UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO 391445
Issued to: William R. JONES

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2167

William R. JONES

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

By order dated 5 May 1978, and Administrative Law Judge of the United States Coast Guard at San Francisco, California, after a hearing at San Francisco, California, on 17 and 27 February and 30 March 1978, suspended Appellant's license and all other valid Coast Guard issued licenses for a period of three months on probation for six months upon finding him guilty of negligence. The one specification of the charge of negligence found proved alleges that Appellant, while serving as Master aboard SS SANTA MARIA, under authority of the captioned document, did, on 9 February 1978, fail to take timely action to prevent SS SANTA MARIA from running into water too shallow for her draft, thereby causing the vessel to ground in Carquinez Strait, California, on 9 February 1978.

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 four witnesses, one deposition, and four documents.

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

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 a period of three months on probation for six months.

The decision was served on 9 May 1978. Appeal was timely filed on 11 May 1978, and perfected on 23 October 1978.

FINDINGS OF FACT

On 9 February 1978, Appellant was serving under authority of his duly issued Coast Guard license as Master of the tanker SS SANTA MARIA. SANTA MARIA was moored starboard-side-to, at the Union Oil Dock, Oleum, California. SS SANSINENA II was moored astern of SANTA MARIA, and SS AVILA was anchored approximately 7000 yards abeam of SANTA MARIA. Shortly after 1700, SANTA MARIA, with Appellant at the conn and acting as pilot, cast off and proceeded upstream, in the Carquinez Strait. SANTA MARIA was assisted by the tug DONALD D. SANDERS. At that time tidal currents were ebbing at approximately 3-5 knots. After progressing upstream approximately 1800 yards, Appellant, with the tug pushing on SANTA MARIA'S port bow, attempted to make a 180° turn to starboard. At approximately 1737, with SANTA MARIA about one-third through the turn, the tug began to lose power on one of the generators which supplied power to the shaft of the tug. Appellant was notified, the turn was aborted, and SANTA MARIA resumed its heading upstream. After notification that the generator problem had been resolved, Appellant attempted the same maneuver once more. Again, after SANTA MARIA was about one-third through the turn, the tug experienced generator difficulty. This time, however, Appellant attempted to complete his turn, with the tug continuing to push, but at reduced power. Appellant failed in this attempt. Because SANTA MARIA was being set toward the Union Oil Dock, Appellant first backed down full, and when that maneuver failed, dropped his anchor. Nevertheless, at approximately 1812, SANTA MARIA grounded. SANTA MARIA eventually was refloated without apparent damage to the vessel or its cargo.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that (1) under the provisions of 46 U.S.C. 226 and 239, the Coast Guard has no jurisdiction to suspend or revoke a master's license upon a charge of negligence; (2) "the order suspending Appellant's master's license `and all other valid licenses' is so unjustified in the circumstances as to manifest an intent to apply the investigatory procedures in a punitive rather than remedial manner, and as such, Appellant has been denied due process of law (viz., trial by jury);" (3) "the entire investigatory process denies due process of law, as guaranteed by the Constitution of the United States, in that, *inter alia*: (a) it denies to the person charged the right to trial by jury; and (b) it fails to properly separate the functions of and contact between the administrative law judge, the investigating officer, the Commandant and his staff, and the chief administrative law judge;" (4) the Administrative Law Judge relied upon a standard of conduct not properly before him; and (5) Appellant's actions were not unreasonable in the circumstances encountered and therefore he was not negligent.

APPEARANCE: Hall, Henry, Oliver & McReavy, San Francisco, California, by John E. Droeger, Esq.

OPINION

I

Appellant contends that the Coast Guard has no jurisdiction under 46 U.S.C. 239 (R.S. 4450, as amended) to proceed against his license on the ground of negligence, because the sole jurisdictional statute under which it can proceed against the license of a master is 46 U.S.C. 226 (R.S. 4439) and "negligence" is not one of the grounds specifically denominated therein. In

support of this argument he cites *Dietze v. Siler*, 414 F. Supp. 1105 (E.D La. 1976). Simply stated, Appellant's contention is meritless. As the court in *Dietze* correctly stated:

"the language of 239, albeit more specific in the sense of having greater detail, also is purposefully broader in its reach than that of the individual licensing sections. The repeated reference in 239 (b), (d) and (g) to `any licensed officer' demonstrates this section's applicability to the Coast Guard's exercise of both its investigatory and suspension/revocation authority *vis-a-vis* pilots, captains, mates, and engineers. Indeed, the stated grounds for suspension or revocation in 239 (g) appear sufficiently broad to incorporate all of the varying grounds set forth in sections 214, 226, 228, and 229. Reasonable as it is to regard jurisdictional authority as the outgrowth of this single, universally applicable section of Title 46, it is unreasonable to believe that Congress sought to establish four separate bases of jurisdiction in addition to a single, largely overlapping fifth." 414 F. Supp 1105, 1109-1110.

