IN THE MATTER OF LICENSE NO. 79188
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Abbott PHILLIPS

DECISION OF THE COMMANDANT
UNITED STATE COAST GUARD

1792

Abbott PHILLIPS

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 21 August 1969, an Examiner of the United States Coast Guard at Providence, Rhode Island suspended Appellant's seaman's documents for fifteen days upon finding him guilty of misconduct. The specifications found proved allege that while serving as operator of the motorboat SURFMASTER III under authority of the license above captioned, on or about 21 June 1969, Appellant:

(1) while the vessel was underway off Block Island, R.I., wrongfully carried for hire more than six passengers; and

(2) wrongfully failed to provide sufficient life-saving devices in serviceable condition while the vessel was underway.

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

The Investigating Officer introduce in evidence the testimony of two witnesses and certain documents.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and two specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of fifteen days (A condition of the order will be discussed in the Opinion below).

The entire decision was served on 21 August 1969. Appeal was timely filed on 2 September 1969, and perfected on 12 January 1970.

FINDINGS OF FACT

On 21 June 1969, Appellant was serving as operator of the motorboat SURFMASTER III and acting under authority of his license while the ship was in Great Salt Pond, Block Island, Rhode Island.

At about 2030 on that date, the officer in charge of a Mobile Boarding Detachment for the First Coast Guard District, one Francis D. Hickey, ENl, USCG, while on duty in Great Salt Pond, Block Island, R.I., observed SURFMASTER III to be carrying persons from the yacht club on the shore to various pleasure craft anchored in the vicinity.

When SURFMASTER III returned to shore from one of the circuits Hickey boarded the vessel for a routine inspection. He counted twenty four persons already aboard the vessel, including the operator, Appellant, and a deck hand. Hickey checked Appellant's license and asked for the vessel's certificate of inspection. When told that there was none aboard, Hickey warned Appellant that he could not carry more than six passengers if the vessel did not have a certificate of inspection. Hickey remained aboard the vessel for

its trip on the circuit of the anchorage and departed when it returned to shore, having checked the vessel's equipment during trip. During the course of this examination he found only sixteen approved individual lifesaving devices aboard the vessel.

SURFMASTER III is a 33 foot motorboat documented for the coasting trade. It was subject to 46 U.S.C. 390-390g if more than six passengers were carried, and previously it had in fact been inspected and certificated for the carriage of ten passengers. On 6 September 1967 the certificate of inspection was revoked. On the date in question, the vessel did not have a valid certificate of inspection.

On 13 May 1969, Appellant contracted with the state of Rhode Island, for a consideration, to carry passengers during the "Block Island Regatta." 21-28 June 1969. On 21 June 1969. Appellant was operating his motorboat and carrying passengers pursuant to that contract.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant's brief is discussed point by point (as I comprehend the points) in the *OPINION* below.

APPEARANCE: Dolbashian, Chappell and Chase, Portsmouth, R.I., by Paul M. Esquire

OPINION

I

This case is a companion to that discussed in Decision on Appeal No. 1793, signed this date. As in that case, there are raised questions as to the sufficiency of the specifications which must be disposed of before considering Appellant's points on appeal.

II

The first specification in this case was couched in language

similar to that in the other case. It alleged that Appellant "did...wrongfully carry for hire more than six passengers." The defect is the same. There is nothing intrinsically wrong in carrying more than six passengers for hire. There must be some reason why it was wrong. In Decision No. 1793 the defect was cured by the fact that the license involved limited the holder to operation of vessels carrying six or less passengers for hire. The wrongfulness of carrying more than six passengers for hire was established by the limitation on the license.

That fact is not present here because it was stipulated in the record that Appellant held an "operator's license", not a limited "motorboat operator's license."

Whether the wrongfulness of the act was established in this case in some other fashion remains to be seen.

III

There was originally a second specification which alleged that Appellant had wrongfully carried for hire passengers on a vessel whose certificate of inspection had been revoked. The Examiner, after the hearing was closed, dismissed this specification as not alleging an offense since the number of passengers aboard was not alleged. The Examiner correctly noted that the fact that vessel's certificate of inspection had been revoked or had expired did not bar it from carrying six or less passengers for hire, and that the number of persons carried aboard was of the essence of the offense. That the Examiner should have dismissed the specification after the hearing, I doubt.

