UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs
LICENSE NO. 468256
Issued to: Olav AUNE Z 1041592

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2146

Olav AUNE

This decision is entered in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations 5.30-3 (b).

By order dated 12 August 1977, an Administrative Law Judge of the United States Coast Guard at New York, N.Y., suspended Appellant's seaman's documents for two months on nine months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as master of the United States SS FRANCIS S. BUSHEY under authority of the license above captioned, on or about 10 December 1976, Appellant did wrongfully sail the vessel from Yorktown, Virginia, to New York, N.Y., in violation of "your" Certificate of Inspection; to wit, sailing without the proper complement of officers and crew. (46 U.S.C. 222).

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

The Investigating Officer introduced in evidence several documents and the testimony of three witnesses.

In defense, Appellant offered in evidence the testimony of one witness and a document.

Three months later, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He entered an order suspending all documents issued to Appellant for a period of two months on nine months' probation.

The entire decision was served on 31 August 1977. Through an administrative error it was not clear for some time whether the decision had been properly served upon Appellant. The status of the case was not accurately ascertained until 28 August 1978.

FINDINGS OF FACT

On all dates in question, Appellant was serving as master of the tank vessel FRANCIS S. BUSHEY and acting under authority of his license.

FRANCIS S. BUSHEY O.N. 269146, a tankship of 1528 gross tons, was inspected under the applicable statutes and regulations and a standard certificate of inspection was issued to the vessel as of 9 May 1975, by the Officer in Charge, Marine Inspection, New York, the certificate to be valid until the stated expiration date of 9 May 1977. This certificate required aboard the vessel for "Oceans" navigation the following "complement of licensed officers and crew:"

1	Master
1	Chief Mate
1	Second Mate
1	Third Mate
4	Able seamen

2	Ordinary Seamen
1	Chief Engineer
1	First Assistant Engineer
1	Second Assistant Engineer

In addition, the vessel was permitted to carry five other persons in the crew for a total of persons allowed to be on board of eighteen.

It was also provided that on a voyage of less than 400 miles the third mate might be dispensed with.

Special provisions were entered for the carriage of "Grade A" cargo to a capacity of 21,000 barrels.

On 5 May 1976 certain "requirements" were placed on the vessel. The owner requested that the time for meeting the "requirements" be set as the date for the next regularly scheduled inspection. (Vessels of this class are required to be inspected every two years, hence the 9 May 1977 expiration date for the certificate issued as of 9 May 1975.)

OCMI, New York, ordered that the "requirements" be completed by the next regularly scheduled drydock examination, which was set for August 1976.

On 6 August 1976, OCMI, New York, issued a "Permit to Proceed" for the vessel. This permit described the master of the vessel as "Olav AUNE." It declared that the vessel had been "examined and inspected" on that date and was found to be "requiring repairs, to wit: Drydock Examination for Credit." It recites that at the request of "said Master" the vessel was permitted to proceed to Jennings, Louisiana, for "the said repairs," with a stipulation that no cargo could be carried. This stipulation was added to the printed matter on the form used for the permit. The permit said nothing about the manning of the vessel.

Although it does not appear that the certificate of inspection issued to the vessel had been revoked under the provisions of R.S. 4453 (46 U.S.C. 435), at some unspecified date the certificate had been "removed" from the vessel, presumably by OCMI, New York. [This "fact" is implicitly accepted by the participants in the hearing

and I find no reason to quarrel with it although there is no evidence on the point. I note only, for technical reasons, that no date for this "removal" can be ascertained from the records presented.]

At some time prior to completion of work on the vessel at Jennings, Louisiana, the owners made application for some reduction of the "manning" requirements which had previously been placed on the vessel. What these would consist of is not known. (The certificate of inspection issued as of 9 May 1975 had, in addition to the "Oceans" manning set out above, also provided specially for navigation on "Lakes, Bays and Sounds," exclusively, or on "Rivers," exclusively.)

At Jennings, Louisiana, on 24 November 1976, Appellant, as master of the vessel, "signed aboard" a crew as to which he filed a report pursuant to R.S. 4451 (46 U.S.C. 643). In this crew were a chief mate, a second mate, a third mate, five able seaman, one ordinary seaman, one chief engineer, one first assistant engineer, one second assistant engineer, and one person engaged as "cook" who held an ordinary seaman's certificate.

