

title>UNITED STATES OF AMERICA

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	COMMANDANT
vs.	:	
	:	ON APPEAL
LICENSE NO. 726646	:	
<u>Issued to William S. Mowbray, Appellant</u>	:	NO. 2593

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By order dated September 6, 1995, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant s license and all other licenses, merchant mariner's documents, certificates or authorizations whatsoever issued by the Coast Guard to Appellant, based upon finding proved one specification of *negligence*, one specification of *violation of law* and two specifications of *violation of regulation*.

The single specification of negligence alleged that on February 21, 1995, while serving as operator aboard the tug TICONDEROGA, Appellant negligently failed to immediately notify the Captain of the Port of a hazardous condition (as defined in

33 C.F.R. § 160.203) in violation of 33 C.F.R. § 160.215, to wit: the sunken barge MC 10 and tug ECCO III near the Hampton Roads Entrance Reach. The single specification of violation of law alleged that Appellant failed to display Appellant's license within 48 hours after employment on the tug TICONDEROGA in violation of 46 U.S.C. § 7110. The Administrative Law Judge dismissed the first specification of violation of regulation upon finding it to be duplicitous of the single specification under the charge of negligence. The second specification of violation of regulation alleged that from February 18, 1995, though February 21, 1995, while serving as operator aboard the tug TICONDEROGA, Appellant allowed an individual to serve aboard the vessel without a valid Merchant Mariner's Document in violation of 46 C.F.R. § 15.401. The third specification of violation of regulation alleged that during the same time period, Appellant also was employed aboard the vessel without all crew members subject to the random drug testing requirements of 46 C.F.R. Part 16 in violation of 46 C.F.R. § 16.320(f).

Hearings were held in Norfolk, Virginia on April 19, 1995, and September 1, 1995. Appellant was represented by counsel and entered a response denying all charges and specifications. The Coast Guard Investigating Officer introduced into evidence the testimony of three witnesses. One of these, Mr. Pontin, was also sponsored by Appellant. Additionally, the Coast Guard Investigating Officer offered 17 exhibits into evidence. Appellant's counsel introduced into evidence the testimony of Appellant and two exhibits. The Administrative Law Judge entered six exhibits into evidence on his own motion.

The Administrative Law Judge's Decision and Order was served on Appellant on September 11, 1995. Appellant filed a timely notice of appeal on October 6, 1995. Upon request from Appellant's counsel, the due date for Appellant's appeal was extended to December 10, 1995. Appellant's appeal was perfected on December 9, 1995. Therefore, this appeal is properly before me for review.

APPEARANCE: Patrick M. Brogan, Davey Associates, P.C., 200 Life Building, P.O. Box 3188, Norfolk, Virginia 23514.

### FINDINGS OF FACT

Appellant is the holder of the captioned license, which authorizes service as mate of near coastal steam or motor vessels not more than 500 gross tons. Service under the license is restricted to 300 gross tons or less until a radar observer endorsement is obtained. Appellant never obtained that endorsement. [I.O. Exhibit No. 2]. Under the equivalency regulations contained in 46 C.F.R. § 15.190, Appellant was authorized to serve as an operator of uninspected towing vessels within the restrictions on Appellant's license.

The tug TICONDEROGA is owned by Appellant and is 85.1 feet in length and displaces 185 gross tons. The Certificate of Documentation for the vessel has an endorsement for the Coastwise trade. [I.O. Exhibit No. 4].

Between February 18, 1995, and February 22, 1995, Appellant was serving as captain and operator of the tug TICONDEROGA. [Decision and Order (D&O) at 5]. Appellant directly hired all other members of the crew serving aboard the tug during the relevant time period. [D&O at 7]. The other members of the crew included F.R. Pontin, holder of a Coast Guard license and serving as the Mate and relief operator, a deckhand J.R. Zang, the holder of a merchant mariners document, and J.K. Mascio who did not hold a Coast Guard license or document during the time period in question. [D&O at 5]. No member of the crew received a drug test when they were hired by Appellant to serve aboard the TICONDEROGA, nor was any member of the crew subject to a random drug testing program. [D&O at 7]. All other relevant facts are discussed in the opinion below.

## BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. Though the U.S. Coast Guard instituted proceedings against Appellant's captioned license, the Administrative Law Judge impermissibly directed the order against all licenses, certificates or documents held by Appellant, contrary to 46 C.F.R. § 5.567.
2. The second specification of the third charge, which charges that Appellant allowed an individual to serve aboard the tug without a valid Merchant Mariner's Document in violation of 46 C.F.R. § 15.401, fails to state a violation of a law or regulation. Appellant argues that 46 C.F.R. § 15.401 prohibits an individual from certain conduct and prohibits an employer from employing certain individuals, but does not prohibit an operator from allowing certain individuals to serve aboard the vessel.
3. The Administrative Law Judge erred in finding proved the second and third specification of the third charge, violation of regulation, for conduct which does not constitute acts committed under the authority of the captioned license.
4. The punishment administered by the Administrative Law Judge was too severe, excessive, and not uniform, in that the Coast Guard prosecuted only one of two operators on board the vessel during the time of the marine casualty.

