

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 460791
and MERCHANT MARINER'S DOCUMENT Z-996218 D2
Issued to: John E. MAGIE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2152

John E. MAGIE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 26 January 1978, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, after a hearing at Tampa, Florida, on 16 August and 7 September 1977, suspended Appellant's license for a period of four(4) months on probation for eight(8) months upon finding him guilty of misconduct and negligence. The two specifications of the charge of misconduct found proved allege (1) that while serving as operator aboard M/V ALICE ST. PHILIP while pushing ahead the barge FAUSTINA, under authority of the captioned license, Appellant did, on or about 16 April 1977, while navigating aforesaid vessel in a narrow channel, fail to keep to that side of the fairway or midchannel which lies on the starboard side of the vessel, as required by Article 25 of the Inland Rules of the Road, thereby contributing to a collision between his vessel and SS LOUISIANA BRIMSTONE in Tampa Bay, Florida, and (2) in that Appellant, while serving as aforesaid, did when approaching SS LOUISIANA BRIMSTONE head and head, or nearly so, fail to pass said vessel properly on the port side, after signaling his intention to do so by one short blast of his whistle for a port-to-port passing as required by Article 18 of the

Inland Rules of the Road, thereby contributing to a collision between his vessel and SS LOUISIANA BRIMSTONE in Tampa Bay, Florida. The two specifications of the charge of negligence found proved allege (1) that Appellant, while serving as aforesaid, did in a narrow channel, by failing to keep his vessel to that side of the fairway or midchannel which lies on the starboard of his vessel, negligently collide with SS LOUISIANA BRIMSTONE in Tampa Bay, Florida, and (2) in that Appellant, while serving as aforesaid, did when approaching SS LOUISIANA BRIMSTONE end on or nearly so, by failing to pass said vessel properly on the port side, negligently collide with SS LOUISIANA BRIMSTONE in Tampa Bay, Florida.

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

The Investigating Officer introduced into evidence the testimony of six witnesses, including that of the Mate and the Chief Engineer of M/V ALICE ST. PHILIP, and ten documents.

In defense, Appellant introduced into evidence the testimony of three witnesses, his own included, two documents, and one disposition.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that all charges and specifications as alleged had been proved. He then entered an order of suspension for a period of four months on probation for eight months.

The Decision was served on 30 January 1978. Appeal was timely filed on 27 February 1978, and perfected on 22 May 1978.

FINDINGS OF FACT

On 16 April 1977, Appellant was serving as Master aboard M/V ALICE ST. PHILIP (hereinafter ALICE), under the authority of his license. Shortly after midnight (0000) Appellant, manning the helm and in direct pilothouse control of the engines, backed ALICE, with the barge FAUSTINA secure in the notch, out from the Agrico Dock,