An Examiner is specifically charged by paragraph (a) of 46 CFR 137.20-65 to "examine the charges and specifications to determine their correctness as to form and legal sufficiency." The reason for this requirement is to obviate an avoidable exercise in futility and to prevent just what happened here. The succeeding paragraphs of this section allow curative measures so as to permit meaningful proceedings on meaningful specifications.

The Examiner here did not, apparently, comply with this requirement because the question of sufficiency did not arise until

he wrote his decision, which he published a month after the public proceedings before him had ended. The Examiner was not, however, bound to dismiss even if he had second thoughts or late first thoughts. He could have reopened the proceedings to voice his misgivings and to give effect to the intent of paragraphs (b) and (c) of 46 CFR 137.20-65. This was not, however, the only way to keep the proceedings in order.

There was adequate proof in the record, after disputed testimony was received, that the vessel in this case carried 22 passengers for hire, and the Examiner so found. (Findings of FACT 4.) Appellant was on notice that the number of passengers was in question, and the matter was litigated.

I have, all too often, had occasion to cite *Kuhn* v. *Civil Aeronautics Board*, CA D.C. (1950), 183 F. 2nd 839, as authority for proposition that findings leading to orders of suspension or revocation of licenses and documents can be made without regard to the framing of the original allegations as long as the issue was raised on the record and litigated. The "Kuhn" decision was recently quoted in Order No.ME-10 of the National Transportation Safety Board in upholding an order of mine in Decision on Appeal No. 1776 affirming an examiner's order of revocation. The "Kuhn" doctrine is as applicable to examiners as it is to me and to the National Transportation Safety Board.

There are other valid theories of curative procedure pertinent to the handling of this case. Procedure in Federal court proceedings is not necessarily controlling in these administrative proceedings under 46 CFR 137, but if a procedure is authorized for a District Court and is available within the framework of judicial proceedings it is certainly allowable here.

To avoid any unwarranted inferences, I state here that the Federal Rules of Criminal Procedure are not applicable to these proceedings, but state again that if a procedure is permitted under those rules it is permitted here. Similarly, the Federal Rules of Civil Procedure are not applicable to these proceedings, but, obviously, if a procedure can be permitted in Federal Court civil

action it can be permitted here.

In Federal Court civil actions it has long been recognized that pleadings may be amended to conform to proof. FRCP 15 (B). IT has also been recognized that when the effect of the proof is obvious the pleadings need not be formally amended.

However, there is more reason to make formal amendments of pleadings to conform to proof in proceedings under CFR 137, because when a "prior record" is in question it is often important to know just what was found proved, whereas in the Federal Court civil action the money judgment renders the precise terms of the pleadings relatively unimportant. The important point is that examiners have the power to make the necessary amendments when, as here, the proof adduced during litigation will support the findings and amendments necessary to make out misconduct.

IV

I have said above that I have had "all too often" to cite the "Kuhn" decision to support deficiencies of investigating officers' charges and examiners' findings. While precision of pleading is not a necessary element in charges brought under 46 CFR 137, I expect investigating officers to draw up and serve proper specifications. I also expect examiners to observe the requirements of 46 CFR 137.20-65 and to see that a hearing proceeds on proper charges and specifications.

It may be that recourse to the "Kuhn" doctrine in appealed cases has lulled field personnel to expect that deficiencies in pleading and findings will be later corrected. This is no excuse for failure to try to draw up adequate charges for the hearing. On the other hand, examiners must leave the world of common law pleading, with resultant unnecessary dismissals of charges, and enter the atmosphere of administrative law, which was designed to relieve the courts by creating a new, summary, easily administered procedure not fettered by age-old bonds.

It so happens that in proceedings under 46 CFR 137 I have hitherto chosen not to allow an appeal from a dismissal by an examiner after a finding that a specification was "not proved."

(But see Decision on Review No. 6 in which the dismissal order followed a finding that the charge had been proved.)

A dismissal such as the one in the instant case was not necessary. The defect in the specification had been cured by the evidence introduced in the actual litigation and the specification could have been amended to reflect what the evidence proved -- that a vessel without a valid certificate of inspection had been navigated with more than six passengers for hire aboard. Under the self-imposed limitation, my action on this appeal cannot revive and rehabilitate the specification dismissed. However, the principles just discussed indicate the way in which the Examiner's ultimate finding that the first specification was proved can and should be upheld. Preferably, the action which I am taking in this decision on appeal could have and should have been by the Examiner himself.