On the same date, OCMI, Port Arthur, Texas, within whose jurisdiction Jennings, Louisiana, is located, issued to the vessel a "Temporary Certificate of Inspection." It provided, as to manning, that "Officers and crew" to the number of eighteen (with no other persons) were "allowed" aboard the vessel. It provided also for carriage of "Grade A" cargo to a capacity of 21,000 barrels.

At some time on or after 1 December 1976, OCMI, Port Arthur, mailed to the owner of FRANCIS S. BUSHEY, at New York, a certificate of inspection which was essentially a duplicate, as to manning, of the certificate issued on 9 May 1975. The "Port Arthur" certificate recited a date of approval of 24 November 1976. An accompanying letter advised that the reduction in manning previously requested would not be permitted until certain equipment changes were made to the vessel.

On 10 December 1976, FRANCIS S. BUSHEY, working its way back from Jennings to the New York area, was at Yorktown, Virginia. Appellant was instructed by his owner, by telephone from New York,

to discharge certain members of the crew. Appellant's report filed pursuant to R.S. 4551 (46 U.S.C. 643) reflects that persons serving in the following capacities were discharged:

(1) chief mate
(2) second mate
(3) third mate
(4) 1 assistant engineer
(5) 2 able seaman
(6) 1 ordinary seaman,

and a new chief mate was taken aboard. For the voyage from Yorktown, the cook served as a deck seaman.

The "discrepancy" between the persons actually on board and the persons indicated as "required" for such a voyage on both the "old" and the as-yet-undelivered certificates of inspection was the absence of:

1 second mate
1 assistant engineer
1 able seaman
1 ordinary seaman

BASES OF APPEAL

As stated, through confusion as to corrections of service of the intial decision on Appellant and the effect of a notice of appeal filed by Appellant's counsel at the hearing, it was not ascertained whether a proper appeal had been filed until 28 August 1978. At this time it became apparent that deficiencies in the findings in the initial decision and a novel question both rendered an agency decision necessary under 46 CFR 5.30-3 (b).

Besides the inadequacy of the findings of fact to support the ultimate finding that the specification was proved, there appears the question whether, under the statutes, there was an applicable standard of manning of the vessel which Appellant could be held to have violated.

OPINION

I

The specification in this case refers to only one date, 10 December 1976, and alleges very simply that Appellant sailed the vessel "from Yorktown, Virginia, to New York, N.Y.," in violation of "your certificate of inspection; to wit, sailing without the proper complement of officers and crew. (46 U.S.C. 222)." The "your" in the specification is puzzling at first since a certificate of inspection is issued to a vessel, not a person, but a cause for the use of the unusual language may lie in a peculiar circumstance of the case which influenced the theory of both the presentation of the case and the decision.

The only findings made in the initial decision as to Appellant's service under authority of his license is that he was serving as master on 10 December 1976. This is clearly insufficient for the purpose since the theory upon which the findings of misconduct was based necessarily involves responsibility of Appellant before and, by specific notice taken in the initial decision, after that date. That prior service was seen as a requisite to the theory was recognized when the Investigating Officer made reference to the possibility of presenting prior employment records of Appellant but the evidence was not produced for the record. What is in the record plainly supports, nevertheless, a finding that Appellant was the master on 24 November 1976 (and there after to the date in question) since he filed a master's report of seamen shipped, pursuant to R.S. 4551 (46 U.S.C. 643), as of that date. There is, further, evidence that Appellant was master on 6 August 1976, since the "permit to proceed" issued to the vessel on that date described the master as "Olav Aune." This is not a self serving document, prepared by the agency for its own purposes and therefore suspect as against Appellant, but a business record of an official nature issued as a benefit to the vessel upon the representations of the master or owner or both and adequate evidence of those identifications attendant upon its issuance. A technical difficulty in establishing the chain needed for the theory of the case is, of course, that on 24 November 1976 the only effective document pertinent to the case was the temporary certificate and the date of the "withdrawal" of the former permanent certificate was left unidentified.

Two findings in the initial decision relative to the

complement required from time to time aboard the vessel are also, as stated without qualification, erroneous. They assert in terms that the two permanent certificates of inspection placed in evidence "required" as distinguished from "allowed." In view of the absence of findings on the matter next to be mentioned this would be an error calling for, at best, a remand of the case because it permits a completely false impression of the offense which it was intended to find proved.

