

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 506221 and
MERCHANT MARINER'S DOCUMENT
Issued to: Charles Nathaniel Harris Z-266-48-4206

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

NO. 2210

Charles Nathaniel Harris

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 6 February 1979, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, after a hearing at Galveston, Texas, after a hearing at Galveston, Texas, on 10 January 1979, suspended the captioned documents for a period of one month on probation for a period of six months upon finding Appellant guilty of misconduct. The single specification of the charge of misconduct found proved alleges that Appellant, while serving as Master aboard BERING SEAL, under authority of the captioned documents, did, from on or about 1 December to 22 December 1978, wrongfully operate the vessel without the complement of crew required by the vessel's Certificate of Inspection, in that he did not have the required number of able seamen aboard.

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

The Investigating Officer introduced into evidence the testimony of two witnesses and four documents.

In defense, Appellant introduced into evidence the testimony of a witness and testified in his own behalf.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of suspension for a period of one month on probation for six months.

The decision was served on 7 February 1979. Appeal was timely filed on 22 February 1979, and perfected on 9 July 1979.

FINDINGS OF FACT

On a voyage which lasted from on or about 1 December to 22 December 1978, Appellant was serving under the authority of his duly issued Coast Guard license and Merchant Mariner's Document as Master of BERING SEAL, a merchant vessel of the United States. The Certificate of Inspection of BERING SEAL required that two able seamen be included in the vessel's complement. In violation of the Certificate of Inspection, no able seamen were carried aboard BERING SEAL during the aforementioned voyage.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that (1) violation of a statute cannot be charged as "misconduct;" (2) a fine of \$50.00 is the exclusive penalty for this violation; (3) that Appellant was not guilty of misconduct because he had no choice but to sail with ordinary seamen in lieu of the required able seamen; and (4) the penalty is more severe than is warranted because the Administrative Law Judge felt that Appellant's employer needed to be "impressed."

APPEARANCE: Hinds & Meyer, Houston, Texas, by John K. Meyer, Esq.

OPINION

I

At the hearing, Appellant admitted sailing with two ordinary seamen aboard BERING SEAL in lieu of the required able seamen.

Appellant argues that he could have been charged only with violation of a statute, viz., R.S. 4463, as amended (46 USC 222), but not misconduct. This argument is without merit. See, Decisions on Appeal Nos. 1827, 1961, 2041, 2136, 2172.

II

Appellant contends that the \$50.00 penalty provision of 46 USC 222 is the exclusive sanction authorized and therefore the Coast Guard was without authority to proceed against his license and document under R.S. 4450. Appellant cites Bulger v. Benson, 262 F.929(9th Cir. 1920), in support of this contention. This contention, likewise, is without merit. See, Decisions on Appeal Nos. 1574, 1832.

III

Appellant argues that he should not be held accountable for the failure of his employer to provide a sufficient number of able seamen to man his vessel adequately. It appears from the testimony of the Marine Personnel Manager of Appellant's employer that,

because of a relatively low pay scale, Appellant's employer has difficulty in recruiting able seamen. Nevertheless, I am not persuaded by what is essentially an "economic hardship" argument. Safe navigation of the vessel previously had been determined to require manning by, among others, two able seamen, not two ordinary seamen. Appellant's responsibility for complying with the manning requirement set forth in the Certificate of Inspection was understood by him, as he acknowledged at the hearing. R-60. Hence, I reject this argument. See, Decision on Appeal Nos. 1858, modified, 1 NTSB 2345(1972); 1910.

IV

There is merit in Appellant's final contention. My review of the Administrative Law Judge's initial decision, specifically finding of fact number 7, discloses that the Administrative Law Judge, to at least some extent, was motivated to issue an order which would "impress" Appellant's employer with the necessity for adequately manning its vessels. This was wholly improper. As I have often stated in these decisions, revocation and suspension proceedings are concerned with the conduct of the individual respondent, not the conduct of any other. The imposition of the harsher sanction to "impress" Appellant's employer may or may not have had its desired effect upon his employer; nevertheless it is not a proper consideration in fashioning a proper order. Hence, as Appellant has suggested, I shall reduce the order of suspension on probation to an admonition.

V

One final observation is in order. The Administrative Law Judge, in his findings of fact, stated, "[i]t is officially noticed that in the recent past there have been slow employment periods in the eastern seaboard for able seamen and others in the American Merchant Marine." This so-called "official notice" does not appear to satisfy any of the criteria set forth in 46 CFR 5.20-102(a); neither does it appear that the procedural requirements of 46 CFR 5.20-102(b) were met. Hence, I specifically reject this "fact". Because Appellant has not been prejudiced by his error of the Administrative Law Judge, further action on my part is unnecessary.

ORDER

The findings of the Administrative Law Judge, except as noted above, are AFFIRMED. The order entered in the decision dated at Houston, Texas, on 6 February 1979, is MODIFIED so that Appellant's record will reflect that he was ADMONISHED for navigating BERING SEAL from on or about 1 December to 22 December 1978, without the number of able seamen require by the Certificate of Inspection.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 20th day of May 1980.

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