UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. 206223
Issued to: Hubert A. FREDERICKS

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2450

Hubert A. FREDERICKS

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 701.

By order dated 22 September 1986, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia revoked Appellant's license upon finding proved charges of negligence and misconduct. The negligence charge was supported by two specifications which alleged that Appellant, while serving as operator on board the M/V NATIVE SON, on or about 26 April 1986 negligently failed to keep clear while overtaking another vessel, and negligently crossed the bow of another vessel, thus endangering the life, limb and property of the passengers and crew aboard the two vessels. The misconduct charge was supported by two specifications which alleged that Appellant, while in preparation for a trip from St. Thomas, U.S. Virgin Islands to Tortola, British Virgin Islands, on or about 10 May 1986, failed to give a safety orientation prior to getting underway or to have placards posted as required by 46 CFR 185.25-1(d), and while acting in the same capacity on the same date failed to have on board and available for inspection his license as required by 46 CFR 185.10-1.

The hearing was held at St. Thomas, U.S. Virgin Islands on 24

July 1986.

At the hearing, Appellant appeared pro se and entered a denial of the negligence charge and specifications. Appellant denied the first specification under the misconduct charge, and admitted the second specification, which alleged his failure to have his license on board and available for inspection.

The Investigating Officer introduced in evidence nine exhibits and the testimony of four witnesses.

In defense, Appellant testified on his own behalf, and introduced the testimony of three additional witnesses.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been proved, and entered a written order revoking all licenses and documents issued to Appellant.

The complete Decision and Order was served on 28 July 1986. Appeal was timely filed on 25 September 1986 and perfected on 27 October 1986.

*FINDINGS OF FACT*

At all relevant times on 26 April 1986, Appellant was serving as Operator aboard the M/V NATIVE SON, a passenger-carrying vessel certificated to carry 144 passengers and a crew of three, under the authority of his license which authorizes him to serve as operator of mechanically propelled passenger carrying vessels of not more than one hundred gross tons upon the Atlantic Ocean, Caribbean Sea, not more than fifty miles offshore of the U.S. Virgin Islands.

At approximately 6:55 A.M. on 26 April 1986 the M/V BOMBA CHARGER departed the dock at West End Tortola, British Virgin Islands, carrying 80 passengers enroute to St. Thomas, U.S. Virgin Islands. The M/V NATIVE SON, also bound for St. Thomas, left the dock approximately 5 minutes later carrying 106 passengers. Both vessels were bound for the same pier in Charlotte Amalie, St. Thomas, and the route followed by both was the same.

The NATIVE SON was the faster vessel, and when the BOMBA CHARGER arrived in the vicinity of Charlotte Amalie Harbor, the NATIVE SON was directly behind the BOMBA CHARGER. As they passed the main channel entrance to Charlotte Amalie Harbor, the NATIVE SON overtook the BOMBA CHARGER and for approximately 2-3 minutes ran abreast of the BOMBA CHARGER approximately two feet off her port side. The NATIVE SON executed this maneuver without giving any sound signal or attempting radio contact with the BOMBA CHARGER. This maneuver caused the passengers aboard the BOMBA CHARGER to become frightened. The bow wake of the NATIVE SON was sprayed onto the decks of the BOMBA CHARGER, resulting in general panic among the passenger. Many feared a collision. At that time, the BOMBA CHARGER was running approximately ten feet from a reef on its starboard side.

After a few minutes, the NATIVE SON accelerated and cut across the bow of the BOMBA CHARGER at a distance of approximately three feet. The operator of the BOMBA CHARGER quickly decreased speed in order to avert a collision. The BOMBA CHARGER was hit hard by the stern wake of the NATIVE SON.

On 10 May 1986, Appellant, again serving as Operator of the NATIVE SON, departed Charlotte Amalie for a trip to West End without safety placards showing emergency procedures to be followed in case of a mishap, and without providing any safety information to the passengers. Appellant did not have his Operator's license aboard. On the return trip, the same deficiencies were noted.

*BASES OF APPEAL*

This appeal has been taken from the order of the Administrative Law Judge. Appellant advances a number of grounds for appeal, summarized as follows:

1. The specifications under the negligence charge do not contain sufficient facts to enable the Appellant to identify the act or offense with which he is charged.