## OPINION

### I

Appellant argues that the Administrative Law Judge impermissibly directed his order against all licenses, certificates, or documents issued to Appellant, rather than confining the order to the captioned license. Appellant requests on appeal that the order be made applicable only to the captioned license. For the reasons stated below, I find that the Administrative Law Judge's order against all licenses, certificates, or documents issued to Appellant was proper.

46 C.F.R. § 5.567(b) describes the permissible scope of an order by an Administrative Law Judge in a suspension and revocation hearing, stating that "[t]he order is directed against all licenses, certificates or documents, except that in cases of negligence or professional incompetence, the order is made applicable to specific licenses, certificates or documents. . . ." (emphasis added). Appellant argues in his appeal that the clear wording of 46 C.F.R. § 5.567 limits the scope of Appellant's documents that could have been affected by the Administrative Law Judge's order solely to Appellant's license. Based on this interpretation, Appellant contends that the regulation does not allow the order to affect every document issued to Appellant by the Coast Guard.

Appellant also argues that, in addition to the clear wording of the regulation, due process concerns

require that the order be directed solely at Appellant's license. In support of his due process argument, Appellant points to the fact that the Notice of Hearing and Charges issued by the Coast Guard to Appellant only spoke of potential action against Appellant's license: "You, William S. Mowbray, are hereby charged to appear at a hearing under the provisions of 46 U.S.C. § 7703 and the regulations thereunder, looking to the suspension and revocation of your License. . ." (emphasis added). Based on this wording, Appellant maintains that he was only on notice that his license, but not other documents, was at risk

Appellant was charged with three separate counts; negligence, violation of law and violation of regulation. At the hearing, the Administrative Law Judge found at least one specification of each count proved. If Appellant had solely been charged with negligence, then Appellant would be correct in his interpretation of 46 C.F.R. § 5.567 that the order could only be made applicable to a specific license. In this case, however, Appellant was also charged with two independent counts, violation of law and violation of regulation. The applicable regulation is clear that an order by an Administrative Law Judge in suspension and revocation hearings is to be directed against all licenses, certificates, and documents, except in limited cases where someone is charged with negligence or incompetence. The Notice of Hearing and Charges issued to Appellant plainly charged Appellant with three separate counts, only one of which was a count of negligence. Appellant was distinctly advised that he was also charged with 2 non-negligence charges, the underlying facts of which were related to the charge of negligence solely because the incidents in question occurred during the same voyage.

5 U.S.C. § 552 requires agencies to publish in the Federal Register all substantive rules of general applicability. Under 44 U.S.C. § 1507, a filing of a document for publication with the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it." Appellant, hence, had adequate notice through the publication of 46 C.F.R. § 5.567 that action would be taken against all documents issued to him by the Coast Guard, not just his license. Accordingly, I find that there was no violation of due process nor violation of the clear language of the regulations when the Administrative Law Judge directed his order against all licenses, certificates, or documents issued to Appellant.

## II.

The second specification of the third charge states that Appellant "while serving as operator aboard the tug TICONDEROGA. . .under the authority of the captioned license. . .did allow an individual to serve aboard such vessel without a valid Merchant Mariner's Document in violation of Title 46, Code of Federal Regulations, Section 15.401." 46 C.F.R. § 15.401 reads,

[a] person may not employ or engage an individual, and an individual may not serve, in a position in which an individual is required by law or regulation to hold a license, certificate of registry, or merchant mariner's document, unless the individual holds a valid

license, certificate of registry, or merchant mariner's document, as appropriate authorizing service in the capacity in which the individual is engaged or employed. . . . (emphasis added).

Due to the size and tonnage of the tug TICONDEROGA, all persons serving aboard the tug were required to hold a Coast Guard license or document pursuant to

46 U.S.C. § 8701. Appellant, as owner of the tug, was responsible for the hiring of the crew. [D&O at 9]. There is no dispute that one of the crew, J.K. Mascio, hired by Appellant and working aboard the tug, did not hold a Coast Guard license or document at the time of the voyage in question. [Transcript (TR) at 152].

Appellant contends on appeal that because he is charged in his capacity as operator of the tug, and not as owner who hired the crew, this specification fails to state a violation of a law or regulation. Appellant argues that 46 C.F.R. § 15.401 prohibits an individual from certain conduct, and an employer from employing certain individuals, but does not prohibit an operator from allowing certain individuals to serve aboard the vessel. Appellant reasons that he hired the crew in his capacity as owner of the tug, not as the operator, and that the regulation at issue, 46 C.F.R. § 15.401, does not prohibit an operator from allowing an undocumented individual from serving aboard the tug.

