UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 477451 and
MERCHANT MARINER'S DOCUMENT NO. Z-874261
Issued to: Wayne R. McKee

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2154

Wayne R. McKee

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 6 March 1978, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, after hearing held at Valdez, Alaska, suspended Appellant's seaman's documents for three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as Master of the United States SS AMERICA SUN under authority of the document and license above captioned, on or about 8 December 1977, Appellant did, while the vessel "was departing the Port of Valdez, Alaska, wrongfully fail to obey an order regarding said vessel's speed issued by competent authority, to wit, the Captain of the Port, Prince William Sound, Alaska, which was issued by verbal direction of the Vessel Traffic Center."

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

After hearing, 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 three months on twelve months' probation.

The entire decision was served on 14 March 1978. Appeal was timely filed, and perfected on 8 August 1978.

FINDINGS OF FACT

On 8 December 1977, Appellant was serving as Master of the United States SS AMERICA SUN and acting under authority of his license. (Because of the disposition being made, no further findings besides this jurisdictional statement are appropriate.)

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Since the disposition to be made is not based upon the record of proceedings but only upon the initial decision itself, the grounds for appeal stated need not be reviewed.

APPEARANCE: Hughes, Thorsness, Gantz, Powell and Brundin, Anchorage, Alaska, by Kenneth P. Jacobus, Esq.

OPINION

I

The specification in this case leaves something to be desired. On its face it alleges a failure to obey an order on 8 December 1977 and a justifiable inference is that the order was given on that date. (It is possible of course that an "order regarding...vessel's speed" may in certain modes of promulgation be given at some earlier date than the day on which the disobedience is said to have occurred, but I do not think that such a speculation is appropriate now in light of the initial decision.) The order is said to be an order issued by the Captain of the Port, Prince William Sound, who is identified as a competent authority. It is also said however that the order was "issued by verbal

direction of" The Vessel Traffic Center.

To allege two "issuances" of an order is ambiguous. I am accepting as understood that "verbal" is here used in the sense, frequently encountered, of "spoken" rather than written, but I am forced to question the meaning of "by direction of." As most often seen, this phrase is completed by the name or office of the one having the power to order or direct while the one "directed" is the agent of the authorized issuer of the order. I construe the specification, in reliance on official notice of the organization of the Coast Guard, to mean that an order of the Captain of the Port was transmitted to Appellant by the agent of the Captain of the Port, under the direction of that officer.

The specification alleges only an order "regarding the speed of said vessel," but the uncertainty of this may be cured by proper findings supported by evidence of what the order commanded.

Absent some indication otherwise I take it then that it was fairly alleged that the "Vessel Traffic Center," acting under the authority of the Captain of the Port, gave a spoken order to Appellant "regarding" the speed of AMERICA SUN, with the precise order subject to proof, and that Appellant, having received the order, failed to obey it.

II

The findings made in the initial decision do not support an allegation to this effect.

In review of the findings some comments are first necessary to rule out some implications that appear to be concealed within them.

The fact that the Commander, Seventeenth Coast Guard District,

by letter, ordered the Captain of the Port to set a certain speed limit is merely a preliminary matter, relevant only to establishing the duty and authority of the Captain of the Port to set a speed limit. There is no finding that the Captain of the Port set this limit. The finding that a "boarding kit," which "included the speed restrictions and Operating Manual," was "furnished to the vessel by the Coast Guard" on either 10 or 30 October 1977 (before Appellant became master of the vessel) is irrelevant to the issue of a spoken order given on 8 December 1977.

The closest to a finding that an order was given to Appellant is a finding that "when the vessel was first advised that it was transiting at 12 knots through the Narrows, the Pilot told the Master (Appellant) that he would have to reduce speed." This is immediately followed by a finding that Appellant refused to reduce speed. Other apparently pertinent findings, made in the initial decision just before these findings are:

(1) that at 0945 the pilot was advised by VTC that the maximum speed authorized through Valdez Narrows was 6 knots;
(2) that at 1025, the vessel entered Valdez Narrows and was again advised of the "6-knot speed limit;"
(3) that at 1036 a report was made to the Duty Officer at VTC that AMERICAN SUN was plotted at 12 knots;
(4) that, presumably shortly after this, VTC advised the vessel that the plot showed a speed of 12 knots; (This finding is made in these words, "The VTC advised the vessel that the plot showed her traveling at 12 knots in excess of the required 6 knots." I take this to mean not that the vessel was advised that it was traveling at 18 knots but that it was advised that its speed was 12 knots and that this was in excess of the "required 6 knots.");
(5) that at 1039 the vessel asked permission to maintain at 12-knot speed and permission was granted.

Under the findings made, the one noted as "(4)" above appears to correspond with the reference made later in the initial decision to the time "when the vessel was first advised that it was transiting at 12 knots...."

