

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 413119 AND
MERCHANT MARINER'S DOCUMENT NO. Z-8887482
Issued to: William R. HORNE

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2155

William R. HORNE

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 3 March 1978, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, suspended Appellant's license and merchant mariner's document for 1 month on 6 months' probation upon finding him guilty of misconduct. The two specifications of misconduct found proved allege (1) that Appellant, while serving as master aboard SS ACHILLES, under authority of his license and document, on or about 9 January 1978, wrongfully failed to plot the position of SS ACHILLES while navigating from naval anchorage "A", Narragansett Bay, East Passage, to Mount Hope Bay, Rhode Island; and (2) that Appellant while serving as master of SS ACHILLES, under authority of his license and document, "wrongfully navigated the vessel in violation of the vessel's certificate of inspection from 17 December 1977 to 9 January 1978; to wit; the vessel's tailshaft was due to be drawn no later than 31 October 1977."

At the hearing, Appellant was initially represented by professional counsel, who was subsequently disqualified by the

Administrative Law Judge on motion of the Coast Guard Investigating Officer. Appellant then entered a plea of guilty to the charge and specifications.

The Investigating Officer introduced into evidence seventeen exhibits and the testimony of one witness.

In mitigation of his plea of guilty, Appellant offered his sworn statement and five exhibits. Upon conclusion of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved by plea. He entered an order suspending Appellant's license and merchant mariner's document for one month on 6 months' probation.

The entire decision was served on 6 March 1978. Appeal was timely filed on 20 March 1978 and perfected on 10 August 1978.

FINDINGS OF FACT

On 9 January 1978, Appellant was serving as master aboard SS ACHILLES and acting under authority of his license and merchant mariner's document while the vessel was underway in Mount Hope Bay, Rhode Island. Because of the disposition of this appeal, no further findings are necessary.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge erred in disqualifying Appellant's attorney on the ground that the latter was also representing a witness in the matter. Because of the disposition of this appeal, additional arguments on the merits will not be addressed.

APPEARANCE: Glynn and Dempsey, Boston, Massachusetts, by Richard A. Dempsey, Esq.

OPINION

I

At the outset, it is necessary to raise and dispose of an issue not previously addressed by the parties in these proceedings.

The second specification of misconduct found proved alleges that "while serving as Master of the SS ACHILLES, under authority of his license and document, [Appellant] wrongfully navigated the vessel in violation of the vessel's Certificate of Inspection from 17 December 1977 until 9 January 1978; to wit: the vessel's tailshaft was due to be drawn no later than 31 October 1977." "A specification should be so framed that if all its allegations are found established the offense charged must be found proved." *Decisions on Appeal* 1739, 2013. A specification must contain a "statement of the facts constituting the offense." 46 CFR 021 5.05-17(b). Here, proof of the acts alleged, that Appellant navigated the vessel from 17 December 1977 until 9 January 1978, and that the vessel's tailshaft was due to be drawn no later than 31 October 1977, would not establish the commission of an offense. An essential element of the offense, that the tailshaft was in fact not drawn when due, is missing from the specification. Adding the terms "wrongfully" and "in violation of the vessel's Certificate of Inspection" does not cure the defect in the specification. I might add that it is not necessary that a specification be stated with the technical precision required of pleadings at the old common law, but, at the least, a specification must recite facts which, if proved, will constitute an offense.

II

The only issue which need be resolved in this appeal is whether 46 CFR 5.20-93 was properly invoked to preclude Appellant from being represented at the hearing by the attorney-counsel of his choice. Appellant was master aboard SS ACHILLES on 9 January

