UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 32782
Issued to: PETER ALOUISE

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2275

PETER ALOUISE

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

By order dated 18 May 1981, an Administrative Law Judge of the United States Coast Guard at St. Louis, Mo. suspended Appellant's license for 2 months on 12 months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as operator on board the M/V R. E. DOYLE under authority of the license above captioned, on or about 9 May 1980, Appellant operated his vessel in a negligent manner creating an excessive wake which caused 15 barges to break loose from their moorings at Cleancoal Terminal Facility, Mile 535.2 L/B Ohio River.

A hearing was held at Cincinnati, Ohio on 1 April and rehearing was held on 7 May 1981 to hear the testimony of a defense witness.

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

The Investigating Officer introduced in evidence the testimony

of three witnesses and four exhibits.

In defense, Appellant offered in evidence his own testimony and the testimony of one witness.

At the end of the original hearing on 1 April, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He suspended all documents issued to Appellant for a period of two months on twelve months' probation. After the rehearing the Administrative Law Judge served a written order on Appellant which upheld the oral decision of 1 April. The entire decision was served on 18 May 1981. Appeal was timely filed on 19 May 1981 and perfected on 30 November 1981.

FINDINGS OF FACT

On 9 May 1980, appellant was serving as operator on board the M/V R. E. DOYLE and acting under authority of his license. (Because of the disposition 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: Thompson & Mitchell, by Robert H. Brownlee, Esq.

OPINION

A hearing in a suspension and revocation proceeding conducted under 46 U. S. C. 239(g) is presided over by an administrative law judge (ALJ) in accordance with the requirements of the Administrative Procedure Act (APA), 5 U. S. C. 551 *et. seq.* and the regulations promulgated by this agency, 46 CFR 5.20 *et. seq.* Coast Guard regulations require the ALJ to prepare a

written or*de*r and complete decision. 46 CFR 5.20-175. The contents of this written decision are set forth at 46 CFR 5.20-155(a) and require, in part,

> (1) "Findings of Fact", including necessary evidentiary and ultimate facts pertaining to each specification; [and] ...
>
> (4) "Opinion," discussing the reasons, precedents, legal authorities, or other basis for the findings, conclusions and order on all material issues of fact, law, or discretion, with such specificity as to advise the parties of their record and legal basis ...

The findings of fact made by the ALJ in this case are insufficient. While he has made findings as to the ultimate facts (Appellant operated his vessel in a negligent manner; this created an excessive wake which caused 15 barges to break loose from their moorings), the findings do not include the necessary evidentiary facts to support these ultimate findings which, in turn, pertain to the specifications with which Appellant was charged.

The difference between ultimate and evidentiary (or basic) facts and the reasons why both types of findings are necessary are clearly set forth in 3 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE 14:27 (2d Ed. 1980).

> An ultimate finding is usually expressed in the language of a statutory standard - the rate is reasonable, the proposed action is in the public interest, the company has refused to bargain collectively. An ultimate finding is typically mixed with law or policy. "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact." Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 491 (1937). "[S]uch an ultimate finding was not enough . . . in the absence of a basic finding to support it . . ." United States v. Pierce Auto Lines, 327 U. S. 515, 533 (1946). "Basic findings" are somewhere between ultimate findings and a summary of each bit of evidence. A good formulation: "The decisions require a commission in a quasi-judicial proceeding to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings." Capital Transit Co. v. Public Utilities Commission, 213 F.2d

176, 187 (D. C. Cir.), cert, denied 348 U. S. 816 (1954). "Findings based on the evidence must embrace the basic facts which are needed to sustain the order." Morgan v. United States, 298 U. S. 468, 480 (1936). "[G]iven that the report contains all the essential findings required . . . the Commission is not compelled to annotate to each finding the evidence supporting it." United States v. Pierce Auto Lines, 327 U. S. 515, 529 (1946).

When the findings are too general, the reviewing court may have difficulty filling the gap between the evidence and the general findings; when they are too detailed, the court may want something by way of "basic findings" in the nature of summary.

The ALJ has attempted to make findings in the Opinion. The Opinion is not the proper place for findings and, at any rate, in the paragraph on page 8, starting with the words, "I find that the evidence in this case ....", he has merely alluded to his findings, or at best, made statements as to ultimate facts. for example, after more than a page of discussion in which he sets forth the various conflicting testimony concerning the speed of the DOYLE at the time of the alleged negligence, the ALJ concludes, "I find that the evidence in this case of two eye witnesses as to the speed of the DOYLE, Respondent's vessel, plus the fact that other vessels had passed previously without any disturbance indicates that the Respondent was proceeding at an unreasonable rate of speed for the circumstances." Decision and Order, p. 8. This is a statement of an ultimate, not evidentiary, fact. Fault is also found with that the mooring lines were normal and the vessels were moored in the customary fashion. Here, neither an ultimate nor evidentiary finding of fact has been stated.

The transcript is replete with conflicting evidence regarding important factual issues, such as the speed of the DOYLE and the condition of the mooring lines. This should not, however, prevent the ALJ from weighing this conflicting testimony and making proper findings of fact on these matters, so long as these findings can be supported in the record by substantial evidence of a reliable and probative character as required by 46 CFR 5.20-95(b).

It should be noted that the APA provides that when agency

review is undertaken "the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U. S. C. 557(b). Therefore, I have the power to decide the issue de *novo*, including making evi*de*ntiary findings. However, I have not previously engaged in a de *novo* review of findings of fact except where the record is "made conclusively from depositions or other pre-recorded testimony and exhibits." Commandant's Appeal Decision 2059 (LESKINEN). *Accord*, Commandant's Appeal Decision 653 (DIETRICH); Commandant's Appeal decision 652 (TIMMERMAN). *Cf*. Commandant's Appeal Decision 2176 (CARR and REED). I see no reason to deviate from this established procedure in this case

ORDER

The order for the Administrative Law Judge, dated 18 May 1981 at St. Louis, Mo., is VACATED; the findings are SET ASIDE; and the charge is dismissed.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D. C. this 4 JUN, 1982.

***** END OF DECISION NO. 2275 *****

Top