In his Decision and Order, the Administrative Law Judge found that because Appellant, while acting in his capacity as owner of the tug, knew when he hired

Mr. Mascio that the individual lacked proper documentation, that the violation was a continuing one, known to Appellant in his capacity as operator, and one that could have been corrected. "When Mowbray assumed control of the vessel, the first time at New York he was responsible for the safety of the vessel and the crew and was required to obey the applicable law. He continued to allow Mr. Mascio to serve despite the fact that he knew that the man did not have the required document." [D & O at 19].

I find it significant that the regulation in question, 46 C.F.R. § 15.401, makes it a violation for a person to "employ or engage" a person without the requisite document when one is required. I will not regard the additional language as superfluous. Thus, by making it a violation to "employ or engage" a person lacking proper documentation, I find that the regulation clearly articulates two separate violations; that of hiring or employing a person without the proper required documentation and that of engaging a person in work aboard a vessel without the required documentation. The legislative history of the underlying statute, 46 U.S.C. § 8701, provides no guidance to suggest a contrary interpretation. Therefore, when Appellant engaged Mr. Mascio in performing work aboard the vessel in a position which required the person to hold a merchant mariner document, knowing that Mr. Mascio did not hold such a document, Appellant was in clear violation of 46 C.F.R. §15.401. I affirm the holding of the Administrative Law Judge.

### III.

Next, Appellant argues that the Administrative Law Judge erred in finding proved the second and third specification of the third charge, violation of regulation, for conduct which does not constitute acts committed under the authority of the captioned license. As Appellant correctly points out, 46 U.S.C. § 7703 restricts the suspension or revocation of a license to violations that occurred while the license holder was acting under the authority of that license. The second specification of the third charge, discussed in Paragraph II above, charged Appellant with allowing an individual to serve aboard the tug TICONDEROGA from February 18, 1995, through February 21, 1995, without a required document in violation of 46 C.F.R. § 15.401. The third specification charged Appellant with being employed aboard the tug during the same time period without having all crew members subject to the random drug testing requirements of 46 C.F.R. Part 16, in violation of 46 C.F.R. § 16.230(f). I note that on December 2, 1994, the Coast Guard issued a final rule, "Random Drug Testing Program", 59 FR 62218, effective January 1, 1995, in which the paragraph containing the applicable regulation for the third specification was redesignated as 46 C.F.R. § 16.230(k). This change in designation did not affect the wording of the paragraph and has no material effect on this case. Since the incidents in question occurred after the redesignation, the correct cite for the violation, however, is 46 C.F.R. § 16.230(k).

As to Appellant's arguments regarding the decision on the second specification, I find that Appellant was clearly acting within the authority of his license when he allowed an undocumented individual to serve aboard the vessel. Appellant argues that his license did not authorize him to hire a crew and, therefore, the employment of the individual was not accomplished under the authority of the license. However, Appellant misunderstands the charge. As discussed in Paragraph II above, Appellant was not charged with a violation for hiring the individual as owner of the tug, but with engaging the individual in work aboard the tug in a position that required the individual in that position to hold a merchant mariner document. It was the engagement of the individual to perform work required to be performed by someone with an appropriate document that constituted the violation that was charged, not the mere hiring of the individual. Therefore, when Appellant, in his capacity as operator, engaged Mr. Mascio in the performance of work on the vessel in violation of a regulation that required Mr. Mascio to hold a merchant mariner document, as discussed in paragraph II, Appellant was certainly acting under the authority of his license.

46 CFR § 5.57 outlines the circumstances under which a person is considered to be acting under authority of a license. Paragraph (a) of the regulation states in part, "A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate, or document when the holding of such license is. . .required by law or regulation." Due to the size and tonnage of the tug in question, Appellant was required by 46 U.S.C. § 8701 to hold an operator's license. In my past decisions, I have made clear the limits of when an individual is acting under the authority of a license. "An 'operator' license is not a management license. Rather, it is a control license. An 'operator' is subject to charges for professional activities peculiar to his license status solely for the period during which he is directing and controlling the vessel." (citations omitted). Appeal Decision No. 2373 (OLDOW), affirmed by National Transportation Board ME-110. See Appeal Decisions Nos. 2292 (COLE), 2262 (SHERMAN), 2249 DURAND) and 2153 (McKENNEY). Clearly, in this case, Appellant was acting as operator when he engaged Mr. Mascio in work that required an individual to hold certain documents that

Appellant knew Mr. Mascio did not possess.