located near the easterly end of Big Bend Channel in Hillsborough Bay, Tampa, Florida, into a turning basin. While he was making a 180 degree turn, a fuse in the electrical circuitry controlling the primary ("followup") steering system on ALICE failed. Appellant switched to an alternate electrical circuit for the system but its fuse also failed. Both fuses were replaced. Because further difficulty with the electrical circuitry of the primary system was anticipated, Appellant shifted to the secondary ("non-followup") steering system. At approximately 0040 Appellant completed the turn, entered Big Bend Channel, and then released the tug PALMETTO, which had been assisting him. At about this time, "some sluggishness" was first observed on the steering capability of the ALICE, in that the rudder responded to the lever which controlled the non-followup system in a slower fashion than normal, and the flotilla (ALICE and FAUSTINA) was not as responsive to the rudder as normally could be expected. At approximately 0100, Appellant broadcast a "security call" on VHF radio, channel 13, during which he announced that he was experiencing steering difficulties. Portions of this transmission were heard by the Master and the Pilot of SS LOUISIANA BRIMSTONE (hereinafter BRIMSTONE) inbound from the Gulf of Mexico, but not that portion dealing with the steering difficulties. At approximately 0115, ALICE was proceeding outbound (generally westerly) in the Hillsborough Cut "A" and BRIMSTONE had entered Gadsden Point Cut (which runs 069°-249° T) proceeding on a course of approximately 069°T. ALICE and BRIMSTONE exchanged radio communications during which Appellant and the pilot of BRIMSTONE agreed on a "one whistle" or port-to-port passing in Gadsden Point Cut. Night visibility was clear, wind was slight, and the current in Gadsden Point Cut was slack or nearly so. At approximately 0120, Appellant made a turn to starboard from Cut "A" and entered Gadsden Point Cut. As he completed his turn, Appellant found his flotilla on the wrong (south) side of the channel. Appellant then maneuvered his flotilla to the proper (north) side of the Gadsden Cut, and attempted to come to a course which would have permitted him to pass safely port-to-port with BRIMSTONE. However, in doing so, his flotilla turned into the path of the oncoming BRIMSTONE. As BRIMSTONE and Appellant's flotilla closed, Appellant sounded the danger signal. The pilot of BRIMSTONE also sounded the danger signal, and its Master took emergency evasive action. Nevertheless, at 0126, the port bow of the barge FAUSTINA collided with the port quarter of BRIMSTONE. After the collision, both BRIMSTONE and Appellant's flotilla were able to proceed without further incident.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that the ALJ erred in finding that Appellant's failure, either to return to the Agrico dock or to retain the tug PALMETTO until safely reaching the Gulf of Mexico, constituted negligence or misconduct. It is contended that the Administrative Law Judge erred in finding Appellant guilty of a technical violation of Articles 25 and 18 of the Inland Rules for failing to keep to the starboard side of the channel and pass BRIMSTONE port-to-port. It is finally contended that the Administrative Law Judge erred in finding that Appellant had failed to satisfactorily to rebut the presumption of negligent operation which had been established.

APPEARANCE: Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, Florida, by Dewey R. Villareal, Jr., Esq.

OPINION

I

At the outset, I must agree with Appellant and disapprove the findings of the Administrative Law Judge that Appellant either should have returned to the Agrico Dock or should have retained the tug PALMETTO until his flotilla reached the Gulf of Mexico. With the exception of the minor collision involving BRIMSTONE, Appellant was apparently able to maneuver his flotilla safely from Tampa Bay, Florida, to Louisiana without incident. In hindsight, one might agree that had he returned to the Agrico Dock for immediate repair of the primary steering system, or had he retained the tug PALMETTO until he reached the Gulf of Mexico, he would not have been involved in this collision. However, despite many pages of testimony and much argument, it is still clear that Appellant was *legally required*, for the safety of his or any other vessel, to undertake either action. It simply cannot be said, except in a remote and indirect sense, that the failure to undertake one of these two actions contributed to the collision. While secondguessing Appellant on the appropriateness of undertaking such actions is appealing, speculation of this sort

cannot soundly or equitably be the basis for action under R.S. 4450 to suspend or revoke a license. I therefore reject both these findings of the Administrative Law Judge.

Although I reject both these findings as not being adequately supported in law, some guidance on the propriety of the Administrative Law Judge's even considering them is in order. No motion was ever made to amend the charges and specifications to include specifications alleging that Appellant improperly failed to return to the Agrico Dock or improperly failed to retain the tug PALMETTO. It cannot fairly be said that either specification of either charge, as *drafted*, provides sufficient warning to Appellant that his failure to undertake either of these actions might support findings of misconduct or negligence. This failure to amend, by itself, is not fatal in an administrative hearing of this nature. Under the rationale of *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839 (D.C. Cir. 1950), had Appellant been fairly apprised during the hearing that his conduct in not undertaking either of these two action might be held against him, and had he then been permitted a fair opportunity to defend himself, he could not now be heard to complain that he had been denied due process during this hearing. Although not necessary to my decision, I find that the notice given to Appellant was insufficient. Not until the Administrative Law Judge made his closing remarks at the conclusion of the hearing was Appellant actually informed that he might be found to have improperly failed to return to the dock. Only upon service of the decision upon him was he first formally advised that he had been found to have improperly failed to retain the tug PALMETTO. In neither instance was he provided fair opportunity to "litigate" the issues. Thus, the notice he finally did receive was clearly too late in the administrative process. For this additional reason, these findings cannot stand.

