IN THE MATTER OF LICENSE NO. 24690
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: George A. FARIA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1793

George A. FARIA

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 14 August 1969, an Examiner of the United States Coast Guard at Providence, R. I., 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 motorboat DOLLY B under authority of the license above captioned, on or about 21 June 1969, Appellant:

(1) while operating on the waters off Block Island, Rhode Island, wrongfully carried more than six passengers for hire, and

(2) wrongfully failed to provide sufficient and serviceable approved lifesaving devices.

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 two witnesses and certain documentary evidence.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of fifteen days, subject to certain conditions.

The entire decision was served on counsel on 15 August 1969. Appeal was timely filed on 2 September 1969, and perfected on 3 December 1969. Appellant has not yet complied with the Examiner's order.

FINDINGS OF FACT

On 14 July 1969, Appellant was serving as operator of the motorboat DOLLY B and acting under authority of his license.

At the time in question DOLLY B was an uninspected motorboat, that is one which could not lawfully carry more than six "passengers" as defined in 46 U.S.C. 390 without being inspected and certificated. Appellant's license authorized him to serve only as operator of a vessel carrying six or less passengers for hire.

Pursuant to an arrangement authorized by the State of Rhode Island, Appellant had been hired to transport passengers in his vessel, DOLLY B, between wharfside and anchored pleasure vessels in Great Salt Pond, Block Island, Rhode Island. Shortly before 2100 of the date in question, DOLLY B, operated by Appellant, was observed underway with more than six passengers for hire aboard. It was also observed that DOLLY B delivered the passengers to various anchored boats. The observer was a Coast Guard petty officer who caused a photograph to be taken while the vessel was proceeding away from him.

When DOLLY B returned to the pier this petty officer boarded the vessel. Fourteen passengers were already aboard. After checking Appellant's license, the petty officer examined the vessel

for equipment. He found only ten approved life-saving devices of the kind required on a vessel carrying passengers for hire. After further conversation, Appellant ordered that only six passengers would be carried. The excess got off the boat. DOLLY B was then observed to make two more trips carrying only six passengers.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

Appeal has been filed in unorthodox fashion in this case and an orderly treatment is attempted in the Opinion below. Some of Appellant's grounds have been gathered together and discussed under one heading, since they are similar in nature. A few quibbling exceptions as to rules of evidence are not discussed.

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

OPINION

I

One of Appellant's grounds for appeal is an asserted lack of jurisdiction. The reasoning appears to be that Rhode Island is a sovereign State, that its first legislature enacted a law that "all charters heretofore granted shall remain in full force and effect", and that since Appellant was operating under a State contract his vessel was covered by "State immunity" which cannot be affected by the United States Coast Guard. It is also said that, "The Coast Guard has no jurisdictional orders of Great Salt Pond, Block Island, Rhode Island."

It should be needless to point out that Appellant's contract was not a charter "heretofore [before the convening of the first Rhode Island Legislature] granted" and the reference is irrelevant.

The preeminence of Federal law governing vessels licensed to engage in trade on the navigable waters of the United States was first set out in *Gibbons* v. *Ogden*, (1824), 22 U.S. (9

Wheat.) 1. Green Salt Pond is a navigable waterway of the United States, and DOLLY B is such a vessel.

Far from the State's contract weaving a cloak of immunity from the laws of the United States around DOLLY B, the fact is that even if DOLLY B, had been owned by the State itself the vessel would be subject to Federal inspection and safety laws while on the navigable waters of the United States (although a few Acts of Congress, irrelevant to the instant case, do specifically exempt State owned vessels from Federal regulation in narrowly limited areas). *The Oyster Police Steamers of Maryland*, 35 Fed. 926.

Examples of the scope of the Federal authority need not be belabored. Appellant's contention has no merit.

II

Another of Appellant's points may well be disposed of out of the order in which presented because if it were persuasive it would not be appropriate to proceed to the merits of the case at this time.

An allegation on appeal is that the transcript of proceedings is defective with respect to the introduction of the witness "Captain Bud Phillips". On this matter the transcript reads:

> "INVESTIGATING OFFICER: I would like to call one other witness, Captain Bud Phillips.
>
> CAPTAIN BUD PHILLIPS, CHARTERER BOAT OPERATOR was called as a witness by the Investigating Officer, and having first been duly sworn, was examined and testified as follows. . ."R-15

It is asserted in Appellant's brief:

> "The transcript is severely incomplete. . .. It is obvious from this that an entire section of the transcript has been deleted, wherein objections to Captain Phillips being called were duly entered."