1978 when the vessel went aground in Mount Hope Bay, Rhode Island. The hearing was conducted in Providence, Rhode Island, on 19 January 1978. As his first witness, the Investigating Officer called the state pilot who had been aboard ACHILLES when it grounded. The Investigating Officer elicited from the pilot the fact that he had discussed the case with his attorney, Mr. Richard A. Dempsey, the same attorney who was representing Appellant at the hearing. The Investigating Officer then removed to disqualify Mr. Dempsey from representing Appellant, citing 46 CFR /z/ 5.20-93, which provides, "(a) Any witness may have personal counsel to advise him as to his rights, but such counsel may not otherwise participate in the hearing." Both the pilot and Mr. Dempsey stated that the latter was not acting as counsel for the pilot at the hearing. Subsequently, Appellant testified that he continued to desire legal representation at the hearing by Mr. Dempsey. Nevertheless, relying upon the holding of *In Re Cahill*, 230 S.W. 2d 633,313 KY 867 (1950), the Administrative Law Judge granted the motion and disqualified Appellant's counsel, Mr. Dempsey. Ultimately, acting without benefit of legal counsel, Appellant pleaded guilty to the charge and specifications.

At issue is the right of Appellant to be represented by the counsel of his choice at a suspension and revocation proceeding, which is an adjudicatory, administrative hearing, under 46 CFR Part 5. The statutory basis for this right is found in Subsection (d) of R.S. 4450 as amended (46 U.S.C. 239(d)), and the Administrative Procedure Act (APA) codified at 5 U.S.C. 555(b).

Most of the Federal courts which have considered the right to counsel under the APA have held that a witness is entitled to retain the attorney of his choice, that attorney's representation of others involved in the same agency proceeding notwithstanding. *Backer v. The Commissioner of Internal Revenue*, 275 F. 2d 141 (5th Cir. 1960), *Securities and Exchange Commission v. Higashi*, 359 F. 2d 550(9th Cir. 1966), *Securities and Exchange Commission v. Caspo*, 533 F. 2d 7 (D.C. Cir. 1976); Contra, *U.S. v. Steel*, 238 F.Supp. 575 (S.D.N.Y. 1965). *Steel, supra*, is distinguishable in that the agency proceeding was merely investigatory in nature, not adjudicatory, as is a suspension and revocation hearing. While the right of a party in an adjudicatory proceeding to retain the attorney of his choice, under either the APA or R.S. 4450, has apparently not been considered by

any Federal Court, certainly this right is at least equal to that of a witness in the same type of proceeding. Cf., *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932) (right of criminal defendant to attorney of choice). *In re Cahill*, *supra*, does not support the disqualification of Mr. Dempsey. In *Cahill*, the Kentucky Court of Appeals affirmed a six month suspension of an attorney who had represented both the prosecutrix and the defendant in the same criminal proceeding. A suspension and revocation proceeding such as this one is not criminal in nature; of greater significance, as was clearly established on the record, Mr. Dempsey was acting at the hearing not as counsel for both Appellant and the pilot but as counsel for Appellant.

Had Mr. Dempsey actually been acting as counsel for both Appellant and the pilot in the same proceeding, 46 CFR 5.20-93 could still not serve as the means for disqualifying him from representing Appellant. Review of the history of this regulation will serve to explain its rather limited purpose. Prior to the commencement of War World II, seamen's suspension and revocation proceedings were conducted by the Bureau of Marine Inspection & Navigation (BMIN). The pertinent regulations promulgated by BMIN, at 46 CFR Parts 136 and 137, contained neither authority for, nor restriction of, the active participation of witnesses' attorneys at hearings. After transfer of various of the functions of the BMIN to the Commandant of the Coast Guard in 1942, he suspended the existing regulations and issued, without explanation germane to the issue in this appeal, "Temporary Wartime Rules Governing Investigations of Accidents and Casualties." 7 F.R. 6778 (1942). Among these "rules" was eventually included, at 46 CFR 136.106(e), the following, "(a) any witness may, if he so desires, have personal counsel present during the time he is being examined to advise him as to his rights, privileges, and immunities under the Constitution, but such counsel may not otherwise participate in the hearing." 8 F.R. 2160(1943). In 1947, the Commandant canceled both the suspended peacetime and the "temporary wartime" regulations, and issued new regulations for conducting suspension and revocation proceedings, including, at 46 CFR 137.09-25, in which provided, "the appearances of persons at the hearing shall be entered in the following order:

(a)...