II

Appellant's characterization of the order of the Administrative Law Judge as "punitive" is equally unsound. While it is true that Appellant's license was suspended for three months, the order further provided that this suspension would not be effective provided "no charge under R.S. 4450, as amended, (46 U.S.C. 239), or 46 U.S.C. 239 b, or any other navigation or vessel inspection law, is proved against [Appellant] for acts committed within SIX (6) months from the date of service upon [Appellant] of this Decision and Order." Hence, the essential impact of this order upon Appellant is that of providing him with an additional inducement to avoid further violations and is hardly to be characterized as "punitive." Moreover, as has been stated often, the nature of revocation and suspension proceedings is remedial, not punitive. 46 CFR 5.01-20, Decisions on Appeal Nos. 830, 1574, 1871, 1999.

III

To find that Appellant was denied his constitutional "right to

trial by jury" in these proceedings would require my holding that portions of RS 4450, as amended (46 U.S.C. 239) and the Administrative Procedure Act (5 U.S.C. 551 *et seg*.) violate the Constitution. Appellant cites absolutely no authority in support of this contention, perhaps because there is none. In any event, I find nothing in either of these laws which violates the Constitution.

Appellant's contention as to the separation of the functions, and contact among the Administrative Law Judge, the Investigating Officer, the Commandant and his staff, and the Chief Administrative Law Judge is similarly unfounded. Revocation and suspension proceedings under R.S. 4450 are conducted in accordance with 46 CFR Subparts 5.01 though 5.25. The written decision and order of each administrative law judge is reviewed by the Chief Administrative Law Judge in accordance with 46 CFR 1.10 (c) (4). Appeals and reviews are conducted in accordance with 46 CFR Subparts 5.30 and 5.35, respectively. Appellant has not demonstrated that these regulations fail to provide adequate separation of functions and contact. Neither has he demonstrated that, in fact, there has been any impropriety committed in the disposition of his particular case. Thus, I am constrained to reject this contention.

A separate reason exists for rejecting the latter contention of Appellant. In *Miller v. Smith*, 292 F. Supp. 55 (S.D.N.Y. 1968), the Court dismissed a contention similar to Appellant's stating, " [t] he Commandant naturally makes use of members of his staff in reaching decisions in suspension or revocation proceedings." 292 F. Supp. 55, 57. In so acting, the Court specifically recognized that, as long as the Decision on Appeal is that of the Commandant himself (or his proper delegate), it matters not that members of his staff have had a hand in its preparation.

IV

During the hearing, the Investigating Officer argued that the mere fact of the grounding, coupled with Appellant's failure to drop his anchor sufficiently early, was sufficient to establish negligence. As discussed more fully *infra*, a rebuttable presumption was created. At the close of the hearing, the Administrative Law Judge, in accordance with 46 CFR 5.20-150, requested the submission of written findings and conclusions. In

his submission, the Investigating Officer, for the first time, proffered a passage from a book identified only as *Naval Shiphandling* by a "Captain Crenshaw." This passage, quoted in the Administrative Law Judge's opinion, supports the position taken by the Investigating Officer during the hearing, *i.e.*, that the anchor should have been dropped earlier to prevent SANTA MARIA from grounding. Appellant argues that the Administrative Law Judge's reliance upon this passage violates 46 CFR 5.20-102 (b) because the latter took "judicial notice" of a matter which Appellant should have been afforded "an opportunity, on the record, to rebut." To an extent, I agree with Appellant. I specifically disapprove the practice of investigating officers who "save" citations to authorities until a post-hearing submission of proposed findings and conclusions, and then, for the first time, argue these authorities before the administrative law judge. Offering a respondent the opportunity to rebut these authorities in his own post-hearing brief does not render this practice any more acceptable because the practice itself violates the requirement for presenting all evidence and argument *during* the hearing. I also specifically disapprove the practice of taking official notice in an administrative law judge's opinion of an authority such as "Captain Crenshaw's *Naval Shiphandling* without first having afforded "[e]ither party ... an opportunity on the record, to rebut such matter." 46 CFR 5.20-102 (b). When authority of this nature is relied upon, especially to establish the standard of conduct in a negligence case, due process requires that both parties be afforded an opportunity, on the record, to argue the propriety of relying upon that authority, and to present evidence of compliance with the authority if it is accepted as establishing the standard of conduct.