The transcript is accompanied by a certificate of the court reporter that it is a true record of the proceedings therein contained. Appellant attacks the accuracy of this certificate.

On receipt of Appellant's brief containing this allegation, the Examiner immediately filed a certificate to the effect that he had examined the transcript and had reviewed (or heard) a sound recording of the proceeding, and that there was no deletion or omission of proceedings. This certificate is sufficient, especially since Appellant does not cite one objection which he asserts was made but not recorded. Indeed, it is impossible to think of an objection which Appellant could make to the appearance of the witness such that its omission from the transcript would have been prejudicial. The witness was obviously competent and was amenable to subpoena.

The insubstantial character of Appellant's point in this connection is further seen when his continued remarks in the brief are observed. "Also, this insertion in the transcript can only be the comments of the hearing reporter, which have no business being in a transcript. The Reporter's evidence certainly is inadmissible." To characterize a reporter's notation that a witness entered and was duly sworn as "evidence" reveals a misconception of the function of the reporter.

This point of Appellant requires no further discussion.

III

Another of Appellant's points on appeal is that the Examiner erred in ruling on several objections to questions asked of the witness Captain Bud Phillips, and in not excluding the testimony of the witness entirely.

The record on this matter developed in an unusual fashion. Appellant's counsel began by objecting to several questions asked of the witness on the grounds that answers might cause the witness to incriminate himself. Surprisingly, at first view, the Examiner did not deny standing to Appellant's counsel to object, on the grounds that the privilege is personal to the witness and may not be asserted by a third party. The Examiner instead engaged with Appellant's counsel in a discussion of the rights of the witness.

The Examiner noted that the witness was before him in another, entirely separate, suspension and revocation proceeding under R.S. 4450 involving the license of the witness. the Examiner ruled that:

(1) since the suspension and revocation proceeding was not a criminal case in the first place, and

(2) since the testimony of the witness in Appellant's case could not be used against the witness in his own case,

the assertion of the privilege was not proper.

Appellant's counsel later appeared on the record instructing the witness not to answer a question, on Fifth Amendment grounds, without curb by the Examiner on the apparent intrusion, although he consistently denied the objection.

There then became apparent from the record a fact which was obviously well known to the Examiner and the Investigating Officer, that Appellant's counsel on this record was counsel for the witness in his own suspension and revocation proceeding. This seems to explain why Appellant's counsel was dealt with, inexplicably at the time to the reader of the record, as having some standing to object to questions put to the witness. The assumptions of the Examiner and the Investigating Officer that this fact was evident was unwarranted.

A witness is entitled to advice of counsel. His counsel should, however, be required to make appearance on the record and, if heard on the record, should be clearly identified. It is, I suppose, within the judgement of counsel whether he can ethically and adequately represent both a person charged in these proceedings and a witness called to testify against that person. If he can, I think it necessary, and the confused record on this matter in this case makes it obvious, that the appearance of the counsel should be clearly defined, not left to some collaterally obtained information available to the examiner and the investigating officer, and his capacity should be identified at each time he speaks so that on appellate review what is known to the parties present is timely known to the appellate reviewer.

The decision made by the Examiner as to the availability of

the Fifth Amendment to the witness can be defended on the grounds that Appellant's counsel, who turned out to be the counsel of the witness, urged the Fifth Amendment privilege only with respect to the pending proceeding to suspend or revoke the license of the witness. If counsel, while acting for the witness, had urged other considerations, like possible criminal prosecution, as a Fifth Amendment bar, other considerations on decision on appeal might have to be undertaken, even if the result might be no different. But on the limited grounds presented to the Examiner, he cannot be said to have been wrong. An assertion of a constitutional privilege need be given no broader consideration than the breadth asserted.