(b)...

(c)...

(d) Witnesses' personal counsel who may in the course of the hearing advise such witnesses of their constitutional rights, privileges and immunities, but who will not be allowed to examine or cross-examine the person charged or other witnesses or otherwise participate in the hearing." 12 F. R. 6744(1947). Among the purposes for promulgation of these 1947 regulations was the fulfillment of requirements mandated by Congress in the Administrative Procedure Act. 12 F.R. 1111(1947). This regulation remained in effect as quoted above until 5 October 1962 when it was re-drafted to read as it now appears (at 46 CFR 5.20-93), and was issued as 46 CFR 137.20-93. 27 F.R. 9871(1962). The intent in redrafting this regulation in 1962 apparently was not to change it substantively, but instead only to present it in a more concise fashion. Without further change it subsequently was reissued as 46 CFR 5.20-93. 39 F.R. 33330 (1974). It is readily apparent from reviewing the history of this regulation that it was never intended to be used as a means to disqualify counsel for an individual who had been charged under RS 4450. Its sole purpose is to restrict somewhat the active participation of counsel for a witness during the hearing. Had it been established that Mr. Dempsey was representing both Appellant and the pilot at the hearing, this regulation could perhaps have been properly invoked to limit the scope of his representation of the pilot, but it could not serve to limit the right accorded to Appellant, under R.S. 4450 and 5 U.S.C. 555(b), as implemented by 46 CFR Section 5.20-45(1), to full and adequate representation by the counsel of his choice.

III

In arguing the motion to disqualify Mr. Dempsey, the Investigating Officer questioned the ethics of representation by Mr. Dempsey of both the pilot and the master in proceedings arising from the grounding of SS ACHILLES. This issue, i.e., whether it was ethically permissible for Mr. Dempsey to represent more than one of those who might have been charged following the grounding, is one which merits little discussion here. As Appellant points out on appeal, the proper forum for pursuing that question, if at all, is before the Massachusetts Bar Association, of which Mr.

Dempsey is a member. While there may be a possibility for finding that Mr. Dempsey was representing clients with conflicting or adverse interests (e.g., where the interests of one would require attempting to prove the fault of the other), no testimony at all was taken to establish that conflicting interests actually do exist. Moreover, what the record does establish is that both men knew of the joint representation and apparently of its perils, yet wholeheartedly approved of Mr. Dempsey's continued representation of Appellant in this proceeding, and of his future representation of the pilot in any state proceedings which might be brought. In these circumstances, I conclude that the propriety of Mr. Dempsey's representation of Appellant was properly to be determined by Appellant, not by the Investigating Officer or the Administrative Law Judge.

IV

In further support of his motion to disqualify Mr. Dempsey, the Investigating Officer stated that his investigation had been unfairly impeded because Mr. Dempsey represented Appellant, the pilot, and the third mate aboard ACHILLES. This multiple representation notwithstanding, if it is conceded that the refusal to freely discuss the grounding was based upon proper legal advice (See, e.g. 46 CFR 4.07-35), it makes no difference whether that advice comes from one attorney or from one hundred, for the result is the same. In any event, as correctly observed by the Administrative Law Judge, a witness at a suspension and revocation hearing, is sworn and must testify truthfully. Should any attorney, whether representing one or more of those who testify, suborn perjury or otherwise act illegally, his conduct would subject him to criminal sanction. See 46 CFR 4.11-5, and 5.20-87. At the hearing itself, a recalcitrant witness called by the Investigating Officer may, at the discretion of the Administrative Law Judge, be treated as a "hostile witness." See, e.g., Rule 611, Federal Rules of Evidence (1975). For this additional reason, it is not necessary that each who testifies be represented by separate counsel.

CONCLUSION

It is concluded that because Appellant was not permitted the assistance of legal counsel of his choice, his plea of guilty to

the charge and specifications must be set aside.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts, on 3 March 1978, is VACATED and the charge is DISMISSED without prejudice to the institution of further proceedings.

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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