2. There is insufficient evidence to support finding the misconduct specifications proved.

3. Certain hearsay evidence was improperly allowed.

4. A chart of the waters in the area involved was used during the hearing without having been introduced into evidence.

5. The Administrative Law Judge improperly interrupted Appellant's examination of a witness.

6. The Administrative Law Judge erred in allowing certain questioning, statements and "testimony" by the Investigating Officer.

7. It was error to allow testimony concerning similar incidents that occurred before and after the incidents in question.

8. Opportunity to prepare a rebuttal of evidence offered in aggravation was not provided.

9. The sanction imposed was harsh and excessive.

APPEARANCE: Charles B. Herndon, Esq., 5-6 Kongens Gade, P.O. Box 6647, St. Thomas, V.I. 00801.

*OPINION*

I

Appellant contends that the specifications under the negligence charge do not allege sufficient facts to enable him to identify the act or offense with which he is charged, and that the allegations appear to set forth a violation of the Rules of the Road and thus should have been charged as misconduct.

I find the negligence specifications adequate. Title 46 CFR 5.25 provides, in part:

> A "specification" sets forth the facts which form the basis of a "charge" and enables the respondent to identify the act or offense so that a defense can be

prepared.

The regulation further requires that each specification state the basis for jurisdiction, the date and place of the act or offense, and the facts constituting the alleged act or offense.

In this case the specifications in question fulfill the regulatory requirements. It is clear from the record that Appellant understood the charges against him and the incidents from which they arose. Further, he did not object to the form of the specifications at the hearing. "[A]ny complaint with respect to the adequacy of this specification should have been made at the hearing rather than on appeal for the first time . . . . In such a situation, the specification need not be set aside on appeal. See *Kuhn v. Civil Aeronautics Board*, 183 F. 2d 839, (D.C. Cir. 1950)." Decision on Appeal 2400 (WIDMAN).

Violations of Rules of the Road may be charged as negligence. See, e.g., Appeal Decisions 2400 (WIDMAN), 2386 (LOUVIERE), 2369 (ASHLEY).

II

Appellant also alleges that there is insufficient evidence of a reliable and probative nature to support the finding of "proved" as to the misconduct specifications.

The law on this issue is well settled. In Appeal Decision 2395 (LAMBERT), the Commandant stated:

> Sitting as the trier of fact, the Administrative Law Judge's duty is to evaluate the evidence presented at the hearing. The Administrative Law judge has discretion to find the ultimate facts pertaining to each specification. The findings need not be consistent with all evidentiary material contained in the record so long as sufficient material exists in the record to justify such a finding. Appeal Decision No. 2282 (LITTLEFIELD). There is a longstanding precedent in these suspension and revocation proceedings that the Administrative Law Judge's findings of fact are upheld unless they can be shown to be

> unreasonable or inherently incredible. Appeal Decisions 2333 (AYALA) and 2302 (FRAPPIER).

There has been no such showing here. With respect to the first specification, the applicable regulation requires that "before getting underway, the operator in charge of each vessel . . . shall insure that suitable public announcements, instructive placards or both are provided in a manner which affords all passengers an opportunity to become acquainted" with safety procedures. 46 CFR 185.25-1(d). A Coast Guard petty officer testified that the required placards were not posted (Record at 132), and that no instruction was given. Record at 136-37.

As noted *supra*, Appellant admitted to the misconduct alleged in the second misconduct specification. "For purposes of proceedings under this part, an admission . . . is sufficient to support a finding of 'proved' by the Administrative Law Judge." 46 CFR 5.527(c).

The findings of the Administrative Law Judge are well supported, and will not be disturbed on appeal.

III

Appellant argues that in several instances, hearsay evidence was improperly admitted during the hearing. Strict adherence to the Rules Of Evidence, however, is not required in suspension and revocation proceedings, and hearsay evidence is admissible.

> (T)he evidence competent to support findings need not fulfill the prerequisites of admissibility necessary in jury trials. Hearsay evidence may be admitted and used to support an ultimate conclusion, the only *caveat* being that the findings must not be based upon hearsay alone . . . . The Administrative Law Judge has broad discretion as to the weight to be given evidence. Appeal Decision 2183 (FAIRALL), appeal dismissed on Coast Guard motion sub. nom. *Commandant v. Fairall*, NTSB Order EM-89 (1981).

