

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	
vs.	:	VICE COMMANDANT
	:	
LICENSE NO. 036107	:	ON APPEAL
	:	
Issued to: David B. Guest, Appellant	:	NO. 2599

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

By order dated October 12, 1995, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's license based upon finding proved the charge of misconduct. The single specification supporting the charge alleged that between February 25 and June 1, 1994, while serving as master of the OVERSEAS ALICE, Appellant failed to ensure the maintenance of the lifeboats as required by 46 C.F.R. §§ 33.01-15 and 33.25-20.

The hearing began on May 23, 1995, and was held for three consecutive days at Boston, Massachusetts. Appellant was represented by professional counsel and entered a response denying the charge and specification.

The Coast Guard Investigating Officer introduced into evidence nine exhibits and the testimony of four witnesses. In defense, Appellant offered into evidence two exhibits and the testimony of eight witnesses, including himself.

Both parties submitted proposed findings and were given the opportunity to submit written closing arguments. The Administrative Law Judge issued a written Decision and Order (D&O) on August 3, 1995. It concluded that the charge and specification of misconduct were found proved.

A request for an Oral Hearing on the issue of mitigation was submitted by Appellant and was granted by Order dated September 7, 1995. The Hearing was held on September 28, 1995, at Boston, Massachusetts. The Appellant offered the testimony of one witness, himself. The Administrative Law Judge entered one exhibit into evidence.

The Administrative Law Judge issued a written Order on October 12, 1995. It concluded that the

remedial purposes of the proceeding had been served and suspended Appellant's license for a period of three months, remitted after six months of probation. Appellant filed a timely notice of appeal on November 13, 1995. The appeal was perfected on December 15, 1995. Therefore, this appeal is properly before me for review.

APPEARANCE: William Hewig, III, Kopelman and Paige, 31 St. James Avenue, Boston, Massachusetts, 02116-4102.

### FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned license which authorized service as Master of Steam or Motor Vessels of Any Gross Tons upon Oceans; also Radar Observer Unlimited. Appellant was acting under the authority of that license while serving as Master aboard the OVERSEAS ALICE between February 25 and June 1, 1994. [Transcript (TR) Vol. III at 463-464].

The vessel OVERSEAS ALICE, Official Number D514928, is a tankship, measured at 632.3 feet and 20879 gross tons, owned by the Alice Tankships Corp. and operated by the Maritime Overseas Corporation. The vessel is required by its Certificate of Inspection to maintain two lifeboats [Investigating Officer (I.O.) Exhibit #1].

On May 25, 1994, the OVERSEAS ALICE entered the Bethlehem Steel Shipyard at Sparrows Point, Maryland, for a regularly scheduled shipyard overhaul and Coast Guard Inspection. On June 1, 1994, a Coast Guard marine inspector inspected the lifeboats, which were removed from the vessel one-week prior. During the course of this inspection, the marine inspector condemned one of the lifeboats. The other lifeboat required extensive replacement of steel plates on the hull. [TR 77-78, I.O. Exhibits 7a-j].

### BASES OF APPEAL

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

1. Regulations requiring that lifeboats be "maintained" and kept in "good condition" are unconstitutionally vague absent a showing by the Coast Guard of a more definitive standard of care;
2. The Administrative Law Judge improperly found the charge misconduct for failure to "maintain" lifeboats in "good condition" proved while finding the charge negligence for "not maintaining reliable and seaworthy lifeboats" not proved; and
3. It was clear error for the Administrative Law Judge to suspend Appellant's license absent a showing that Appellant, not the vessel, violated the underlying statute.

### OPINION

## I

Before proceeding to the merits, I find it necessary to address the statutory basis of the specification. Because the Appellant was charged with misconduct, the specification must state sufficient facts to enable the respondent to identify the act or offense so that a defense can be prepared. 46 C.F.R. § 5.25. Although the original specification states the offense, it incorrectly referenced 46 C.F.R. § 97.15-45, which pertains to Cargo and Miscellaneous Vessels. The correct citation for Tank Vessels is 46 C.F.R. §§ 33.01-15 and 33.25-20.

The fact that the original specification referenced the incorrect law does not constitute reversible error in this case. The wording of the regulations originally referenced and that of the substituted regulations embody the same standard of care. *Compare* 46 C.F.R. § 97.15-45 *with* 46 C.F.R. §§ 33.01-15 and 33.25-20. Furthermore, "[f]indings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated." Appeal Decision 2422 (GIBBONS), *citing* Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950); Appeal Decision 1792 (PHILLIPS). The record clearly shows that the Appellant understood that the substance of the charge was his failure to ensure the maintenance of the lifeboats. [TR Vol. I at 27-29; Appellant's Brief (Brief) at 6]. This is the offense that was actually litigated by the parties, and that was decided upon by the Administrative Law Judge, regardless of the incorrect reference in the original specification. [TR Vol. I at 27, D&O at 17-18]. Although the Appellant did object to the new wording of the specification at the hearing, this was resolved at the onset when the Investigating Officer stated that it was the same standard. [TR Vol. I at 27]. "It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." Appeal Decision 2386 (LOUVIERE), *citing* Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950); Appeal Decision 1792 (PHILLIPS). Therefore, there was no prejudice to Appellant as a result of the amended specification.