Nevertheless, the failure of the Administrative Law Judge to offer Appellant an opportunity to rebut the Investigating Officer's proffer of "Captain Crenshaw's" tome does not require vacation of his decision. In his decision the Administrative Law Judge opined that "the use of the anchor as an emergency measure is well established." He subsequently adopted the quote from *Naval Shiphandling* as an illustration of the standard of conduct, but did not adopt the treatise itself as the authority for that standard of conduct. Since the standard against which Appellant's conduct was measured was the same one argued for by the Investigating Officer during the hearing, Appellant was not

prejudiced by the use of Crenshaw's work as an illustration.

V

Initially the Investigating Officer's burden of proof was satisfied by the creation of a rebuttable presumption. The fact that SANTA MARIA grounded in a well-charted strait, at a position where the actual depth of water was clearly marked, created a presumption that Appellant's navigation of his vessel was somehow negligent. Decisions on Appeal Nos. 1200, 1738, 2024. Appellant argues that "this long cherished theory had been forcefully disapproved by the National Transportation Safety Board" in its Order No. EM-57. Because the Board affirmed the Commandant's decision, its statement on this issue properly can be considered mere *dictum* and therefore not controlling. Once properly created, a rebuttable presumption is sufficient to establish a *prima facie* case. Although the burden of proof does not shift from the Investigating Officer (*see*, 46 CFR 5.20-77), the effect of this *prima facie* proof is to put the burden on Respondent of going forward with the evidence. *See*, *e.g.*, Decision on Appeal No. 477; Rule 301, Federal Rules of Evidence for United States Courts and Magistrates (1975); J. H. WIGMORE, EVIDENCE 2487, 2490, 2491 (3rd Ed. 1940).

Upon close review of the entire record, I conclude that Appellant did meet his burden and did rebut the presumption of negligence. When SANTA MARIA departed the dock, the simpler maneuver would have been to turn to port rather than starboard, and then proceed downstream. However, judging that this maneuver might unnecessarily imperil either SS SANSINEMA II, moored astern, or, more likely, SS AVILA, anchored abeam, Appellant chose instead to proceed upstream and then undertake his turn there. Based upon the testimony of both Appellant and an expert witness, I conclude that this choice of alternatives was indeed the safer. Appellant did proceed to a point in the Carquinez Strait where he safely could have completed his turn, but was prevented from doing so by the unexpected motive difficulty encountered by the assisting tug. Upon being assured that this problem had been resolved, Appellant, with the aid of the tug, again commenced his turn. Once more the tug lost some of its motive power. Nevertheless, apparently believing that he could complete his turn, Appellant ordered full

power from SANTA MARIA'S engines and continued his attempt. Appellant was more than half-way through his turn when it first became apparent that SANTA MARIA had been set too far by the current to permit him to continue safely. Appellant took emergency action to avoid drifting into the dock, culminating in his dropping of the anchor, but SANTA MARIA grounded nonetheless.

That events happened substantially as just related is not in dispute. I conclude that Appellant was guilty of, at worst, an error in judgment in attempting to complete the second turn and not dropping his anchor sooner, but not negligence.

> "[A] master is not required to make the right decision at all times in order to avoid being guilty of negligence; but he must exercise reasonable care according to the standards of the ordinary practice of good seamanship. Hence, by making a wrong choice among alternatives, a Master commits an error of judgment which does not amount to negligence if his choice was one which a competent and prudent Master might reasonably have made under the prevailing circumstances."

Decision on Appeal No. 1093. "Appellant was not found negligent for persisting in his efforts to complete the turn, but rather, for failure to drop his anchor early enough to prevent the grounding. However, in finding that Appellant should have let go his anchor sooner, the Administrative Law Judge implicitly must have determined that Appellant, upon first realizing that he might either strike the dock or go aground, was negligent in backing full rather than immediately dropping his anchor. I am unable to conclude that, at the time Appellant ordered back full, a "competent and prudent" mariner necessarily would not have done likewise. In hindsight it appears that the wiser choice would have been to drop the anchor immediately; nevertheless, "[w] hile second guessing 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." Decision on Appeal No. 2152. Therefore, because negligence was not proved by substantial evidence, the decision of the Administrative Law Judge must be vacated.

ORDER

The order of the Administrative Law Judge, dated at San Francisco, California, on 5 May 1978, is VACATED and the charge DISMISSED.

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

Signed at Washington, D. C., this 17TH day of October 1979.

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