V

I repeat that the first specification found proved in this case was just as defective as the original second specification which was dismissed. Since the first specification was found proved, however, I may utilize the Examiner's findings, so long as they are based upon substantial evidence adduced in a matter under litigation, to amend the specification as found proved to conform to the evidence.

While no limitation on Appellant's license prevented him from lawfully carrying more six passengers for hire, it is obvious that if Appellant, even without such a limitation on his license, carried more than six passengers for hire on a vessel without a valid certificate of inspection, he "wrongfully" carried for hire more than six passengers.

VI

To refer to matters briefly discussed in Decision on Appeal NO.1793, I reemphasize here that under the statutes there is a difference between carriage of "passengers for hire" under the

Motorboat Act of 1940 (46 U.S.C. 526 et *seg*.) and carriage of "passengers" under 46 U.S.C. 390 *et seg*.

The concept of "for hire" is not incorporated into 46 U.S.C. 390 *et seg* in d*et*ermining what is a "passenger". As I shall point out below, Appellant's arguments that no "for hire" element was proved in this case are irrelevant or not persuasive. A cash payment by the passenger for his transportation is not an essential element under 46 U.S.C. 390 et *seg*. Thus, it is unfortunate that the specification injected the element of "for hire" where it was not necessary to refer to this concept at all.

VII

A distinction may be made at this point b*et*ween this case and that discussed in Decision No. 1793. There, the Appellant had not been charge with operating a vessel carrying more than six passengers without the vessel's having had a valid certificate of inspection. The only specification that dealt with the number of passengers was concerned with the carriage of more than six "passengers for hire." I upheld the finding there because the record demonstrated that the Appellant's license limited him to operation of vessels carrying six or less passengers for hire. It was not found necessary there to amend the specification to conform to the proof because the identification of the license involved could be the basis for official notice of the limitation on the license and because the limitation on the license was spread on the record. Further, there was no reason in that case to discuss the meaning of "passenger" at length because of the fact that the appellant had not been charged with operating a vessel that should have been inspected when it did not hold a valid certificate of inspection.

In the instant case the absence of a required certificate of inspection was litigated and resulted in findings by the Examiner that the vessel had no valid certificate of inspection, although his dismissal of the original second specification was based on the failure to allege that more than six passengers "for hire" were carried.

The difference between the carriage of "passengers for hire",

and "passengers" under 46 U.S.C. 390 is important here. When we speak of "passengers" under 46 U.S.C. 390 the concept of "for hire" becomes irrelevant. While many statutes speak of "passengers for hire", 46 U.S.C. 390 provides its own special definition of "passenger". It is obvious from a reading of the section, without regard to the legislative history, that a conscious choice was made to introduce a new concept of "passenger" for the vessels to be affected.

Under the peculiar allegations of the charges in the case of Decision No. 1793, since no reference had been made to operation of the vessel with more than six passengers without a valid certificate of inspection, and the only supportable issue was the carriage of more than six "passengers for hire" by an operator whose license was limited, it became necessary to find that there was carriage of more than six "passengers for hire".

To place the matter in issue as clearly as possible, it may be seem that if the question raised is the carriage of more than six "passengers" without the vessel's having a valid certificate of inspection there is one set of considerations applicable, while if the only question is whether an operator exceeded the number of "passengers for hire" he could carry because of the limitation on his license, there must be proof that at least a seventh "passenger for hire" was aboard.

In No. 1793 I mentioned that the appellant had not been charged with operating a vessel required to be inspected when there was not a valid certificate of inspection aboard the vessel. It was possibly the theory of the drafters of the charges there that there could not be a valid specification alleging service under authority of a license when the person was not authorized to operate in such service, and that the only remedy was a civil penalty action rather than action to suspend or revoke the license. I am not prepared to state that a lesser license is not amenable to suspension and revocation actions when a person chooses to act in a higher capacity by virtue of that license, and that issue is not before me now. The question in this case is not whether "passengers for hire" were carried but whether "passengers", as defined in 46 U.S.C. 390 were carried.
was t Although the original "Specification Two" was dismissed

(unnecessarily, as I indicated) the issue of the validity of the certificated of the vessel was litigated. The question of Appellant's "wrongful" action in carrying more than six "passengers for hire" was thereby rendered academic.

