IN THE MATTER OF LICENSE NO. 81027 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: John J. GILLEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1765

John J. GILLEN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 3 October 1968, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for six months on eighteen months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as operator of M/V CAPT. GILLEN under authority of the license above captioned, Appellant:

(1) from 10 through 18 August 1968, both dates included, and from 20 through 27 August 1968, both dates included, wrongfully operated the vessel by carrying more than six passengers, without the vessel's having a valid certificate of inspection, and

(2) on 28 August 1968, willfully operated the vessel with more than six passengers aboard without the vessel's having a valid certificate of inspection.

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

The Investigating Officer introduced in evidence the testimony of one witness and one document. The Investigating Officer and Counsel joined in entering nine stipulations on the record.

Appellant offered in evidence two documents.

The Examiner entered in evidence a pre-hearing memorandum filed by Appellant.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and both specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months on eighteen months' probation.

The entire decision was served on 7 October 1968. Appeal was timely filed. Appellant had until 3 March 1969 to perfect his appeal, but has filed nothing beside his original statement of grounds for appeal.

FINDINGS OF FACT

On all the dates in question, Appellant was serving as operator of CAPT. GILLEN, a passenger carrying vessel subject to Act, May 10, 1956, Ch. 258, 70 Stat. 151 (46 U.S.C. 390-390g), and acting under authority of his license authorizing service on such a vessel.

Appellant, as owner of CAPT. GILLEN, was notified by a letter dated 13 June 1968 from Officer in Charge, Marine Inspection, New York, that the vessel's certificate of inspection would expire on 9 August 1968 and that inspection would be required before a new certificate could be issued. The certificate did expire on 9 August 1968.

From 10 through 18 April, inclusive, and from 20 through 27 August 1968, inclusive, Appellant operated CAPT. GILLEN each day with more than six passengers aboard. On 27 August 1968, Appellant received a notice from Officer in Charge, Marine Inspection, New York, that the license to operate CAPT. GILLEN, scheduled to expire, would not be renewed until a valid certificate of inspection had been issued to the vessel. On the afternoon of that

date Appellant telephoned the New York Marine Inspection Office to arrange for inspection the next day. The officer to whom he spoke set a time and place for the inspection, as suggested by Appellant, and advised him that the vessel could not be operated with more than six passengers until the inspection should have been satisfactorily completed.

On 28 August 1968, prior to the inspection, Appellant made a trip with CAPT. GILLEN with more than six passengers aboard. Later in the day the vessel succeeded in passing inspection.

BASES OF APPEAL

This appeal had been taken from the order imposed by the Examiner. Appellant's grounds for appeal are:

(1) The Examiner improperly received into evidence testimony of a witness, who did not know Appellant and had never before spoken to Appellant on the telephone, as to a telephone conversation purportedly between the witness and Appellant;

(2) The fact that the Examiner made a finding that CAPT. GILLEN was seaworthy on 28 August 1968 negates his findings as to wrongful or willfully wrongful operation of the vessel;

(3) There is no substantial evidence that Appellant's acts were "wrongful" or willful"; and

(4) The order is excessive.

APPEARANCE: William J. Troy, Esquire, New York, New York.

OPINION

I

One of Appellant's arguments is that the Examiner improperly received in evidence the testimony of a Coast Guard officer as to a telephone call he assertedly received from Appellant on 27 August

1968. The fault alleged is that the witness could not identify the caller by reason of any prior established familiarity with voice in telephone conversations, it having been conceded that the witness did not know Appellant personally.

Objection to this testimony was timely made to the Examiner and is renewed on appeal. The significance of the evidence would be to support the wording of the second specification that Appellant's alleged action was "willful" as well as "wrongful". (Otherwise, the allegations were the same.)

There are two reasons why the Examiner was not wrong gin accepting this testimony.

It is true as a general rule to justify acceptance of telephoned statements ascribed to a party to a proceeding there must be a foundation laid, such as establishment of prior similar communications and recognition of the voice by the witness. This "foundation" is lacking in this case.

The purpose of this rule is to exclude evidence of statements supposedly made by a party when they cannot be satisfactorily associated with that party. In an administrative proceeding, where the rules of evidence for criminal and civil proceedings are relaxed and hearsay becomes to some extent usable, there need not be a mechanical or automatic rejection of such testimony.

In this case, the telephone-caller is said to have identified himself as the owner if the vessel CAPT. GILLEN and to have sought arrangement for inspection of the vessel at a certain time and place the next day. The arrangement was agreed to by the Coast Guard officer who took the telephone call. The evidence is clear that the vessel was boarded and inspected the next day at the time and place agreed upon, with no conflicting evidence that the Appellant-owner claimed surprise at the inspection.

