UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Dewitt T. HOLLOWELL 1209010

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2414

Dewitt T. HOLLOWELL

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 9 November l984, an Administrative Law Judge of the United States Coast Guard sitting at Norfolk, Virginia, revoked Appellant's license and suspended his merchant mariner's document outright for a period of twelve months upon finding proved the charges of misconduct and negligence.

The misconduct charge is supported by two specifications which allege that Appellant, while serving as operator aboard the M/V SEAHAWK under the authority of the captioned documents and while navigating a flotilla consisting of the SEAHAWKand the Barge ATC 12000 in the vicinity of Newport News Channel Buoy No. 10, Hampton Roads, Virginia, on 3 September 1984 did:

(1) fail to take action to avoid a collision with a 16 foot pleasure craft as required by 33 U.S.C. 2008(d), Rule 8(d) Inland Navigation Rules, resulting in a collision with that pleasure craft and the loss of one life; and

(2) fail to sound appropriate maneuvering and warning signals as required by 33 U.S.C. 2034(d), Rule 34(d) Inland Navigation Rules, contributing to a collision with a 16 foot pleasure craft, resulting in the loss of one life.

The single specification supporting the negligence charge alleges that on the same date, and at the same location, Appellant, while serving in the same capacity aboard the M/V SEAHAWK, together with its flotilla, failed to maintain a proper lookout, contributing to a

collision with a 16 foot pleasure craft which resulted in the loss of one life.

The hearing was conducted at Norfolk, Virginia on 3 and 4 October 1984. Appellant was represented by professional counsel at the hearing, and he entered pleas of not guilty to both charges and all specifications.

The Investigating Officer introduced into evidence the testimony of eight witnesses and seventeen documents. In defense, Appellant introduced the testimon of one witness and one document. Following the hearing, both parties submitted proposed findings of fact and conclusions of law.

Thereafter, the Administrative Law Judge rendered a written decision in which he found proved both charge#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **# issued on 5 December 1984. Extension of that temporary document until 4 December 1985 or service of the Commandant's Decision on Appeal in this matter, whichever occurs first, was authorized on 15 May 1985.

FINDINGS OF FACT

On 3 September 1984, Appellant was serving as operator aboard the M/V SEAHAWK, a merchant vessel of the United States, under the authority of his license and merchant mariner's document. In addition to Appellant, Captain Marvin Cates and able seaman Frederick Vance were also serving aboard the SEAHAWK on that date. The M/V SEAHAWK is a steel-hulled towing vessel approximately 112 feet long, displacing 180 gross tons.

On the date in question, the SEAHAWK's tow was the barge ATC 12000, which measures 302.8 feet in length and 90 feet at the beam. The ATC 12000 is configured to carry liquid cargo below deck and dry cargo in its superstructure above deck. The superstructure rises approximately thirty f#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **# Hopewell, Virginia, the ATC 12000 drew 18'6" forward and 17'6" aft. After undocking, the flotilla transited the James River and entered the Newport News Channel bound for the Chesapeake Bay and points south.

At all pertinent times on 3 September 1984, the weather in the Newport News Channel in the vicinity of Newport News Point was clear, visibility unlimited and the waters were relatively calm with a 1 to 1.5 foot chop. The Newport News Channel in this area is approximately

800 feet wide and the surrounding depths on both sides range between 17 and 28 feet.

Because the date in question was Labor Day, Newport News Point, a popular fishing area, was congested with recreational boaters. Witnesses estimated that between 25 and 100 boats were scattered throughout the area. Among these boaters were Joseph Newby and his two companions, Mr. Sharpless and Mr. Glee. The three men were drift-fishing along the channel off the Newport News Bar in a 16 foot fiberglass motorboat owned by Mr. Newby. The small boat had drifted into the channel during the course of the afternoon.

At approximately 1130 on 3 September 1984, Appellant relieved Captain Cates at the tug's helm and was in command of the flotilla at all pertinent times thereafter. When the flotilla entered the Newport News Channel at the confluence of the James River and Hampton Roads, there was no lookout stationed on the barge's bow. Mr. Vance was positio#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **# he had not been instructed to serve as lookout, nor did he have any means of communicating with Appellant, who was operating the flotilla from the tug's whelhouse. Further, the configuration of the barge's superstructure prevented Mr. Vance from seeing, or being seen from, the wheelhouse.

