UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 466420
Issued to: George H. McDONALD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2158

George H. McDONALD

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

By order dated 16 November 1977, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, after a hearing conducted at Tampa, Florida, on 16 June and 9 August 1977, suspended Appellant's license for a period of one month and further suspended his license for an additional period of four months on probation for twelve months upon finding him guilty of negligence. The one specification of the charge of negligence found proved alleges that Appellant while serving as First Class Pilot aboard SS PHILLIPS WASHINGTON, under authority of the captioned document, did on or about 27 March 1977, while the vessel was maneuvering in Tampa Bay, Florida, negligently order full ahead engines while the tug TONY ST. PHILIP was made fast to the stern of PHILLIPS WASHINGTON, thereby resulting in tripping and subsequent sinking of the tug TONY ST. PHILIP.

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

The Investigating Officer introduced into evidence the testimony of five witnesses, ten documents, and two depositions.

In defense, Appellant introduced into evidence the testimony of two witnesses, his own included, one document, and transcribed portions of previously recorded interviews of three crew members of PHILLIPS WASHINGTON.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of suspension for one month and further additional suspension of four months on twelve months' probation.

The decision was served on 17 November 1977. Appeal was timely filed on 22 November 1977, and perfected on 9 May 1978.

FINDINGS OF FACT

Appellant was serving as Firs Class Pilot aboard SS PHILLIPS WASHINGTON (hereinafter WASHINGTON) on the evening of 26 March 1977, when it grounded on the west side of Cut "F" Channel, Tampa Bay, Florida, while on an outbound (southerly) transit. WASHINGTON is 492.9 feet long and 68.3 feet in breadth. Cut "F" Channel is 400 feet wide and runs 172°-352°T. After efforts to bring WASHINGTON off the ground without outside assistance proved unsuccessful, the tugs, TONY ST. PHILIP (hereinafter TONY) and GLORIA ST. PHILIP (hereinafter GLORIA) were dispatched. After further unsuccessful efforts, TONY was ordered by Appellant to go on a hawser to pull while GLORIA took position on WASHINGTON's port quarter to push. At all times material to this appeal, WASHINGTON was under the conn of Appellant who gave all engine and helm orders and directed both tugs via walkie-talkie, VHF Channel 14. At 0129, 27 March 1977, Appellant ordered the engines of WASHINGTON put at full astern while TONY pulled and GLORIA pushed. Shortly before 0137, WASHINGTON came free of the ground. At approximately 0137 1/2, Appellant ordered the engines stopped. Shortly after

WASHINGTON came free, the captain of TONY radioed Appellant and advised him that the stern of WASHINGTON was getting close to the east side of the channel. Appellant ordered TONY to let go the hawser. TONY's captain advised Appellant that he would have to come up behind WASHINGTON to do so. Appellant then directed TONY's captain to advise him when TONY was clear. Appellant ordered WASHINGTON's Second Mate, on duty in the wheelhouse, to have the towing hawser released. This order was in turn relayed aft by the Second Mate, but, although TONY had come up behind WASHINGTON, the towing hawser was not let go because no one on board WASHINGTON had been standing by to release it. Appellant informed WASHINGTON's Master of his intention to issue an order to go ahead slow at which time the Master cautioned Appellant to be careful because the tugs were still made fast. Appellant twice visually checked on the status of TONY from the port wing of the bridge, but at 0139, without awaiting radio confirmation from TONY that it had cleared, he ordered WASHINGTON's engines put at slow ahead. Almost immediately thereafter, Appellant ordered full ahead on the engines. This resulted in tightening the towing hawser between the sterns of WASHINGTON and TONY, and the creation of substantial wheelwash. The forces so generated acted to lay TONY over on its side causing it to sink. No lives, however, were lost.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that this suspension and revocation proceeding grew out of an improper and prejudicial casualty investigation, that Appellant's right to due process of law was denied him, that the Administrative Law Judge improperly failed to recuse himself, and that the charge and specification were not proved.

APPEARANCE: Holland and Knight, Tampa, Florida, by C. Steven Yerrid, Esq.