Still, since Appellant's counsel, when called on to specify his grounds for assertion of the privilege of the witness (while acting as counsel for the witness) invoked all the laws of the United States, a broader statement may be made here to obviate questions which might arise. Let us assume that the Examiner's orders to the witness actually abrogated a privilege of the witness stemming from a Constitutional right, and let us assume that the compelled answers of the witness might subject the witness to action from which the Fifth Amendment was designed to protect him. The privilege is still that of the witness. The witness may claim that his compelled testimony should not be used against him in some other proceeding, but that is a different matter from a third person's (Appellant's) attempt to invoke another's constitutional privileges to protect himself from adverse testimony, even if both the third person and the witness are represented by the same counsel as they were in this case.

IV

At the hearing and on appeal, Appellant argued that there had been no proof that he carried more than six passengers for hire.

The specification dealing with the number of passengers carried originally read thus:

> "...In that you, while serving as operator of motorboat DOLLY B, under authority of the captioned documents, did on or about 21 June 1969 while operating on the waters off Block

Island, Rhode Island wrongfully carry more than 6 passengers."

Sometime between the service of charges and the hearing, the Investigating Officer perceived a defect in the specification. At the outset of the hearing he moved that the words "for hire" be added to the specification so as to make the final term "passengers for hire." Appellant objected to the amendment stating that he could plead surprise. When the Examiner permitted the amendment, Appellant effectively waived his objection by not asking for additional time.

Even as amended the specification might be open to question, unless the terms of the license captioned could be considered as incorporated by reference so as to constitute a sufficient allegation that carriage of more than six passengers for hire was improper. No objection was made by Appellant, and the fault, if there was one, was cured by the showing that Appellant's license limited him to the operation of vessels carrying six or less passengers for hire. If the evidence sustained a finding that Appellant carried more than six passengers for hire a finding of misconduct can be sustained. The ultimate question that must be faced is whether there was proof that Appellant carried more than six passengers for hire at any time.

Because of the differences in statutes and regulations that could bear upon this situation, there must be some discussion of the term "passenger" and of what must be established under varying conditions. Under the statutes, the number six becomes important when the question raised is whether a vessel is subject to inspection. 46 U.S.C. 390-390g. The term "passenger" in those sections encompasses more persons than those who are "passengers for hire" under 46 U.S.C. 526 et, *seq*., and the difference is not accidental. The definition in 46 U. S. C. 390 was adopted deliberately for the purpose of eliminating the need for showing that the passenger was "for hire".

I emphasize here that the definition of "passenger" in 46 U.S.C. 390 has no application here, because Appellant was not charged in this case with carrying more than six such "passengers" on a vessel which did not have a valid certificate of inspection. To sustain a finding that Appellant operated a vessel in excess of the authority conferred by his license, there must be substantial

evidence that the vessel carried at least seven passengers for hire.

There is no doubt that the contract which Appellant operated under rendered the carriage of passengers carried under the contract the carriage of passengers for hire. It does not matter from whom the consideration flows for the carriage. If the State of Rhode Island paid for the transportation, or a marina paid for the transportation,even through a primary contractor, the activity for which Appellant was engaged was the carriage of passengers for hire, and he does not deny this.

The complaint was made at hearing that no person aboard the vessel was questioned as to how he came to be aboard nor as to what his capacity might have been. There was ample evidence, however, that the vessel delivered many persons from shore to anchored vessels, just as the contract called for.

Once it was established that more than six persons in addition to the operator were aboard DOLLY B and that on the first occasion, at least, these persons were delivered to anchored boats, it is not an unreasonable inference, indeed it is an inescapable inference, that these were the persons contemplated by the contract to be carried between shore and anchored vessels.

When grounds for a reasonable inference are established the burden to negative the inference passes to the one who seeks a finding otherwise. After it had been established that more than six persons were carried aboard DOLLY B, which had contracted to carry passengers for hire, and that these persons were delivered to various anchored vessels, in conformance with the terms of the contract, it became incumbent upon Appellant to rebut the inference and to offer proof either that the number of persons above six was made up of members of the crew or of persons who were not carried under the contract and had not otherwise given consideration for their carriage. Appellant offered no such evidence. His "Request for Extraordinary Relief", mentioned below, in fact admits that he carried more than six passengers for hire on the vessel.

In this same connection may be mentioned Appellant's argument that the vessel was not shown to have been underway at the time of the alleged offenses, or that Appellant was not identified as

having been the operator at any time when the vessel was underway. The replies to these alternatives are straightforward.