In regard to the third specification, Appellant was charged with a violation of

46 C.F.R. § 16.230(k). That regulation states that, "An individual may not be engaged or employed, including self-employment, on a vessel in a position as master, operator, or person in charge for which a license or merchant mariner's document is required by law or regulation unless all crew members covered by this section are subject to the random testing requirements of this section." 46 CFR § 16.230 (b) describes those crew members to whom the section applies. Specifically, paragraph (b) requires marine employers to establish programs for chemical testing on a random basis for the presence of dangerous drugs for two classes of crew members on uninspected vessels: 1) crew members required by law to hold a license issued by the Coast Guard in order to perform their duties on the vessel, and 2) crew members who perform duties and functions directly related to the safe operation of the vessel.

At a minimum, Appellant and Mr. Pontin, the Mate and relief operator, were required to be subject to random drug tests by virtue of the requirement for both of them to hold a license issued by the Coast Guard to perform their duties on the vessel. Hence, under the regulation, Appellant had a duty not to engage certain crew members without those crew members being subject to a random drug testing program. The Administrative Law Judge found as a matter of fact that no member of the crew received a drug test when they were hired by Appellant to serve aboard the TICONDEROGA, nor was any member of the crew subject to a random drug testing program. [D&O at 7]. Therefore, Appellant violated 46 C.F. R. § 16.230(k) by engaging crew members required to be subject to random chemical tests without having those crew members subject to an acceptable testing program.

Once again, contrary to Appellant's arguments on appeal, Appellant is not being charged for his actions as the marine employer. Instead, Appellant is charged with engaging in work that required him to hold an operator's license aboard a vessel that did not have a random drug test program in place. As the Administrative Law Judge stated in his Decision and Order, the violation occurred because "[the Appellant] operated the vessel knowing that there was no random drug testing program in place." [D&O at 20]. Clearly, since the violation occurred because of his status as operator aboard the tug, Appellant was acting under the authority of his license.

Therefore, for the reasons discussed above, I affirm the holding of the Administrative Law Judge that Appellant was acting under the authority of his license in regard to both specifications at issue.

#### IV.

Finally, Appellant contends that the punishment administered by the Administrative Law Judge was too severe, was excessive and was not uniform in that the Coast Guard prosecuted only one of two operators on board the vessel during the time of the marine casualty. Appellant requests on appeal that the revocation of his license be modified to a suspension for one year from the date of the order. I disagree with Appellant's argument.

I have previously stated that there is often more than one type of enforcement action which can result from a violation, but the mere fact that not all enforcement options are taken does not invalidate those enforcement options which are taken. Appeal Decision No. 2308 (GRAY). Thus, the fact that only one of two operators on board the vessel was taken to a hearing does not in and of itself render the punishment administered by the Administrative Law Judge too severe, excessive, or not uniform. Additionally, the order imposed upon finding a charge proved is solely within the discretion of the Administrative Law Judge and should not be disturbed on appeal unless it is shown to be clearly excessive or an abuse of discretion. Appeal Decision Nos. 2465 (O'CONNELL), 2414 (HOLLOWELL), 2391 (STUMES), and 2313 (STAPLES).

46 C.F.R. § 5.61 outlines the circumstances under which revocation of a license, certificate, or document may be sought. Paragraph (b) states that

[a]n investigating officer may seek revocation of a respondent's license, certificate or document when the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the license, certificate or document would be clearly a threat to the safety of life or property, or detrimental to good discipline.

In revoking Appellant's license, the Administrative Law Judge found in his Order that the evidence produced during the hearing "reveals a series of acts by the respondent which are inimical to the safety of life and property at sea." [Order at 2]. The Administrative Law Judge pointed to a number of factors as support for that statement, including failure to provide timely notice to the Coast Guard of a sunken tug atop a barge he was towing at the entrance to the Port of Hampton Roads (the incident which resulted in the charge of negligence), evidence that Appellant had been advised by the Coast Guard seven months prior to the incident that he was required to have a drug testing program in place but yet had ignored the requirement, and the hiring of the crew and operation of the tug with an unqualified seaman aboard. The Administrative Law Judge concluded that Appellant "has not and will not abide by the fundamental rules of good seamanship and the requirements of Federal law and regulation. He is not fit to continue to serve under a Coast Guard license on any vessel." [Order at 2-3]. Thus, the Administrative Law Judge's order was based on a careful consideration of a history of Appellant's actions and is not clearly excessive or an abuse of discretion.

### CONCLUSION

The Administrative Law Judge's findings and decisions are lawful, based on the correct interpretation of the law, and are supported by reliable, probative, and substantial evidence. The hearing was conducted in accordance with applicable law.

### ORDER

The Decision and Order of the Administrative Law Judge dated September 6, 1995, is AFFIRMED.

/S/

J. M. LOY  
VADM, U.S. Coast Guard  
Acting Commandant

Signed at Washington, D.C., this 14<sup>th</sup> day of August 1997.