It can be seen that only a person intending a deliberate hoax on Coast Guard officials would make a telephone call, falsely identify himself as the owner of a vessel subject to inspection, and arrange for its inspection at a time and place certain the next day. The very fact that the vessel was available at the time and place specified, plus the fact that no objection or surprise was pleaded when the inspector came aboard, would support the belief that it was Appellant who made the telephone call. The testimony

as to the telephone conversation was not only admissible but was probative evidence as to what information had been given to Appellant.

There is additional conclusive reason to reject Appellant's contention on this point. Although the contention is substantively without merit, it is reduced to the merest quibble by the fact that Appellant submitted to the Examiner a "Pre-Hearing Memorandum", made part of the record, which says, at page 5, ". . ."Capt. Gillen [Appellant], on 27 August, 1968, telephoned and arranged for a full and complete inspection at the shipyard for 28 August, 1968. . ." The fact of the telephone call, as it was testified to, was admitted. It was open to Appellant to attack the credibility of the witness who accepted the telephone call, but he could no longer object to evidence as to the substance of the conversation on the grounds that Appellant was not adequately identified as the speaker. He had admitted that he initiated a telephone call to the Coast Guard office on the day testified to.

II

The fact that the Examiner found that the vessel in question was seaworthy does not excuse Appellant. Appellant's theory is that as long as the vessel would have been found substantially in compliance with the regulations governing inspection of vessels, adequately equipped, and so forth, there was no fault on his part.

This view of the law cannot be accepted. When the law imposes an obligation, that obligation must be met. It is no answer to say that the violation of the law did not directly endanger the life or property of a person, even of safety is the ultimate purpose of the law.

For clarification of this view in the instant case, a comparison may be made between the two types of law. 46 U.S.C. 526a, for example, requires certain equipment to be carried on classes of uninspected vessels. It is enough to have the required equipment aboard. But 46 U.S.C. 390-390g, applicable to CAPT. GILLEN, do not specify details of construction or equipment to be carried. These matters are left to regulation, and inspection is required to assure that the standards have been met. A certificate is provided for, as evidence of inspection. With respect to a certificate the law establishes a flat prohibition. A vessel to which the law applies may not be operated or navigated without a

valid certificate. 46 U.S.C. 390c(a). The prohibition is not against navigating a vessel without a certificate "in such a fashion as to endanger life or property". It is absolute.

III

The principal thrust of Appellant's appeal is that the operations of the vessel covered by the first specification were not "wrongful" and that the single operation covered by the second specification was neither willful or wrongful. In fact, Appellant stipulated to all the factual assertions of the two specifications and contested only the adverbial qualifications of the allegations.

It may be observed, on this point, that when a specification spells out sufficiently a statement of a violation of a statute this is a sufficient specification of misconduct; the adverbial qualification of "wrongfully" is not needed in the allegation.

It need not be questioned here whether the specifications would have been sufficient without adverbs. The proof establishes the violation of the statute and a violation is wrongful.

It is no defense here to set up carelessness or negligence as the cause of the violation. Appellant acknowledges that he had received a notice dated 13 June 1968 which advised him that his vessel's certificate of inspection would expire on 9 August 1968 and that a new inspection for certification would be required before a new certificate could be issued. The failure to seek a timely inspection which would have permitted him to operate lawfully without interruption he attributes to forgetfulness, and he argues that the evidence does not establish that his failure was "knowing", and thus "wrongful" and not merely "negligent" and therefore "not wrongful."

As has been seen above, this argument has no weight. To establish misconduct in the operation of a vessel subject to 46 U.S.C. 390c(a) it is not necessary to give affirmative proof of knowledge because negligence is not a defense. It is the very operation that constitutes the violation; the motivation or the cause of the violation can only be a matter in aggravation or extenuation. It may be that Appellant's immediate application for inspection when he was informed that his vessel's enrollment and license would not be renewed until the vessel had been inspected and certificated was evidence that Appellant's violation was not a

deliberate flouting of the law up to 27 August 1968. This is merely a matter of extenuation; it could influence the Examiner's order, but would not tend to affect his findings.

IV

With respect to the second specification Appellant specifically attacks the finding that the offense was willful. He objects also to a specific ruling made by the Examiner. The specification as drawn up and served upon Appellant alleged that the carriage of passengers was done both "wrongfully and willfully". On this matter, the Examiner said:

> "It was clearly pointed out in Appeal #489 that the word `willfully' contained within its definition the meaning of the word `wrongful'. Therefore the use of the word `wrongful' in conjunction with the word `willful' in The Second Specification is tautology."

The Examiner thereupon omitted the allegation of wrongfulness when he found the Second Specification proved.

Appellant now cites several court decisions which treat of willfulness as involving a careless disregard of the safety of others, and points out again that the proof in this case did not demonstrate any gross disregard of the safety of others. Such considerations are irrelevant here because they all deal with tort law.