The vessel was boarded immediately after it returned to take on more passengers. It had been under constant surveillance. It is a reasonable inference that the operator at the time the vessel was boarded was the operator at all times during which the vessel had been under observation. It is also a fair inference that the lifesaving equipment on the vessel at the time it was boarded while moored was the same equipment as was on board just before it was moored.

V

With respect to the question of lifesaving equipment, however, there is serious difficulty. The observer estimated that there were about twelve passengers on the vessel on the trip he watched just before boarding. No head count was made, and a head count was probably not feasible. The photograph shows that there were more than six passengers. It may raise a suspicion that there were ten, possibly more.

The estimate of "about twelve", made by a visual look, is not precise enough to establish "more than ten persons on board". Such an estimate, I make haste to add, is good enough to support a finding of "more than six", even without the photograph, but neither the estimate nor a suspicion raised by the photograph is sufficiently substantial to support a finding of more than ten.

When the vessel was boarded it was not underway. It is therefore immaterial that there were fourteen prospective passengers on board at that time, because all but six got off before the vessel moved again. If it had been shown, in the instant case, that there were only six required lifesaving devices on board at the time of boarding there could be a reasonable inference that, on the trip just completed, there were more persons on board than there had been approved lifesaving devices.

The evidence of "about twelve" and the photograph do not, to my mind, establish "more than ten persons on board" so that it can be held proved that on the trip in question there were insufficient approved devices on the vessel.

VI

Included in Appellant's brief in this case is a document entitled "Request for Extraordinary Relief" which has previously been forwarded to me under separate cover even before the appeal was perfected.

Insofar as Appellant, through his counsel, complains that the laws governing carriage of passengers for hire are unjust and discriminatory, he is in the wrong forum at this time. When a person's license is suspended for a flagrant violation of a Federal law it is not for me to question the adequacy or propriety of that law in a proceeding like this. In consideration of this case it is of no significance that different laws have been found desirable for vessels used exclusively for recreational purposes and for those carrying passengers for hire. It is the duty of the Coast Guard to enforce the laws governing the carriage of passengers for hire, not to pass upon the propriety of Acts of Congress. In a proceeding such as this, it is obviously beyond my power to grant "extraordinary relief" from any consequence following from an Act of Congress. The question which Appellant would pose must necessarily be presented to the legislative branch, or even to the Coast Guard, but in an absolutely independent manner, not combined in any way with decision on this case.

VII

One of Appellant's complaints in his request for extraordinary relief (incorporated into his appeal in the instant case) is that there were so many people waiting for transportation that he could not fend them off (after he was instructed, as the evidence clearly shows, not to carry more than six passengers). It may be true that more than six passengers would swarm on to the vessel and demand transportation which someone had promised them. This did not justify Appellant's transportation of these extra persons in violation of Federal law.

At the time he entered his contract, he well knew that his license was limited to operation in the carriage of six or less passengers for hire. He well knew that his vessel was not certificated for the carriage of more than six passengers. If he undertook a contract which he could not legally fulfill that is his

misfortune. Appellant cannot argue now that the swarm of passengers could not have been foreseen by him, so that his violation of law should be forgiven.

Appellant had remedies available to him. One was to refuse to move his vessel until six or less passengers were aboard. Another was to have upgraded his license to allow the carriage of more than six passengers and to have equipped his vessel so as to have qualified for a certificate of inspection. Another was to admit that he could not fulfill his contract.

There is nothing in the laws of the United States to authorize one to grant "extraordinary relief" to a person in Appellant's position. Further, I see no fundamental inequity in the case to call for consideration of the possibility of advocating remedial legislation to render his conduct lawful. Since 1897 Congress has seen fit to set different standards for operation of vessels carrying passengers for hire and for those engaged exclusively in the pleasure of the owner.

VIII

The novel question which appears in this case was the nature of the Examiner's order. It reads:

> "That your License No. 24690 and all other valid licenses issued to you by U. S. Coast Guard now held by you be and the same hereby are suspended outright. This suspension is to be effective immediately upon the service hereof upon your counsel and shall remain in effect until 15 days after the day on which you have surrendered your license to the nearest U. S. Coast Guard office, which you are hereby ordered to do forthwith. Because of the seasonal nature of your operation, under the authority of this license, which is generally between about July 1 and September 1, the suspension here ordered is not to run between September 1, 1969 and July 1, 1970."