## II

Appellant's first basis of appeal asserts that the Coast Guard regulations requiring that lifeboats be "maintained" and kept in "good condition" are unconstitutionally vague absent a showing by the Coast Guard of a more definitive standard of care. Appellant raises constitutional issues inappropriately in this forum. The purpose of these proceedings is remedial in nature, and the proceedings are intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 U.S.C. § 7701; 46 C.F.R. §§ 5.3, 5.5. The exercise of the Coast Guard's authority over mariner licenses and documents is governed by the Administrative Procedure Act. *See* 5 U.S.C. § 551 *et seq.*; 46 C.F.R. § 5.1 (a); Appeal Decision 2490 (PALMER). Neither the Administrative Law Judge nor the Commandant is vested with the authority to decide constitutional issues; that is exclusively within the purview of the Federal courts. Appeal Decisions 2546 (SWEENEY), 2560 (CLIFTON). In light of my findings on the Appellant's second basis of appeal, I will not address this issue further.

## III

Appellant asserts that the Administrative Law Judge improperly found the charge of misconduct for failure to "maintain" lifeboats in "good condition" proved, while finding the charge of negligence for "not maintaining reliable and seaworthy lifeboats" not proved. I agree.

The standard against which Appellant's conduct was measured in finding the charge of negligence not proved is that set out at 46 C.F.R. § 5.29 in which negligence is defined as the "commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." The underlying act specified is that the Appellant negligently put the vessel's crew at risk by not maintaining reliable and seaworthy lifeboats available for any emergency requiring their deployment.

The Administrative Law Judge noted that "[I]n proving a negligence case, it is incumbent upon the Investigating Officer to establish the standard of care which is relevant to the circumstances involved and to show how that standard has been breached by the respondent." [D&O at 14]. In certain cases, the standard of care may be established by relevant safety regulations. In such a situation, if it is proven that the relevant safety regulation is violated, then this could also constitute proof of negligence. Appeal Decisions 1515 (EWING); 2261 (SAVOIE).

In this case, the Administrative Law Judge determined that the standard of care for purposes of determining whether the Appellant was negligent was the regulatory standard established in 46 C.F.R. § 33.01-15. As stated by the Administrative Law Judge in his analysis of the charge of negligence, "[i]n the case of lifeboats it is the Master's responsibility to make sure they [the lifeboats] are in good operating condition and are seaworthy. Indeed, that standard is specifically established by regulation at 46 CFR 33.01-15." [D&O at 15]. 46 C.F.R. § 33.01-15 requires that it "shall be the duty of the master ... to see that the lifeboats ... are at all times ready for use, and that all equipment for his vessel required by the regulations in this subchapter are provided, maintained, and replaced as indicated." With regard to the breach of this duty, in his Decision and Order, the Administrative Law Judge stated that "it cannot be concluded on this record that [the Appellant] breached the applicable standard of care." [D&O at 15]. The Administrative Law Judge found "the lifeboats were not in good condition but it has not been shown they were unseaworthy. Indeed, the preponderance of the evidence here is that despite their serious defects, they would have been able to launch seamen into the seaway." [TR Vol. I at 265, D&O at 17]. Accordingly, the Administrative Law Judge dismissed this charge and specification.

Misconduct is defined in 46 C.F.R. § 5.27 as "human behavior which violates some formal, duly established rule." The misconduct of which Appellant is charged stems from his alleged failure to "ensure the maintenance of the lifeboats as required by 46 C.F.R. § 33.01-15 and 46 C.F.R. § 33.25-20." 46 C.F.R. § 33.01-15 is the same standard that established the duty of care, according to the Administrative Law Judge, for the negligence charge that was dismissed. 46 C.F.R. § 33.25-20 requires that "Every lifeboat ... together with its equipment shall be kept in every respect in good condition and

ready for immediate use."

The Administrative Law Judge determined that it was possible to hold the Appellant accountable for a violation of these regulations based on evidence that the lifeboats were not properly maintained while finding that the Appellant did not violate the standard of care, i.e. that the lifeboats must be maintained in a seaworthy condition, established by the same regulations.

I hold that this finding is logically and legally inconsistent. In order to determine whether the lifeboats are maintained properly in accordance with the applicable regulations, there must be some standard by which to make this determination. As stated by the Administrative Law Judge, the standard established by the regulations was that the lifeboats had to be ready for use and seaworthy. In finding that the specification of negligence was not proven, the Administrative Law Judge found that there was insufficient proof that this standard was breached. Thus, by necessity, the proof that the regulation was violated because the lifeboats were not properly maintained could not have been sufficient.

It is well established that the Administrative Law Judge's evidentiary determinations will be upheld on appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. See Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1996); 2546 (SWEENEY); 2541 (RAYMOND); 2522 (JENKINS); 2492 (RATH); 2333 (AYALA). The Administrative Law Judge's contradictory findings that the lifeboats were not properly maintained as required by statute while finding that the duty of care established by the same statute was not breached is not supported by substantial evidence, and is clearly erroneous. See Appeal Decision 2550 (RODRIGUES).

#### IV

Appellant next asserts that the Administrative Law Judge improperly subjected his license to Suspension and Revocation Proceedings absent a showing that the Appellant, not the vessel, violated the underlying regulation. Because of my findings set out above, I will not address this issue.

#### CONCLUSION

As discussed in Section I of my Opinion, the specification is properly amended to cite 46 C.F.R. §§ 33.01-15 and 33.25-20. Having reviewed the entire record and considered Appellant's arguments, I find that the findings of proved by the Administrative Law Judge as to the misconduct charge and the supporting specification are not credible and not supported by substantial evidence of a reliable and probative character.

#### ORDER

The Decision of the Administrative Law Judge, dated August 3, 1995, is VACATED, the findings are SET ASIDE, and the charge and specification are DISMISSED. The order of the Administrative Law

Judge is VACATED.

/S/

R. D. HERR  
Vice Admiral, U.S. Coast Guard  
Vice Commandant

Signed at Washington, D.C. this 27<sup>th</sup> day of March, 1998.