Compounding this, and leaving the actual findings in a state of unacceptable vagueness, is the absence of findings in the initial decision of the specific deficiencies in the manning of the vessel that were to be found proved. There is only presented a recital of persons first aboard the vessel, those discharged, and personnel then shipped. Computations could be made from these transactions, but were not, so as to arrive at a specific statement of deficiencies. The opening statement of the Investigating Officer does give, at least, an indication of the specifics which he intended to prove. He declared that he would establish deficiencies of: "one third mate, one licensed engineer, and three deckhands."

It may be observed that the certificates of inspection relied on did not require "deckhands" (a term used in application of vessel-manning status for certain persons found necessary for the operation of inspected vessels under conditions in which the holding of a certificate by a seaman is not required) but rather "able seamen" and "ordinary seaman." The initial decision, in dealing with unlicensed persons shipped and discharged, spoke only of "deckhands," although, if the theory of the case be correct, the computations to be made would support findings of deficiency of one able seaman and one ordinary seaman.

As to the "mate," the initial decision nowhere recognizes that a "four hundred mile" provision (allowed under Act, May 11, 1968, c.72, $2, 40 Stat. 549, 46 U.S.C. 223) was incorporated into the permanent certificates of inspection and would have been applicable to the voyage in this case. Thus, it could not be ruled out that there was a misapprehension that two mates were "missing" rather than one, and that one a "second mate" not a "third mate" as spoken of on the record at hearing.

One initial finding of fact must be specifically disavowed,

that: "When the repairs were completed, the vessel sailed [from Jennings, La.] to Port Arthur, Texas where it was inspected on 24 November 1976." There is no evidence to support this finding and what evidence is available points definitely to a different course of events. The error is not of material significance in the overall consideration but is significantly part and parcel of the lack of clarity in the disposition of the case at hearing.

II

A clear error of law must be corrected before the attention can be properly focused here. The "Opinion" of the initial decision says:

> "The Temporary Certificate is just that - a Temporary Certificate. It maintains the *status quo*. It does not imply change..... It is a pointless quibble to say which is the regular certificate, it `takes the place of' or `is substitute for' : (a) The certificate "removed" at New York? or (b) The Certificate not yet aboard which was issued at Port Arthur? Because the manning requirement in each of these certificates is the same."

R.S. 4421 (46 U.S.C. 399) clearly states that a temporary certificate is issued only after completion of an inspection and "approval" of the vessel. The development of the statute shows that the temporary certificate was first authorized when, for the first time, navigation of a vessel subject to inspection without a certificate was prohibited. The need for a temporary existed because the primary certificate was not issued to a vessel by its inspectors. The inspectors certified to the cognizant collector of customs that the inspection was completed and the vessel approved, and that collector then delivered copies of the certification to the vessel. Since an interagency process was involved the temporary, to be delivered directly to the vessel by the inspectors, became requisite, else the vessel under the new restriction could not sail. There can be no doubt whatsoever that the temporary is a substitute, issued only after inspection and approval, for nothing else but the as-yet-undelivered permanent certificate.

Further, to hold that a temporary certificate merely maintains

the *status quo* under an "old" certificate disregards the fact that a temporary must be issued to a new vessel or a vessel submitted to inspection for the first time.

It can be seen also, from the record in this case, that a temporary certificate does not, of its very nature and without more, necessarily dictate only an enduring and to-be-continued required crew for the vessel. It is clear that an application had been made by the owners of the vessel for a "reduction" in manning requirement from what had previously imposed on the vessel, at the time of the Jennings, La., overhaul and inspection, and that on 1 December 1976, when the new permanent certificate of inspection was apparently placed in the mail by the OCMI, Port Arthur, a covering letter announced that the reduction could not be granted until certain equipment changes were made aboard the vessel. It is seen as entirely possible, within the possibilities of this case, that the "new" certificate of inspection would have reflected a different complement from that in the last permanent certificate issued to the vessel.

III

One other observation in the initial decision also requires comment here. In presenting a rational for the temporary certificate as issued, the Administrative Law Judge declares, in rejecting an argument made by Appellant at hearing:

> "...that the Temporary Certificate should have the manning scale set out on its face would apply equally, in a proper situation, to the other provisions and clauses as to `routes,' `equipment and inspection data,' `fire extinguisher,' grade and capacity of petroleum cargo. So that the short form of the Temporary Certificate would serve no useful purpose....the Temporary Certificate would be `Temporary' in name only, for it would contain every provision that a regular certificate of inspection ought to contain. Since a merchant vessel cannot sail without a certificate of inspection, the vessel would have to remain in port..."