Since Appellant's work is seasonal, it was the obvious intent of the Examiner to insure that the suspension which he ordered would be effective during a period of time in which Appellant had a possibility of employment under authority of his license and not during a period in which Appellant would not be using his license

anyway.

Several questions are raised by this order.

In the ordinary case in which an examiner wishes to order an outright suspension he will order the suspension to begin on service of the decision, to terminate thus many months from the date of compliance by surrender of the documents involved. 46 CFR 137.30-15, authorizing temporary documents for issue to appellants pending a determination of an appeal, is construed as tolling the effectiveness of the orderED suspension until final decision is made. The period of ordered suspension thus normally begins to run again from the date of service of the final decision, the date of surrender of the temporary document, or the date of its expiration,whichever is earliest.

The first problem with the order in this case is that it purports to have become effective when service of the decision was made on counsel. It is one thing to say that service of decision on counsel (properly made under 46 CFR 137.20-175) commences the running of the period in which to file an appeal and another to say that service on counsel, without more, is service on an appellant such as to make service after that date unlawful under 18 U.S.C. 2197. The latter theory is untenable. Actual notice of the order to the person is necessary if later service after the suspension order is to be held unlawful. In fairness to the Examiner it must be noted that the practice of service of decisions and orders on counsel is sanctioned by the regulations. But it is preferable that examiners enter decisions and orders on the record in the presence of the person charged.

In this case, Appellant has not complied with the Examiner's order at all, and has not been issued a temporary document. If the order is to be affirmed on this appeal, the question is when the effective suspension will begin. It can be seen in the ordinary case that a construction of the intent and wording of an order would be such that when the effectiveness of an order by an examiner was delayed or interrupted because of issuance of a temporary certificate the effective date would be the date of final decision.

The Examiner here has not so framed his order as to make this

general application possible. In attempting to insure that the suspension ordered, if upheld on appeal, should be effective during a period when Appellant would normally be employed rather than when Appellant would normally not be employed under his license, the Examiner limited the period when his order could not be effective to days from 1 September 1969 to July 1 1970. Had there been no appeal in this case the suspension could have been served before 1 September 1969. It can be seen that if the appeal were not decided by 1 July 1970, the restriction imposed by the Examiner would be meaningless.

In principle, however, I affirm the Examiner's authority to tailor his order appropriately in cases involving seasonal occupation, with the *caveat* that the order should be properly worded. In view of Appellant's failure to comply with the order when issued, it is open to me to rephrase the order in my final decision on appeal so as to effectuate the intent of the Examiner.

It need hardly be said that an attempt by an examiner to render his order virtually ineffective by limiting its effective dates as to a seasonal operator to a period in which the person would not be employable anyway could not be looked on with favor and could require regulatory restraints.

CONCLUSION

The Examiner's finding that DOLLY B was carrying, at the time of its observation while underway and at the time of taking the photograph, "some 12 passengers", has been MODIFIED in my findings to show that the vessel was carrying more than six passengers for hire. For the reasons stated in Part V of the Opinion above the Examiner's conclusion that the vessel was operated with insufficient approved lifesaving devices aboard will be set aside as unsupported by the required quantum of evidence. There is no reason to disturb the Examiner's order except to tailor it to the date of present decision.

ORDER

The findings of fact of the Examiner made at Providence, Rhode Island, on 14 August 1969, are AFFIRMED as MODIFIED herein. The

findings as to the first specification found proved are AFFIRMED. The ultimate findings as to the second specification found proved are SET ASIDE and the specification is DISMISSED. The order of the Examiner 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 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.

INDEX

Fifth Amendment, applicability of

Licenses
Operating vessel in excess of authority

Burden of proof
Prima facie case, effect of

Burden of going forward with evidence
Prima facie case, effect of

Prima facie
Refutation of, evidence needed
Unrebutted

Findings of Fact
Unsupported by evidence

Coast Guard
Duty of

Commandant
Authority to act on appeal

Order of Examiner
Authority to tailor to seasonal employment

Modification of Examiner's order
Commandant's direction
On appeal

***** END OF DECISION NO. 1793 *****

Top