II

The essential thrust of Appellant's arguments against the charges and specifications found proved is that the Administrative Law Judge applied a "higher standard of performance than the law and the regulations require." In support of this argument, he contends that both negligence and misconduct are defined in 46 CFR 5.05-20 as "conduct which falls short of what a reasonable person

would do in the circumstances." He further contends that "the ALJ has found Respondent guilty of negligence and misconduct, not because he failed to use reasonable care, but because he failed to achieve a result...keeping his tug and barge on its own starboard side of the channel (Opinion-17)." While generally accepting his definition of negligence, I am constrained to point out that misconduct is defined as "human behavior which violates some formal, duly established rule, such as the common law, the general maritime law, a ship's regulation or order, or shipping articles. *In the absence of such a rule, 'misconduct' is human behavior which a reasonable person would consider to constitute a failure to conform to the standard of conduct which is required in the light of all the existing facts and circumstances.*" [emphasis added] (46 CFR 5.05-20(a)(1)) The distinction I have underscored is important in this case because the misconduct of which Appellant is charged stems from his alleged failure to obey two of the Inland Rules of the Road, codified at 33 U.S.C. 210 and 33 U.S.C 203, respectively. As the Administrative Law Judge properly observed, Appellant's violation of these statutes rendered him guilty of misconduct. Decisions on Appeal Nos. [2070](#), [2052](#). Appellant's argument that the Administrative Law Judge applied a "higher standard of performance than the law and regulations require" is clearly without merit. The standard against which his conduct was measured in finding the charge of misconduct proved is the statutory one just discussed. The standard against which his conduct was measured in finding the charge of negligence proved is that set out at 46 CFR 5.05-20(a)(2), in which negligence is defined as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform." A presumption of negligence on the part of Appellant arose from the fact, admitted by Appellant, that his flotilla was proceeding on the wrong side of the channel in violation of the previously cited statutes (Inland Rules of the Road) and thereby clearly impeding navigation. This is well settled. Decisions on Appeal Nos. [2016](#), [2012](#), [866](#), [728](#). That Appellant's failure to navigate his flotilla on the proper side of the channel caused the collision is clear. Hence, a prima facie case of negligent operation was made by the Investigating Officer, and the burden to rebut settled on Appellant. The Administrative Law Judge gave due consideration to Appellant's presentation of his evidence, including the explanation that Appellant had done all

that reasonably could have been expected of him, yet the collision occurred nonetheless, perhaps the result of an unexpected and irresistible current. Nevertheless, the Administrative Law Judge found Appellant's evidence insufficient to overcome the presumption of negligent operation.

The decision of the Administrative Law Judge is supported by substantial evidence of a reliable and probative character. Contrary to Appellant's contention, no error was committed by the Administrative Law Judge in recognizing that Appellant had the burden of rebutting the presumption of negligence, a burden which the latter failed to meet.

CONCLUSION

As stated in above, the Administrative Law Judge erred in making the two specific findings that Appellant had operated ALICE in a negligent manner by failing to either return to the Agrico Dock or to retain the tug PALMETTO. Because consideration of these two findings could have contributed to the severity of the order, a proportionate reduction in the suspension and probation is necessary. The period of suspension is therefore reduced to two months, and the period of probation reduced to four months.

ORDER

The order of the Administrative Law Judge, dated at Jacksonville, Florida, on 26 January 1978, is AFFIRMED as MODIFIED herein.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D. C., this 19th day of April 1979.

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