OPINION

I

Appellant first contends that he was prejudiced in defending himself by the failure of the Coast Guard investigating officer to notify him of the first two "phases" of the casualty investigation conducted after the sinking of TONY. These "phases" consisted of the investigating officer's conducting of interviews on 3 April 1977, of personnel who had been aboard WASHINGTON at the time of the casualty, and on 6 April 1977, of personnel who had been aboard the two tugs. It is contended that the alleged failure to so notify Appellant violated both R.S. 4450, as amended, and Coast Guard regulations, and prejudiced Appellant in that he was not present on either of those two days and therefore lost the opportunity to interrogate or cross-examine potential witnesses at that time.

The record before me virtually is devoid of any evidence that the alleged improprieties in the casualty investigation did occur. I therefore shall assume, *arguendo*, that, as Appellant alleges, he was not notified beforehand of these interviews.

It is not at all clear that , in failing to notify Appellant beforehand of his intention to conduct these interviews, the investigating officer violated R.S. 4450 or any of the regulations issued pursuant thereto. During an investigation conducted pursuant to 46 CFR Part 4, a "party in interest," defined at section 4.03-10 to include "all licensed or certificated personnel *whose conduct,* whether or not involved in a marine casualty or accident *is under investigation* by the Board or investigating officer" (emphasis added), is entitled to "be represented by counsel, to examine and cross-examine witnesses, and to call witnesses in [his] own behalf." 46 CFR 4.07-7. As Appellant concedes, the investigating officer formally did designate him a party in interest on 8 April 1977, during the "third phase" of the casualty investigation. What Appellant's contention boils down to then is an argument that the investigating officer, before he ever set foot aboard WASHINGTON on 3 April, or interviewed his first potential witness, somehow should have foreseen that he would ultimately determine Appellant properly to be a party in interest. Such prescience is normally not required of an investigating officer. That the latter formally did designate Appellant a party in interest only after conducting two days of interviews lends credence to the view that only then did he determine the need to so designate Appellant, and thus only then did his duty to do so

arise. In retrospect, it is clear that Appellant should have been designated a party in interest at the outset of the casualty investigation; however, on the record before me, I am unwilling to castigate the investigating officer for failing to do so. Nevertheless, I shall assume further that the investigating officer acted improperly in failing to notify Appellant of his intention to conduct these interviews.

Appellant contends that the failure to afford him his rights as a party in interest at the "Part Four" investigation (46 CFR Part 4) "tainted" the subsequent Part 5 (46 CFR Part 5) revocation and suspension proceeding, thus requiring dismissal of the charge and specification. "Since a proceeding under Part 137 [now Part 5] is complete and entire in itself and is to be conducted in accordance with provisions of the basic statute relative to suspension and revocation of licenses and of the relevant requirements of 5 U.S.C. 551 *et seq*., in light of judicial glosses where controlling, I hold specifically that when a party has been accorded *all* his rights in a Part 137 proceeding, when evidence properly excluded has been excluded, and when the procedural requirements for a hearing under the part have been met, no alleged error in a proceeding under Part 136 nakedly and without more, constitutes a bar to hearing under Part 137."Decision on Appeal No. 2004.

Appellant further contends that he was prejudiced in defending himself in the Part 5 proceeding because he had been unable to cross-examine several witnesses whom the investigating officer had interviewed during the Part 4 investigation, and because the investigating officer did not keep the Part 4 investigation "open" for a longer period. The simple answer to this contention is that any prejudice Appellant might have otherwise suffered was obviated by the action of the Administrative Law Judge. The latter was quite willing to postpone the hearing in order to provide Appellant with ample opportunity to interrogate any of these witnesses, he required the Coast Guard investigating officer to provide Appellant with the names of all witnesses who had been interviewed, and he clearly indicated to Appellant that one of the information obtained in the Part 4 investigation would be introduced into the Part 5 hearing, as such, except by stipulation. Concededly, it would have been *easier* for Appellant to interrogate all the witnesses at the same time as the investigating officer, but

reversible error does not result from the difficulty of the endeavor alone. Appellant also contends that the investigating officer violated 46 CFR 5.05-10 by scheduling a hearing without first informing him of the complaint against him. Again, assuming, *arguendo*, that the investigating officer did in fact violate the cited regulation, Appellant has failed to show that he was in any way prejudiced by the violation. Moreover, this regulation (previously codified at 46 CFR 137.05-10) has been held to be merely "informational" in nature, i.e., it does not accord a party substantive or procedural rights. Violation of 46 CFR 5.05-10, without a showing of actual prejudice, will not suffice to require reversal. Decisions on Appeal No. 2043; No. 1678, set aside on other grounds. *Van Teslaar v. Bender*, D.C., 1973, 365 F. Supp. 1007.