As the flotilla proceeded into the channel, Appellant maintained his speed and course, still without a lookout stationed aboard the barge. In addition, Appellant did not sound any whistle signals nor make any radio calls to alert the group of recreational boaters ahead that he was approaching. Included among that group were Mr. Newby and his companions.

As the flotilla approached Mr. Newby's boat, neither Appellant nor the three men in the small craft were aware of the other's presence. At approximately 1630, the ATC 12000 struck Mr. Newby's boat, and the latter was swamped. As a result of the collision, Mr. Newby was thrown from the boat and he drowned. Mr. Sharpless was able to cling to the partially submerged craft and was rescued by nearby boaters. Although Mr. Glee was unconscious after the collision, he was rescued by other boaters in the vicinity and he subsequently recovered.

The flotilla proceeded ahead, its crewmen unaware of the collision until being alerted by a boater who had given pursuit. Immediately thereafter, Appellant stopped the flotilla, and Captain Cates notified the Coast Guard of the collisi#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

BASES OF APPEAL

On appeal, Appellant contends that the Administrative Law Judge erred:

(1) by suspending Appellant's merchant mariner's document;

(2) by finding that under normal situations, three lookouts were posted on the bow of the barge;

(3) by allowing the testimony of Commander Gary Johnson, United States Coast Guard; and

(4) by rejecting Appellant's proposed Finding of Fact that the flotilla could not have maneuvered outside the channel in the area of the collision.

APPEARANCE: Vandeventer, Black, Meredith and Martin, Norfolk, Virginia by R. John Barrett, Esq.

OPINION

I

Appellant contends that the Administrative Law Judge erred by suspending his merchant mariner's document. He argues that the charges and specifications found proved concern offenses that are unique to a licensed operator, as opposed to the holder of a merchant mriner's document. Accordingly, Appellant argues that he was not operating under the a#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

In Appeal Decision 2371 (McFATE), I observed that "[b]ecause a merchant mariner's document is required by law and regulation for service aboard vessels of 100 gross tons, see 46 U.S.C. 643 (now codified at 46 U.S.C. 8701), 46 CFR 12.02-7, such service constitutes 'acting under the authority' of the document." I noted that prior decisions, such as those cited by Appellant, will no longer be followed to the extent that they can be interpreted to prohibit suspension or revocation of a merchant mariner's document where a mariner is serving as an operator aboard a vessel greater than 100

gross tons.

In the case at bar, the M/V SEAHAWK displaces 180 gross tons. Under the applicable statute and regulations, Appellant was required to hold a merchant mariner's document in order to serve aboard the vessel. Accordingly, Appellant was "acting under the authority" of his merchant mariner's document while serving as operator aboard the M/V SEAHAWK and his document was properly within the purview of the hearing.

Appellant contends that suspension of his merchant mariner's document, together with the revocation of his license, is unduly harsh and penal in nature. These contentions are without merit.

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. He is not bound by the Scale of Average Orders. #** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

"An order shall be directed against all licenses, certificates, and/or documents, except that in cases of negligence or professional incompetence, the order may be made applicable to specific licenses or documents in qualified ratings."

(Emphasis supplied.) Since the charges found proved in the instant matter include a charge of misconduct, 46 CFR 5.20-170(c) requires that the order be directed against Appellant's merchant mariner's document as well as his license.

Accordingly, the Administrative Law Judge did not err by suspending Appellant's merchant mariner's document.

II

Appellant also challenges the Administrative Law Judge's determination that under the circumstances, his failure to post a bow lookout aboard the ATC 12000 constituted negligence.

Initially, Appellant contends that the Administrative Law Judge erred in finding that, normally, there were three radio- equipped lookouts posted on the barge's bow. I do not believe that this argument assists Appellant.

Regardless of the number of bow lookouts normally posted aboard the ATC 12000, the fact remains that on the date and time in question,

there were no lookouts posted anywhere aboard the barge. In any e#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

(LOUVIERE), 2340 (JAFFE) and 2333 (AYALA).

