UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs
LICENSE NO. 492 393 and MERCHANT MARINER'S DOCUMENT
Issued to: Walter A. REIMANN Z-1175 537

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2234

Walter A. REIMANN

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

By order dated 7 November 1979, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's license for two months, upon finding him guilty of negligence. The specification found proved alleges that while serving as Second Mate on board SS AVILA under authority of the license above captioned, at or about 0830, 19 June 1979, Appellant negligently failed to take adequate precautions to prevent the overfilling of Number 3 starboard tank and subsequent spilling of a harmful quantity of oil into the navigable waters of the United States.

The hearing was held at Embarcadero Center, Suite 310, San Francisco, California, on 27 July, 16 August, 20 August, 5 September, and 14 September 1979.

At the hearing, Appellant was represented by professional counsel and, in Appellant's absence from the first session, a plea of not guilty to the charge and specification was entered on his behalf.

The Investigating Officer introduced in evidence the testimony of the Chief Mate of SS AVILA, and the Union Oil Co. Dispatcher. Additionally, the Investigating Officer introduced into evidence the following documents: the Port Watch Standing Orders for SS AVILA; Hendy International Co. letters on preventing oil pollution; acknowledgements of deck officers to the Hendy letters; Union Oil Co. declaration of inspection of AVILA; and AVILA cargo plan for 19 June 1979.

In defense, Appellant offered in evidence the testimony of: the night relief mate on AVILA; a marine ecologist as to the effect of the spill; and the AVILA third mate. The Appellant's documentary evidence included a statement by a seaman employed on board AVILA; and the notes of the night relief mate.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending his license for a period of two months.

The entire decision was served on 9 November 1979. Appeal was timely filed on 16 November 1979 and perfected on 30 January 1980.

FINDING OF FACT

On 19 June 1979, Appellant was serving as Second Mate on board SS AVILA and acting under authority of his license while the vessel was in the port of Oleum, California.

Appellant came on duty as mate during loading operations shortly before 0800 on 19 June 1979. At that time, the #3 starboard tank was being filled with diesel fuel. That tank has a capacity of 4150 barrels. The filling of the tank had begun at 0718 on the same day. At 0745 the ullage measurement was 33 feet; at 0800 it was 27 feet; at 0810 it was 21 feet; and at 0827 it was zero feet and overflowing.

Normal procedure, and good practice, required the opening of the valve to divert the flow of diesel fuel into the next tank to be loaded, no later than the time when the #3 starboard tank had been filled to an ullage of four feet. Furthermore, it would have been normal procedure, and good practice, for the mate on watch to

observe, or cause a seaman on watch to observe, the tank very closely as it was nearing the completion of filling. Appellant failed to do this, in part because the Master called away two seamen who were assisting Appellant.

This failure caused 50 to 100 barrels of diesel fuel to overflow onto the deck of the vessel. Approximately three gallons of this overflow eventually went into the Carquinez Strait at the entrance to San Pablo Bay. Both of these bodies of water are navigable waters of the United States.

BASES OF APPEAL

Appellant raises the follow*in*g bases of appeal:

(a) Appellant was never properly served and was therefore denied due process of law when the proceeding was held in *absentia*;

(b) Appellant was never served nor even advised of the amended charges and was thereby denied due process of law;

(c) There was no proof that a harmful quantity of oil was spilled into the navigable waters of the United States;

(d) There was no showing of damage, an integral part of negligence;

(e) The statutes prohibiting oil spills are unconstitutionally void for vagueness;

(f) The Administrative Law Judge should have dismissed the charges at the close of the Coast Guard's case;

(g) The findings of fact are inconsistent;

(h) The evidence substantiates Appellant's plea of not guilty;

(i) The misconduct of the Investigating Officer precluded the

Appellant receiving a fair and impartial trial; and

(j) The order of the Administrative Law Judge was excessive and an abuse of discretion.

APPEARANCE: Robert C. Chiles, Esq.; Hall, Henry, Oliver & McReavey; 100 Bush Street, Suite 1200; San Francisco, California 94104.