II

Appellant's second basis of appeal in his contention that his right to due process of law violated "when his right to remain silent became abrogated by the Administrative Law Judge's rulings and the segmented fashion in which the administrative hearings of [Appellant] were held."

Both Appellant and the Master of WASHINGTON were charged under R.S. 4450 as a result of the sinking of TONY. In order to avoid potential prejudice to either which might have resulted from a joint hearing, the Administrative Law Judge conducted separate hearings. The first session of the Master's hearing was held the day before the first session of Appellant's hearing and adjourned. Appellant had been subpoenaed to testify at this session of the Master's hearing. Accompanied by legal counsel, and, by Appellant's own admission, without raising any objection, Appellant testified at the Master's hearing. At Appellant's hearing the subsequent day, the Master objected to being required to decide whether to testify or not until the Coast Guard had rested its case against him. The Administrative Law Judge ruled that the Master would not be required to testify at Appellant's hearing until after the Coast Guard had rested its case against him. Appellant's hearing was recessed, the Master's reconvened, and the investigating officer rested his case against the Master. After the hearing in Appellant's case was reconvened, the Master did testify.

As a result of this sequence of events, Appellant contends that he was not treated fairly as compared to the Master in that he was required to testify at the Master's hearing while the case against him was still pending, but the Master was not compelled to testify at Appellant's hearing until after the Coast Guard had rested in the Master's case. Implicit in this contention is the argument that Appellant was prejudiced because his testimony on the sinking of TONY had already been taken under oath by the same Administrative Law Judge who presided at his own hearing. Appellant specifically argues that the sequence of events effectively denied him his right either to testify or to remain silent.

Appellant's failure to object to being compelled to testify at the Master's hearing constituted a waiver of any objection he might otherwise have raised at that hearing. Hence, the Administrative Law Judge's favorable ruling on the Master's objection during Appellant's hearing cannot be considered dissimilar or "unfair" treatment of Appellant because Appellant never placed this issue before the Administrative Law Judge at the Master's hearing.

Appellant's other contentions also are not well founded.

Under subsection (e) of R.S. 4450, as amended (46 U.S.C. 239), the Coast Guard is empowered to command attendance of witnesses. 46 CFR 5.15-10(b) further provides that "(d) uring the hearing, the administrative law judge shall issue subpoenas for the attendance and giving of testimony by witnesses... either upon his own motion or upon a request of either of the parties." Thus, as a witness, one certainly has no right to disobey a subpoena, properly issued and served, by simply refusing to appear and take the stand. Nevertheless, Appellant's right, as a witness at the Master's suspension and revocation hearing, to invoke his constitutional (Fifth Amendment) privilege against self-incrimination, requires little analysis. Contrary to another of Appellant's contentions, and distinguished from the authority he cites in support of it, R.S. 4450 suspension and revocation proceedings are remedial in nature, not criminal or penal; therefore, the privilege against self-incrimination cannot be invoked when the only outcome is one which might result from the suspension and revocation proceeding itself. This principle is well settled. 46 CFR 5.01-20, Decisions on Appeal Nos. 1574, 1871, 1999. That Appellant properly might have invoked the constitutional privilege because

of concern that any testimony given at the Masters hearing could result in a separate criminal prosecution (see, e.g., 46 U.S.C. 239(h); 46 CFR 5.05-30(a)) is not at issue because Appellant failed to invoke the privilege before testifying. "An assertion of constitutional privilege need be given no broader consideration than the breadth asserted." Decision on Appeal No. 1793. Here, there was no such assertion at all.

To the extent that Appellant is now raising an objection not based in the Constitution, his arguments fare not better.