If the finding that the pilot advised Appellant that he would

have to reduce speed is to be construed as the conveying to Appellant of an order from VTC to reduce speed to 6 knots, or some other unmentioned speed, the failure to obey, it seems, lasted three minutes, until the "order" was rescinded. The initial decision does not advert to this.

I find however no concrete finding that VTC ordered anything "regarding" the vessel's speed nor that an order was conveyed to Appellant. A statement by a pilot that "he would have to reduce speed" is not an order from anyone to anyone even if it is refused.

I will note here the one item I have looked for in the record of proceedings: that is that the pilot in question was asked, "Did the Coast Guard ever direct you or order you to slow down when you were in the Narrows?" and his answers was, "No." (R144.)

III

Other than in reference to the question and answer of the pilot mentioned and to preliminary jurisdictional matters I have not reviewed the record in this case. It may be that some theory of constructive notice was developed at the hearing to allow a finding somewhat different from what seems to have been alleged. It may be that I have misconceived what the order "regarding" the speed of the vessel is supposed to have been, but if so the corrective is not in the findings made. It may be that the record of proceedings may justify the trier of facts in making concrete findings based on inference from circumstantial evidence so as to clarify and make certain fair implications of the specification.

I am not concerned at this point with the authority conferred by the statute or the delegations of authority, nor am I concerned with whether VTC was the authorized voice of Captain of the Port. What I do not see here is that the Administrative Law Judge has found that VTC gave an order, any order, to Appellant to do any thing about the speed of AMERICA SUN at any time on 8 December 1977. The findings therefore are not seen to support the "ultimate" finding that Appellant failed to obey an order "regarding" anything.

IV

There is an inconsistency apparent in the handling of Appellant's "merchant mariner's document" in this case that must be mentioned before a new initial decision may be rendered. Immediately after Appellant entered pleas to the two specifications originally preferred a motion was made to dismiss proceedings "against the Z card." The Administrative Law Judge noted that "misconduct normally includes the document as well as the licenses" but declared that since the nature of the case was "really the concern of the master...duties of as master" it did not reflect upon Appellant's ability to hold "a merchant mariner's document." When it was specified by the Investigating Officer that there was no objection, the motion was granted and the charges were dismissed "as regard the document."

This was of course an error, in disregard of jurisdictional bounds generally and agency policy specifically. See 46 CFR 5.20-170(c). But since it was concurred in by the officer authorized to prefer charges, a condition necessarily precedent to a hearing which may result in suspension or revocation of "seamen's papers," it could be viewed as though the charges had not been preferred at all and the hearing had not taken place. Under the cited policy, of course, an investigating officer has no more the discretion to sever considerations in this respect than has an administrative law judge.

Nevertheless, the Administrative Law Judge entered, on 15 February 1978, an "order" which gave notice of a suspension to Appellant. While this document specifically eliminated a prepared reference to a "merchant mariner's document" it did, in specifically inserted language, address itself beyond Appellant's license to "all other valid licenses and/or documents issued to you by the Coast Guard." This reintroduces as subject to an order that which the striking of the printed words seems intended to eliminate. Without comment, the initial order in the required written decision, issued on 6 March 1978, appears to revise this. Although the Administrative Law Judge declared in that decision that he had "in open hearing on 15 February 1978, issued the following ORDER," the words which followed limited the order to the captioned license and "all other valid licenses issued to you by the Coast Guard...."

Such inconsistencies may be inevitable when unsanctioned

practices are undertaken. However, a *caveat* may be entered here. At the outset of the hearing, the Administrative Law Judge sighted Appellant's "merchant mariner's document." He stated the service which the document authorized for Appellant, but a portion of his statement was recorded in the transcript as "indiscernible." It seems reasonably clear, however, that Appellant holds an able seaman's rating, in which case there exists a subject for suspension. Since licensed officers are not required to hold certificates of service (46 U.S.C. 672(i)), it could well have been that a "merchant mariner's document" issued to Appellant under a different theory of regulation would have been immune to proceedings under R.S. 4450 anyway.

Despite the erroneous application of principles in this case, in fairness to Appellant it is made a condition of further proceedings to limit considerations and a possible order suspension to one affecting only licenses issued to Appellant, and that not greater than as initially stated. Since that order did in fact include all licenses, I conceive that the Administrative Law Judge's reference to consideration of Appellant's conduct only as "master" not to be limiting.

V

Since the entire record may be supportive of proper findings on matters actually litigated, this case will be remanded but I must comment here, since the entire initial decision is to be set aside, that a decision of an administrative law judge is not a proper vehicle for purporting to give advice on the exercise of his discretion to a Coast Guard District Commander who acts by delegation of authority from the Secretary of the Department.

ORDER

The order of the Administrative Law Judge, dated 6 March 1978 at Long Beach, California, is VACATED; the findings are SET ASIDE; The case is REMANDED to the Administrative Law Judge for the entry of a new initial decision.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
Vice Commandant

Signed at Washington, D.C., this 11th day of May 1979.

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