When we enter the field of statutes we need not consider the effect of words like "willfully" or "knowingly" unless the words appear in the statute. No such word appears in this case.

It is apparent that the distinction intended between the first and second specifications was to show that the single violation alleged in the second specification was worse than the violations asserted in the first specification because Appellant had been specifically given notice on 27 August 1968 that he could not carry more than six passengers, as defined in 46 U.S.C. 390, and had still taken out, on 28 August 1968, prior to inspection of his vessel, more than six passengers "for hire".

In view of what has been said before it can be seen that this is merely a matter in aggravation. If established, it would tend to show a deliberate flouting of the law, not merely a careless violation, and might thus affect the Examiner's order but not his decision. The matter need not have been pleaded, since the statute does not separately deal with a "willful" violation as distinct from some other kind.

The Examiner's striking of "wrongfully" from the second specification was superfluous act, not merely because the idea of "wrongful" was included within the term "willful", and thus "tautological" but because neither allegation was necessary to prove the offense alleged. With the understanding that the thought which gave rise to the isolation of the 28 August 1968 offense from the others was to show that it was a "worse" violation, it is reiterated that the misconduct in all cases was essentially the same. There was an operation of the vessel in violation of 46 U.S.C. 390c(a) in each case. The operation on 28 August 1968 could only be viewed as a more flagrant violation than the others.

V

Appellant has argued that his operation on 28 August 1968 was no worse than operations from 10 through 18 August and 20 through 27 August, because the person to whom he talked at the Coast Guard Marine Inspection Office at New York had merely advised him, on 27 August, that he could only carry six passengers for hire without a certificate of inspection and had not specifically advised him that to carry more than six was prohibited.

This argument, as has been noted, could go only to consideration of appropriate order, not as to whether a violation had been committed.

It may be assumed, *arguendo*, that Appellant's earlier violations were the result of his negligence. The question then is whether the evidence as to 28 August 1968 was sufficient to prove that the offense of that date, for purposes of imposing an appropriate order, was somehow different from the others.

The law is clear. The vessel could not be operated with more than six passengers. The advice to Appellant that he could not carry more than six passengers was adequate notice that if he carried more than six he was in violation of the law. The advice

did not, however, change the nature of Appellant's.

With respect to all Appellant's violations of 46 U.S.C. 39c(a) it may be said that every act in violation was intentional in that Appellant intended to make each trip with more than six passengers and each trip was made in violation of law. The act on 28 August 1968 was a more flagrant violation because of the warning already given. Qualifications in the pleading and discriminations in the findings on the pleadings were unnecessary. The specifications were proved.

VI

There remains to be considered the propriety of the order which Appellant attacks as unduly severe. The order calls for a suspension of six months on eighteen months' probation.

Appellant argues that for a first offense of "Violation of a Regulation (unintentional)" The Table at 46 C.F.R.20-170 suggests as average order only an "admonition", and therefore admonition alone is appropriate in this case.

The first fact to be considered on this argument is that the same Table suggests an average order of six months' suspension on twelve months' probation for a first offense of "Violation of a Regulation (intentional)." Since one specification found proved by the Examiner in this case involved, definitely, an intentional violation by Appellant, it could be said that Appellant's argument fails in that it is predicated upon the propriety of an order for an unintentional violation.

There has been so much misunderstanding of offenses of this character that it must be made clear now that "violations" are of different classes.

The basic statute, R.S. 4450, sets up several charges under which an allegation of grounds to suspend or revoke may be placed. One of these "charges" is "an act in violation of any of the provisions of title 52 of the Revised Statutes or of any of the regulations thereunder". Another charge is for "misconduct" committed by a person "while acting under authority of his license..."

It is emphasized here that the only time the "charge" of

violation of a statute or regulation is appropriate is when investigation discloses that a licensed or certificated seaman has committed an act in violation of a regulation issued under authority of such "Revised Statute", and the person to be charged cannot be found case the charge should be "misconduct".

46 U.S.C. 390c(a) is not part of Title 52 of the Revised Statutes, but its violation is, as stated before, misconduct. This misconduct is not one of those specified in the Table, and thus is one in that wide area in which no guidelines are suggested to examiners. The order entered in this case was framed by the Examiner who had before him a record of eighteen illegal sailings, one of which he may well have considered far more serious than the others because Appellant had been given specific notice of limitations on the operation of his vessel. Because of Appellant's previously clear record, the Examiner chose to make the entire period of suspension subject to a period of probation.

It cannot be said that the order of a suspension of six months on eighteen months probation is such an abuse of discretion as to be arbitrary and capricious. There is no valid reason to disturb the order.

ORDER

The order of the Examiner dated at New York, New York, on 3 October 1968, is AFFIRMED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 16 day of May 1969.

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