The analysis of R.S. 4421 (46 U.S.C. 399) upon which this is based is not complete, recognizing only that a temporary certificate was first provided for in 1906 and that a vessel subject to inspection

is prohibited from sailing without a certificate.

One item pertinent here was apparently overlooked, but it has great significance in the complete process of issuance of certificates. The contents of a certificate of inspection distinguished in the just-quoted passage of the initial decision by quotation marks are not required by law to be displayed on a certificate. The "grade and capacity of petroleum cargo," not so distinguished, are required to be specified on a certificate issued to FRANCIS S. BUSHEY. This element is most pertinent to the considerations in this case.

IV

It is best here, for clarity, to elaborate on the development of the statute, briefly treated above, since the entire case turns on an understanding of what this section and others pertinent to the case provide overall.

The statute, prior to the 1906 amendment, did not provide for a temporary certificate of inspection. Neither did it prohibit a vessel's navigation without a certificate of inspection. Prior to a 1955 amendment of the statute the law did not provide for the inspectors to issue a certificate to the vessel inspected. The inspectors, under R.S. 4421 as it appeared from its inception, after completion of the inspection and approval of the vessel, certified under oath to the cognizant collector of customs that the vessel met requirements. The Collector thereupon delivered two certified copies of the original, which he kept on file, to the owner or master of the vessel. The process undoubtedly took some time but occasioned no delay to the vessel. It seems to follow logically that when it was made requisite for a vessel to have a certificate aboard at all times when in navigation it was also necessary to provide for a temporary to enable the vessel, in its inspected and approved state, to sail without delay. The "temporary" was delivered, on the spot, to the vessel by the inspectors themselves. The complete process still involved the routing via the collector of customs.

The temporary issued at that time signified only "substantially the fact of such inspection and approval." It must be recognized, however, that the "permanent certificate," to be

delivered by the collectors, was required under law to do no more. There was no statutory requirement for any specific contents of the certificate. It was not until 1908 that R.S. 4463 (46 U.S.C. 222) was amended to require that a vessel carry the complement imposed by the inspectors and that the inspectors enter the complement required on the certificate of inspection. It is quite possible, indeed highly probable, that absolutely no attention was given to impact of this amendment on R.S. 4421; it is quite certain that there is nothing in the language of the statute reflecting an awareness of a potential connection. It is also apparent that any form adopted for the temporary certificate was not altered as a result of the new requirement.

The only other statute requiring a specific entry on a certificate of inspection, other than as to manning, is R.S. 4417a (46 U.S.C. 39la). In 1936 it provided for the entry on the certificate of matters relative to inflammable and combustible liquid cargo in bulk. Again, no specific attention to existing statutory provisions or practices current was apparent, and again, as reflected in this record, no alteration to a form of temporary certificate was attempted. Nevertheless, the evidence of record here, it is emphasized, shows that some attention has been given to the law since the temporary certificate issued to FRANCIS S. BUSHEY had a handwritten specification as to grade and capacity of cargo endorsed upon it.

This state of practices under the statutes makes the real issues comprehensible. If the law requiring the entry of certain matters on a certificate of inspection by the inspectors requires the entry of those matters on a temporary certificate, the temporary certificate issued to FRANCIS S. BUSHEY was, to pertinent extent, defective, and Appellant cannot be held at fault for non-compliance with a requirement that was not made.

If on the other hand the law does not require the entry of the manning requirements on a temporary certificate (and inferentially does not require entry of tanker cargo limitations), a serious question of notice and accountability is immediately raised.

V

I have no trouble in believing that if a customary manning

standard is known in the community to be found desirable for a certain class of vessel and in the course of a civil liability dispute it is found that one of the parties had in fact manned a vessel inadequately in light of the standard, a court would not be slow in imputing negligence if crew sufficiency became an issue, even in the absence of an established formal pronouncement, statutory or regulatory. We are not dealing here with negligence or its results. This is a pure question of misconduct and the view of the Administrative Law Judge who found misconduct must be scrutinized.

His theory is that the manning requirements of the "old" certificate of inspection carried over in the Temporary and that Appellant was bound by them. Here he allows a concession to "good faith" on Appellant's part. The decision says:

> "... by dismissing the men at Yorktown and sailing without adequate replacements [he] obeyed company orders but violated the law. It is no defense to say he obeyed company orders for his duty as Master is clear. However, the reality of the situation is that...[he] is a man caught `in the bright of the line'. This does not relieve him of responsibility for his actions, but may be considered in mitigation..."

It is clear that if the party is to be caught inextricably in a bight there must no flaw in the continuity of the line.