Appellant apparently fails to comprehended that the proceedings conducted in his case were divorced entirely from those in the Master's case. Appellant could be found guilty only upon evidence properly admitted by the Administrative Law Judge at his own hearing. Review of the entire record reveals no indication that evidence admitted in the Master's case improperly found its way into Appellant's case. Even conceding that Appellant was compelled to testify at the Master's hearing, the right accorded him by 46 CFR 5.20-45, to remain similar or to testify at his own hearing, remained intact. It is only in Appellant's mistaken belief, that testimony taken from him at the Master's hearing would be considered by the Administrative Law Judge in reaching a decision in his own case, that Appellant finds any support for his argument that his right to remain silent or to testify at his own hearing had been abrogated. However, none of Appellant's testimony of the previous day was admitted, as such, into his hearing. It therefore could not be considered by the Administrative Law Judge in deciding Appellant's case. Hence, Appellant is incorrect in his apparent belief that he needed to testify during his own hearing in order to "explain away" any potentially self-damaging testimony given during the Master's hearing. In these circumstances, especially in light of his failure to even object to testifying at the Master's hearing, Appellant's position on this issue clearly is without merit.

III

Somewhat related to Appellant's previous contention is his argument that the Administrative Law Judge in his case should have recused himself. Appellant contends that "it is humanly impossible for a single administrative law judge to divorce

completely the evidence heard at the proceeding against [the Master] from the evidence heard in the proceeding against [Appellant]," and that 46 CFR 5.20-15 therefore required the administrative law judge to recuse himself.

At the outset, I must observe that the cited regulation, 46 CFR 5.20-15, provides a simple procedure for formally seeking disqualification of an administrative law judge from sitting in a particular case. This procedure includes the right to appeal from an adverse ruling on the issue by the Administrative Law Judge concerned. Appellant did not pursue the procedure at all, but instead chose merely to more orally, without more, for the Administrative Law Judge's disqualification. Hence, the question on appeal is whether, under 46 CFR 5.20-15(a), the Administrative Law Judge should have deemed himself unqualified and recused himself on his own motion.

Appellant lists a series of "facts" and several colloquies taken out of context from the record which he contends demonstrate that the Administrative Law Judge impermissibly failed to keep the two hearings separate, thus requiring disqualification. Concededly, the transcript of the hearing does reveal several instances in which counsel for Appellant, or the Administrative Law Judge, or both, alluded to the suspension and revocation proceedings conducted in the Master's case. What the record does not indicate, however, is that the Administrative Law Judge based his decision in Appellant's case on any evidence except that which was properly before him. While it is undoubtedly true that no one could hope to erase completely from his memory events which had occurred only the day before, there is a considerable and crucial distinction between simply being aware of evidence admitted in a separate hearing and the importation of that same evidence into the decision making process of the Administrative Law Judge, i.e., it *is* humanly possible to divorce completely the evidence *relied upon* in deciding one case from the evidence heard in another. It must not be forgotten that the findings in each must be supported by properly admitted and substantial evidence of a reliable and probative nature. 46 CFR 5.2/-95(b). The mental process of sifting out evidence not properly before him is one not unknown to an Administrative Law Judge. He must accomplish this in every case where he has heard both admissible and inadmissible evidence, yet no one seeks his disqualification simply because he might have

heard something which is potentially prejudicial but inadmissible.

Appellant does not contend that the Administrative Law Judge was personally biased against him, and quite properly so because there is absolutely no indication of bias. His contention is simply that knowledge, *per se*, disqualifies. This clearly is not the rule. Decisions on Appeal Nos. 950, 2101.

In the course of presenting this argument on this issue, Appellant advanced two contentions meriting some discussion but no weight.

Appellant states "[u]nder the circumstances of [his] hearing, where the same Administrative Law Judge received evidence in a subsequent proceeding involving factual issues material to a pending proceeding, and yet prior to the termination of the pending proceeding, there is a clear violation of 46 CFR 5.20-1(b). This regulation prohibits an Administrative Law Judge from consulting with anyone concerning any facts and issue in a suspension-revocation proceeding, unless, after notice, all parties are permitted to participate." It will suffice for me simply to observe that an Administrative Law Judge's receipt of evidence on the record during a separate suspension and revocation hearing could not be considered a violation of this rule against improper *ex parte* communication. That Appellant would even advance such an argument evidences a misunderstanding of the cited regulation and its statutory basis, 5 U.S.C. 554(d).