Next, Appellant contends that he had no duty to post a bow lookout because "the custom in the area [where the collision occurred] was for pleasure craft to get out of the way of commercial traffic." This argument is specious.

Appellant assumes, by arguing as he does, that the operator of the pleasure vessel saw him approaching. In fact, the evidence establishes that neither vessel operator saw the other prior to the collision. Any "custom" that may exist is inapplicable here.

Further, by arguing in effect that the pleasure vessel should have gotten out of his way, Appellant implies that the operator of the other vessel was negligent. The fact that the operator of another vessel may have also been negligent does not excuse Appellant's negligence. Appeal Decisions 2402 (POPE), 2400 (WIDMAN) and 2319 (PAVELEC).

Appellant argues that "under similar circumstances the failure to post a bow lookout has been held not to be negligent." In support of his argument, Appellant relies on the holding in Basic v. Lauritzen Tug and Barge Inc., 1975 A.M.C. 870 (Cal. Super. Ct. 1974), where, the court found that a wheelhouse lookout was sufficient under the circumstances of that case.

Appellant's reliance on Basic, however, is misplaced. Unlike the situation in the case at bar, in Basic the barges did not obstruct th#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **# more closely resemble those in Taylor v. Tiburon, 1975 A.M.C. 1229 (E.D. La. 1974), where the court found that a blind spot created by the makeup of the tow mandates posting a lookout aboard the barge.

"The adequacy of a lookout on board a vessel underway is a question of fact to be resolved under all existing facts and circumstances." Appeal Decision 2319 (PAVELEC). Here, the Administrative Law Judge was in the best position to determine whether, under the circumstances, a proper lookout was posted. The evidence fully supports his conclusion that a bow lookout was required

aboard the ATC 12000, that Appellant's failure to post that lookout on the date and time in question constituted negligence, and that Appellant's negligence contributed to the collision.

III

Appellant's remaining contentions require only sumary treatment. First, Appellant contends that the Administrative Law Judge erred in allowing Commander#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **# testimony from Coast Guard personnel.

Finally, Appellant contends that the Administrative Law Judge erred in rejecting Appellant's proposed finding that the flotilla was restricted to navigating the channel by its draft and size. Assuming arguendo that the flotilla was restricted to navigating the channel, the result in this case remains unaltered. Regardless of any restrictions affecting the flotilla's navigability, Appellant breached his duty to post and maintain a proper lookout. Furthermore, since the evidence plainly establishes that Appellant did not see Mr. Newby's boat in his path, he cannot be heard to argue that the boat embarrassed his navigation.

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 order of the Administrative Law Judge dated 9 November 1984, at Norfolk, Virginia is AFFIRMED.

J. S. GRACEY
Admiral, U.S. Coast Guard
COMMANDANT

Signed at Washington, D.C. this 27th day of November, 1985.

Notwithstanding any alleged customary practice among area mariners, Rule 5 of the Inland Navigation Rules, 33 U.S.C. 2005, requires that:

"Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make full appraisal of the situation and the risk of collision."

Moreover, in discussing the duty of an operator to post a proper lookout under existing circumstances, I have stated that:

... the general rules of navigation call for an adequate lookout and the general standards of prudent navigators determine as negligent the operator or pilot who in the most favorable condition of weather and visibility runs into a craft encountered in the usual course of operation without even being aware of its existence. Appeal Decisions 2319 (PAVELEC) and 2046 (HARDEN).

I the instant case, despite clear weather and unlimited visibility, Appellant was not aware that Mr. Newby's boat was in the path of the flotilla. In all probability, a properly stationed lookout would have seen the boat, and the collision and the resulting casualty could have been avoided. Indeed, given the circumstances confronting Appellant, the necessity for posting a bow lookout aboard the barge before attempting to transit Newport News Channel should have been readily apparent. The evidence establishes that at the time of the collision, Appellant's view forward from the tug's wheelhouse was obstructed for a distance of approximately 1747 feet as a result of the blind spot created by the configuration of the flotilla and the height of the barge's superstructure. Given this degree of impairment, a bow lookout should have been posted aboard the ATC 12000, particularly in light of the congested conditions in Newport News Channel on this holiday afternoon.

***** END OF DECISION NO. 2414 *****