OPINION

I

On 23 July 1979, Appellant and his attorney were orally *in*formed by the Investigating Officer that he was being charged with negligence in an R.S. 4450 proceeding. The charge and accompanying specification were explained and Appellant was informed that the hearing would be held at 1300 on 27 July 1979. Appellant and his attorney elected not to wait for the charge sheet to be completed and hastily left before a copy could be personally served. A duplicate original of the charge sheet was sent by certified mail to Appellant and his attorney at his address of record. A second duplicate original of the charge sheet was left in the mailbox at Appellant's home. Finally, Appellant was given a third copy of the charge sheet on 16 August 1979 when he appeared for the hearing.

Appellant contends that he was never properly served with the charge and was thus denied due process of law when the hearing was held in *absentia*. This contention is without merit. The regulations govern*in*g suspension and revocation proceedings provide in 46 CFR 5.20-25 that:

> In any case in which the person charged after being duly served with the original of the notice of the time and place of the hearing and the charges and specifications, fails to appear at the time and place specified for the hearing, a notation to that effect shall be made in the record and the hearing may then be conducted "in *absentia*."

It is clear that the requirements of 46 CFR 5.20-25 were met *in* this case and the Administrative Law Judge's action in allowing the hearing to proceed in *absentia* was appropriate.

All of the elements necessary to effect service of process were present *in* this case. Although Appellant was not handed the charge sheet containing the notice of the time and place of the hearing and the charges and specifications while he was in the Investigating Officer's office on 23 July 1979, that was only because Appellant and his attorney physically frustrated the Investigating Officer's attempt to serve him with the charge sheet. In Decision on Appeal No. 1202 (reaffirmed by Decision on Appeal No. 2083) it was held that "so long as an individual has knowledge of the charges against him and notice of the hearing, he should not be permitted to avoid jurisdiction by physically frustrating attempts to formalize actual service of the charge sheet." There is sworn testimony in the record by the Investigating Officer and another Coast Guard officer who observed the events to the effect that the charge sheet had been prepared on 23 July 1979 and was present in the Investigating Officer's office when Appellant and his attorney entered. Further, there is testimony taken under oath in the record which establishes that Appellant and his attorney were his attorney were verbally advised of the charges, the date and time of the hearing, and the consequences of their failure to appear for the hearing. Appellant and his attorney hurriedly left the Investigating Officer's office before the charge sheet could be actually served upon him. Sworn testimony by the Investigating Officer reveals that a duplicate original of the charge sheet was mailed to Appellant at his last known address by certified mail and the Investigating Officer testified under oath that he personally delivered a duplicate original of the charge sheet to Appellant's home and deposited it in his mailbox. All of these facts lead to the conclusion that Appellant had adequate actual notice of the charge and the date and time of the hearing.

The other elements necessary to permit a hearing to proceed in *absentia* were present. Appellant failed to appear at the time and place designated for the hear*in*g, and the Administrative Law Judge made a notation to that effect in the record. All the requirements of 46 CFR 5.20-25 were thus met, so that the decision to proceed in *absentia* on 27 July 1979

was appropriate. Appellant and his attorney appeared at the subsequent four sessions of the hear*in*g.

II

Appellant contends that he was never served or even advised of the amendment of the charges and was thereby denied due process of law. This basis of appeal is groundless.

At the in *absentia* hearing held on 27 July 1979, the Investigating Officer amended the specification to the charge of negligence. It is provided at 46 CFR 5.20-65(b) that the "administrative law judge may, on his own motion, or the motion of the investigating officer or person charged, permit the amendment of charges and specifications to correct harmless errors by deletion or substitution of words or figures." The amendment which was made consisted of adding the word "negligently" which modifies the failure to act with which Appellant was charged. The Administrative Law Judge properly recognized that the addition of the word "negligently" did not alter the specification such that the Appellant was misled as to the nature of the charge. The charge was that Appellant was negligent. The Specification thereunder clearly set forth the failure to act with which Appellant was charged. The addition of the word "negligently" was a gratuitous and indeed unnecessary amendment of the charge. I find that this amendment could in no way have misled Appellant as to that with which he was charged and what acts or omissions against which he had to defend.