The words "for hire" in second, specification (which was dismissed) were superfluous. Under 46 U.S.C. 390, as I have said, the concept of "for hire" is not significant. When the misconduct alleged is the carriage of more than six passengers on a vessel subject to 46 U.S.C. 390, et *seg*, which is not certificated, there is no need to allege that the carriage was "for hire". It is obvious that if it can be shown that one person was a "passenger for hire" every other person on the vessel other than one specifically excepted from the definition of "passenger" is a "passenger" under the laws. It is not, however, necessary to show here that there was even one passenger "for hire". In this case, under the contract with the State of Rhode Islands, it is apparent that the Voyage in question were for business and not "exclusively for pleasure." Absent a showing that a person on board came within one of the exemptions provided for in the statute every person on board became a "passenger".

The words "for hire" in the first and second (dismissed by the Examiner) specifications were superfluous in both instances.

VIII

It is my opinion that the first specification found proved in this case can be and should have been amended to conform to the proof offered in litigation and made the basis of findings of the Examiner in accordance with the principles stated in III above. While there was no limitation on Appellant's license as to the number of passengers who could be carried there is no doubt that it was proved that Appellant carried more than six passengers on a vessel subject to inspection under 46 U.S.C. 390 *et seg*, which was not inspected and certificated. The finding to that effect can be applied to the offense alleged in the first specification found proved.

Since the matter was litigated, I have no hesitation in applying the principles expressed in III above. The defect in the first specification found proved in this case will be cured by

amending the specification to conform to the proof.

IX

Appellant complains that the offenses were offenses were alleged to have occurred "off Block Island" while the proof was that they took place in Great Salt Pond. Great Salt Pond is a harbor in Block Island. The variance is not fatal.

X

Appellant also urges "entrapment" in that the boarding officer boarded the vessel when it was not underway and that he knew the number of people aboard. Since he made the trip he gave, it is contended, "a non-verbal `go ahead' to the operator."

I note first that when the trip began the boarding officer had not yet made his equipment check. He had, however, checked Appellant's license, which he recognized as valid, and he had asked for the certificate of inspection which, he was told, was not on board. The testimony is clear that when the boarding officer learned that there was no certificate of inspection aboard he "informed Mr. Phillips that when he carries more than six passengers at one time for hire he needs a certificate of inspection." Far from an entrapment, we have here the case of an enforcement officer warning a wrongdoer not to follow an unlawful course of action.

XI

Appellant now urges two somewhat inconsistent points. One is that a contract with the State of Rhode Island was improperly admitted into evidence over objection. In the other, Appellant refers me to another place in the transcript in these words:

> "6.) See page 39 Transcript, lines 6 through 18 wherein it is noted that the accused was under contract with the State of Rhode Island."

The lines referred to are Appellant's counsel's own closing

argument.

The fact is, however, that the initial objection to the admission of the contract into evidence was waived after the Examiner had stated that he, and only he, would construe the terms of the contract. The words of waiver were, "oh, all right then." R-23, line 14.

XII

As in the case in Decision No. 1793, Appellant has incorporated in his brief a "Request for Extraordinary Relief." The remarks on this document in the other case apply here.

XIII

Appellant here, as did the one in the case discussed in Decision No. 1793, urges lack of jurisdiction on the grounds that Appellant was immune from Federal Law because he was acting for the State of Rhode Island and because Rhode Island had never ceded jurisdiction over Great Salt Pond to the United States. These matters are disposed of in Decision No. 1793.

XIV

The Examiner's order in this case raises the same question as in the case of Decision on Appeal No. 1793. The answer is the same here as it was there and the same action will be taken.

ORDER

The first specification found proved in this case is AMENDED to read as follow:

> "In that you, while serving as operator of motorboat SURFMASTER III under authority of the captioned documents [did] on or about 21 June 1969, while said vessel was underway in Great Salt Pond, Block Island, R.I., wrongfully carry more than six passengers on a vessel subject to 46 U.S.C.

390/390g, after the certificate of inspection had been revoked."

The findings of the Examiner are AFFIRMED and his conclusion, except as MODIFIED just above, are AFFIRMED.

The order of the Examiner, entered at Providence, Rhode Island on 10 August 1969 is MODIFIED to provide as follows:

"Your license is hereby suspended as of 1 July 1970 or as of the date of service of this Decision on Appeal, whichever is the latter date. The suspension shall terminate on 16 July 1970 or fifteen days after surrender of your license, whichever is the later date."

The suspension shall terminate on 16 July 1970 or fifteen days after surrender of your license, whichever is the later date."

As MODIFIED, The order of the Examiner is AFFIRMED.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 2nd day of July 1970.

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