It might be merely captious to resolve this case by pointing to the fact that it was not fully established that Appellant had notice of the requirements of the "old" certificate of inspection such that he was bound to know that for certain voyages he was required to have aboard a total complement of thirteen and for others of only twelve. A remand might possibly cure this "defect" in the proof, but it would be to no profit since, even if the prior service of Appellant as master of the vessel should be precisely proved, the essential question, directly addressed by Appellant himself at hearing and on appeal, would still remain.

Of course, even though Appellant's service at a time when a permanent certificate of inspection was aboard the vessel was not shown, the tenor of the adverse finding is that he knew or should

have known of the earlier requirements and that although it was common practice for inspectors to issue temporary certificates without specifying a complement required it was somehow a breach of faith, therefore misconduct, for Appellant not to have observed the unspoken,"understood" intent of the temporary certificate. It would be ironic to hold Appellant guilty of misconduct, as one possibly innocently "caught in a bight," when the standard of conduct to be prescribed under R.S. 4463 (46 U.S.C. 222) was not in the instance set as the statute requires but was left to an administrative practice not even authorized or directed in the pertinent Federal regulations. An understanding or intent in the mind of an administrator cannot be transformed into a test of conduct when the statute directs that "an entry of such complement of officers and crew..." shall be made in the certificate of inspection and the certificate provided to the vessel under R.S. 4421 (46 U.S.C. 399) does not do so.

VI

One other consideration must be accorded to this matter. The specification contained, not as an essential but as an integral reference, a citation to 46 U.S.C. 222, and it has been clearly seen that the recital of vessel complement called for therein was not present within the precise application of the statute to this case. It is true, however, that after the Investigating Officer had rested, in the course of argument on a motion to dismiss, it was newly urged that 46 U.S.C. 223 (section 2 of Act, Mar. 3, 1913, 37 Stat. 733, as amended) also applied to the matter in hand.

It is correct that the provision applied on its face to the situation aboard FRANCIS S. BUSHEY. The statute not only imposes a duty on the inspecting authority to make an entry of a certain minimum of requirements for deck officers in a certificate of inspection but also prohibits navigation of a vessel unless the officers specified in the statute are aboard. The statute operates directly upon a vessel and its master, with respect to the stated minima, in a way that R.S. 4463 does not.

No direct attention was immediately given to this theory when it was first mentioned by the Investigating Officer except that the stated minima, in a way that R.S. 4463 does not.

No direct attention was immediately given to this theory when it was first mentioned by the Investigating Officer except that the Administrative Law Judge asked that officer to repeat the number of the Code section cited. At a later date, in closing arguments, Appellant's Counsel declared that he thought this provision of law inapplicable to the case since 46 U.S.C. 222 had been specifically mentioned in the notice of hearing, and the Investigating Officer repeated his argument that it did apply. The Administrative Law Judge made no comment on the question of applicability in open hearing and made no reference to such a theory in the initial decision.

The facts in evidence demonstrate beyond peradventure that Appellant violated the statute by making the voyage described with only one C mate aboard the vessel. It is noteworthy that the statute must be read and applied for this to be seen because, for a general rule, it requires three mates aboard a vessel of this class, while for a voyage of the type in question it requires only two.

It can hardly be said that this issue was properly litigated when it was completely overlooked, in the course of hearing and initial decision, that even the certificate of inspection which had originally been aboard the vessel reflected, under the "conditions of operation," the same relaxation of requirements that the statute permitted. Since the findings made show no recognition that a deficiency of the nature, if proved, was of only one mate and not two, it would be unfair to correct them at this time. A remand for the purpose of achieving clear and proper notice and for clarification of findings would not be productive of a useful result in light of the more widespread derelictions which it was intended to prove.

CONCLUSION

In sum, it may be said here that while the statutory language directly dealing with temporary certificate of inspection may not spell out explicitly the need for stating manning requirements therein the opportunity to hold a master or owner to an unexpressed standard is foregone under the practice adopted in this case.

If it is desirable to hold a master to compliance with standards imposable at the discretion of an administrator under pain of suspension of his license, it is necessary that the notice of the standards imposed be clear and complete under the applicable statutes and not left to an unstated intent or understanding.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 12 August 1977, is VACATED, the findings are superseded by the findings made herein, and the charges areDISMISSED.

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

Signed at Washington, D. C., this EIGHTH day of JANUARY 1979

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***** END OF DECISION NO. 2146 *****

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