Appellant's complaint that he has been denied due process of law because he was never served with the amended charges is not valid. The charge was amended at the first session of the hearing held *in absentia*. As has already been determined, the Administrative Law Judge's decision to proceed in absentia was appropriate and the amendment to the specification was properly made at that session. Accordingly, Appellant cannot *now* be heard to complain that he was denied due process of law by a "housekeeping" amendment which was made at a hearing at which he did not deign to appear. This is particularly true here because Appellant did appear at later sessions of the hearing and had actual notice of the amendment.

In any event, the question of Appellant's negligence was litigated and this fact alone would cause me to reject Appellant's contention. "It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise." *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839 (D.C. Cir. 1950). There were five sessions of the hearing in this case and Appellant appeared personally at four of these sessions. He had an adequate opportunity to defend against the charge of negligence and, in fact, took full advantage of that opportunity. The issue of negligence was thus fully litigated and Appellant cannot be heard to complain that he was surprised as to the nature of the charge.

III

Appellant argues further that there was no evidence the oil was discharged into the water in "quantities which may be harmful." Furthermore, he contends that there was no showing of damage, an integral part of negligence. While Appellant is correct that the common law definition of the tort of negligence requires a showing of damage, such is not the case with an R.S. 4450 proceeding. "An individual should be found negligent in these proceedings if he fails to take the precautions that a reasonably prudent person would take in the same circumstances whether or not his conduct or failure to act was the proximate or a contributing cause of a casualty." Decision on Appeal No. 1755. Additionally, negligence is defined by the applicable regulation 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." 46 CFR 5.05-20(a)(2). Clearly, the definition of negligence applicable to suspension and revocation proceedings is not the common law definition of the tort of negligence; therefore, a showing of damages is not an integral part of proof of a charge of negligence in an R.S. 4450 proceeding.

Similarly, proof that the oil which was spilled as a result of Appellant's inattention to duty is of a harmful quantity is unnecessary to proof of a charge of negligence, and the language

pertaining to harmful quantity in the specification is mere surplusage. It is the failure on the part of Appellant to prevent the overfilling of the tank which is the negligent act and once that has been proved, the charge of negligence is proved. Admittedly, were this an action to assess a penalty under 311(b)(6) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)(6)), it would be necessary to show that oile was discharged in a prohibited quantity. Since this is a suspension and revocation proceeding conducted under R.S. 4450, it is only necessary to show that the Appellant's failure to act was negligent. It is not necessary to show that the results of that failure to act led to a discharge of oil in a prohibited quantity. At any rate, "it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States." Section 311(b)(1) of the FWPCA. That a small quantity of oil, which may or may not have been a harmful quantity, was discharged is a fortuity - it is the Appellant's inattention to duty which caused even that minimal spill that is at issue in this case. The fact that the amount spilled was small is, at best, a matter in mitigation. Since the language pertaining to the amount of oil spilled is surplusage it may be omitted from the specification and even after that, there remains a valid specification.

IV

All of the other bases of appeal raised by Appellant are likewise without merit. Whether the statutes prohibiting oil spills are constitutional or not is irrelevant to an R.S.4450 proceeding - it is Appellant's failure to prevent the spill which is relevant. The Administrative Law Judge was correct in not dismissing the charges at the close of the Investigating Offficer's case, the findings of fact are not inconsistent, and the evidence supports the Administrative Law Judge's finding of proved. There is, further, no evidence, absent Appellant's bald assertions, that there was misconduct on the part of the Investigating Officer. It is well settled that the degree of severity of an order is a matter peculiary within the discretion of the Administrative Law Judge and will not normally be disturbed on appeal. Decision on Appeal No. 1998. However, similarities in the factual circumstances between this case and Decision on Appeal No. 1755 persuades me that modification of the order of the Administrative Law Judge is

appropriate in this case.

CONCLUSION

There is substantial evidence of a reliable and probative nature to support the finding of the Administrative Law Judge. The order of outright suspension for two months is hereby modified to suspension for two months on twelve months' probation.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 7 November 1979, as MODIFIED herein, is AFFIRMED.

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

Signed at Washington, D.C., this 9th day of February 1981.

***** END OF DECISION NO. 2234 *****

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