Appellant also states "[i]n view of 46 CFR 5.20-93, which prohibits counsel for witnesses who are not parties from participating in revocation proceedings, the net effect of the Johnson/McDonald hearings was to disallow participation by Respondent in the hearing involving Captain McDonald (sic) and vice versa. This was a denial of their rights conferred by other sections of Part 5." It is quite clear from review of the record of Appellant's hearing that counsel for the Master was in no way precluded from adequately representing his client's interests during Appellant's hearing. In fact, the first time this issue has been raised is in Appellant's brief on appeal. Nevertheless, assuming *arguendo* that Appellant's right as a witness to adequate legal representation at the Master's hearing was somehow abridge, it is of no concern here, for the proceedings in each case were entirely separate. Simply put, procedural improprieties in

the conduct of one case, without more, are not properly the subject of complaint in the other. *See also*, Decision on Appeal No. 2155.

IV

The essence of Appellant's arguments on the issue of negligence is that he should be held not to a standard of care which would have required that he verify TONY'S release, but instead to one requiring that he take only those actions which a reasonably prudent pilot would have taken in like circumstances. In view of the facts found in this case, I must conclude that the former standard is subsumed by the latter.

With GLORIA pushing and TONY pulling, WASHINGTON came off the ground and began to move toward the opposite side of the channel. Appellant directed TONY to let go the hawser and to advise him when clear. When Appellant subsequently ordered the engines of WASHINGTON to full ahead he apparently was concerned that WASHINGTON was in imminent danger of again going aground. However, absent verification that TONY had indeed cleared, Appellant's order carried with it the potential for an even greater calamity, that of sinking TONY and drowning three men. In these circumstances, I conclude that a reasonably prudent pilot would have *verified* that TONY was clear, rather than merely assuming so.

Appellant argues that he should not be held accountable for the failure of others to adequately carry out his orders, unbeknownst to him. It does appear that Appellant was unaware that no one on WASHINGTON had been prepared to cast off the line to TONY when so ordered. Nevertheless, Appellant is not relieved of the responsibility for his own negligence simply because others apparently were negligent also. Had Appellant ensured that TONY was clear, TONY would not have been sunk, the negligence of others notwithstanding. In any event, the only real issue in an R.S. 4450 proceeding is whether Appellant himself was, or was not, negligent. *See, e.g.* Decisions on Appeal Nos. 417, 2012.

Appellant contends that he "did not have time to take nor did he take every action conceivably possible in normal circumstances." Yet, by his own admission, he found sufficient time after ordering

TONY to let go to visually check on TONY's progress not once, but twice, from the port wing of the bridge, having stepped into the wheelhouse to check on some ranges in the interim. With the safety of three men and their tug potentially at stake, it is inconceivable that Appellant could not have found the time to initiate a brief radio message inquiry as to TONY's status, especially in light of his previous order to TONY to advise him when clear. Either a negative response or no response at all would have sufficiently warned Appellant not to go ahead full. Rather than verifying that TONY was clear, Appellant chose merely to assume so, incorrectly as it happened, and for this reason his actions in these circumstances cannot be considered those of a pilot acting in a reasonable and prudent fashion. Hence, the charge and specification of negligence are proved.

ORDER

The order of the Administrative Law Judge, dated at Jacksonville, Florida, on 16 November 1977, is AFFIRMED.

R.H. Scarborough
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 8th day of August 1979.

INDEX

Hearings
conducted separately in lieu of jointly
evidence in one hearing not automatically admissible in another
rule against receipt of improper *ex parte* communication not violated

Negligence
of others not at issue

Regulations
violation of held not dispositive

Testimony
before ALJ in one hearing not used in separate hearing
failure to raise objection to giving
invocation of constitutional rights against giving

Witnesses
respondent in one hearing as witness in another

***** END OF DECISION NO. 2158 *****

Top