I note that all but one of the statements or exhibits to which Appellant now objects were admitted in evidence at the hearing without objection.

IV

Appellant complains that a chart referred to in the testimony was not introduced into evidence. I note, however, that the use of this chart was merely to describe a normal voyage between the two islands. Record at 89-92. The chart was not central to the case, and the exclusion of testimony of the witness with respect to the chart would have no bearing on his testimony concerning the events he witnessed on the morning of 26 April 1986. Record at 86-89. Appellant has not demonstrated any prejudice resulting from the failure to include the chart in the record, and I find none.

V

Appellant asserts that the Administrative Law Judge improperly interrupted Appellant's cross-examination of a witness and inquired beyond the scope of direct examination. However, the record suggests that at the point the Administrative Law Judge questioned the witness, Appellant had concluded his examination. Record at 97. At any rate, when the Administrative Law Judge asked Appellant if he had any additional questions for the witness, Appellant replied that he did not. Record at 113.

Concerning the scope of the questions by the Administrative Law Judge, he is given wide discretion as to how the hearing will be conducted, and he has a duty to bring out all relevant and material facts. Appeal Decisions 2321 (HARRIS), 2284 (BRAHN). The questioning in these proceedings is not limited by the "scope, of direct examination" limitation. Appeal Decision 2114 (HULTZ).

VI

Appellant complains that the Investigating Officer presented unsworn testimony when requesting that the Administrative Law Judge

take official notice of certain COLREGS. The applicable regulations (46 CFR 5.541), however, contemplate that either party may request the Administrative Law Judge to take official notice of various statutes, regulations or decisions without having to introduce them into evidence. The statements about which Appellant complains, consisting of the Investigating Officer's argument for taking official notice of the COLREGS were not only permissible, but were entirely proper. See Appeal Decision 2432 (LEON).

Appellant also complains that the Investigating Officer interrupted his testimony, (Record at 175) and introduced testimony of another witness rebutting Appellant's testimony during cross-examination of Appellant, before Appellant had competed his testimony. (Appellant was not represented by professional counsel at the hearing.) It appears from the record, however, that at the time the Administrative Law Judge allowed the Investigating Officer to begin questioning Appellant, Appellant had finished with his presentation. Whether or not he was finished, the Administrative Law Judge extended him wide latitude in presenting his case, and specifically asked Appellant whether he had "anything else to say." Record at 189. Appellant replied that he did not.

While I agree that calling a rebuttal witness during cross-examination was out of order, Appellant has demonstrated no prejudice, and I find none.

VII

Appellant argues that evidence of prior incidents not charged was introduced during the Investigating Officer's presentation of his case. However, there is no indication that this information was relied upon by the Administrative Law Judge in his determination that the charges and specifications had been proved. Indeed, he relied primarily upon a "credibility determination." Decision and Order at 18. Any incompetent evidence which may have been received is presumed to have been disregarded by the Administrative Law Judge in his final determination. E. Cleary, *McCormick On Evidence*, 60, at 137 (2d ed. 1972).

VIII

Appellant argues that he was not permitted to rebut the

evidence presented in aggravation. This assertion is not supported by the record. At the conclusion of the presentation of the evidence in aggravation, Appellant was asked by the Administrative Law Judge if he had any evidence in mitigation. He replied, "Nothing." Record at 214.

IX

Appellant argues that the sanction imposed was harsh and excessive. He argues that there is no evidence showing that he would be a continuing threat to safety of life or property at sea, and that he did not receive a fair hearing. I disagree.

"It is well settled that the sanction imposed at the conclusion of a case is exclusively within the authority and discretion of the Administrative Law Judge." Appeal Decision 2414 (HOLLOWFLL). It will not be disturbed on appeal unless shown to be obviously excessive or an abuse of discretion.Appeal Decision 2391 (STUMES), 2313 (STAPLES)

There has been no such showing here.

*CONCLUSION*

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

*ORDER*

The decision of the Administrative Law Judge dated at Norfolk, Virginia on 22 September 1986, is AFFIRMED.

J. C. IRWIN
Vice Admiral, U.S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D. C. this 11th day of June, 1987.

***** END OF DECISION NO. 2450 *****

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