge recognized that his action was a substantial change to the specification and was therefore ready to grant Appellant adequate time to prepare. However, when errors of substance are found, 46 CFR 5.20-65(c) requires the Administrative Law Judge to rule that the specification is withdrawn. The investigating officer may then prepare and serve a new charge and specification. In Decision on Appeal 1792 (PHILLIPS) The Commandant cited the *Kuhn* decision for the proposition that the Administrative Law Judge has the authority to make necessary amendments to make specifications conform to the proof. It also stated that the investigating officer should prepare proper specifications and not expect them to be corrected later.

The *Kuhn* doctrine is an effective administrative tool when used to make amendments to specifications to avoid unreasonable delays in proceedings. However, amendments should not substantially change the specification. See 46 CFR 5.20-65(c). In this case the specification was not amended, but completely rewritten. The Administrative Law Judge himself agreed that the change was substantial. It no longer alleged negligence for failure to ensure that #4 port overflow discharge vent was

adequately blanked off but instead alleged negligence in allowing oil to be transferred. In *Kuhn*, the court stated that notice was the thrust of modern pleading, especially in administrative proceedings. Here the substantial changes by the Administrative Law Judge changed the offense to one of which Appellant had not been given notice. The only similarity between the original specification and the amended specification is the aggravating circumstance that "oil flowed into the navigable waters of the United States." The critical element of the original offense was the lack of reasonable care in failing to ensure that a discharge vent was blanked off. After the amendment, the critical element was lack of reasonable care in deciding to transfer the oil. This changed the offense.

Such a complete redrafting of the specification after the Investigating Officer presented his case put Appellant at a disadvantage and hampered his ability to present his defense. Presumably, Appellant prepared his defense, including cross examination of Coast Guard witnesses, to address the issues raised by the original specification.

The application of the *Kuhn* doctrine in these administrative proceedings is appropriate when applied in accordance with 46 CFR 5.20-65. It is the Coast Guard's policy as stated in *PHILLIPS, supra*, that investigating officers should prepare proper specifications and not expect them to be corrected later.

Appellant was offered a continuance in this case after he objected to the amendment. This offer, however, is not a substitute for the requirement as set forth in 46 CFR 5.20-65(c), to withdraw specifications containing errors of substance.

CONCLUSION

The Administrative Law Judge, in rewriting the specification over Appellant's objection, exceeded his discretionary authority.

ORDER

The decision of the Administrative Law Judge dated at Long

Beach, California on 14 May 1982, is REVERSED, his Order VACATED,
and the charge DISMISSED.

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

Signed at Washington, D.C., this 28th day of September 1983.

***** END OF DECISION NO. 2326 *****

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