

SANCHEZ et al.

Felix PRIETO, Appellant.

These nine appeals have been consolidated for decision after having been taken singly for appeal in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701. The appeals have been consolidated for the following reasons: In all nine cases, the charges and evidence were substantially identical; all nine cases involved

the same Investigating Officer (IO), Administrative Law Judge (ALJ), and counsel for the various Appellants; pleadings and argument by both the Coast Guard and counsel for the Appellants were substantially identical; and the Decisions and Orders issued by the ALJ were substantially identical. Furthermore, my disposition of these nine appeals is the same because it turns on the same point in each record, as described infra. By order dated 18 May 1993, an Administrative Law Judge (ALJ) of the United States Coast Guard at San Juan, Puerto Rico suspended Appellants' Ordinary Seaman documents for three months, with an additional six months' suspension on twelve months of probation, upon finding proved a charge of violation of law. The sole specification in all cases alleged that Appellants, while acting under the authority of their documents, on or about specified dates between 13 April 1992 and 16 June 1992 fraudulently obtained Able Seaman endorsements in violation of 18 U. S. Code

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1001.

Individual hearings were held at San Juan, Puerto Rico, on various dates between 20 October 1992 and 19 March 1993.

Appellants appeared at their hearings, at the first session or shortly thereafter, with professional counsel by whom they were represented throughout.

All Appellants denied the charge and specification per 46 C.F.R. 5.527. In the course of the hearings, the Investigating Officer introduced into evidence 10 to 13 exhibits per Appellant and the testimony of the same two witnesses. Appellants similarly introduced a number of exhibits at their hearings, including a stipulation of facts agreed between the Investigating Officer and Appellant's counsel (See, e.g., Respondent SANCHEZ's Exhibit E). None of the Appellants testified. Following each hearing, the ALJ rendered a decision in which he found that the charge and specification were proved. His written decisions and orders were entered on 18 May 1993, and were served either on Appellant or on Appellant's counsel on dates between 21 May and 25 May 1993. Through counsel, Appellants filed notices of appeal together with completed briefs on 1 June 1993, within the filing requirements of 46 C.F.R.

5.703. Accordingly, these appeals are properly before me.

Appearance (for all Appellants): Jorge L. Arroyo, Esq., Suite 201, Metroparque VII, First Street, Metro Office Park, San Juan, PR 00968.

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FINDINGS OF FACT

At all times relevant herein, Appellants were the holders of their respective documents (MMDs) captioned above, all endorsed as Ordinary Seaman, which had been issued to them by the United States Coast Guard.

On different dates between 13 April and 16 June 1992, each Appellant applied for an Able Seaman endorsement to his MMD at Marine Safety Office San Juan, PR. Each was acting under the authority of his merchant mariner's document in so applying. After his application was evaluated, each was given the Able Seaman written test. Each Appellant paid an undetermined amount of money to Juan Del Valle, the civilian Coast Guard employee in charge of the Licensing Monitoring unit at MSO San Juan, PR. As a result of that payment, each Appellant later received a merchant mariner's document endorsed as Able Seaman. BASES OF APPEAL

Appellants raise a number of bases of appeal, including points raised in the several Motions to Dismiss of 18 March 1993 which all Appellants renewed and incorporated by reference in their appellate briefs. Because of my disposition of these cases I shall not specifically address Appellants' arguments.

OPINION

I

The charge and specification in each of these cases present

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jurisdictional problems. Jurisdiction must be affirmatively shown and will not be presumed. Appeal Decision 2025 (ARMSTRONG).

A

Appellants were each charged with violation of law, supported by a single specification:

"In that you, while acting as Ordinary Seaman under the authority of your Merchant Mariner's Document, [document number], did on or about [different date in each case] fraudulently obtained [sic] an Able Seaman Endorsement. A violation of 18 U.S. Code 1001." [sic]

Investigating Officer Exhibit 3 [SANCHEZ].¹

The authority for suspension and revocation hearings is 46 U.S.C. 7701(b), which refers to 46 U.S.C. 7703 as stating the bases for such proceedings. The charge in these cases, violation of law, relies on 46 U.S.C. 7703 (1)(A) which reads:

A . . . merchant mariner's document . . . may be suspended or revoked if the holder --

(1) when acting under the authority of that license, certificate, or document --

(A) has violated . . . any other law or regulation intended to promote marine safety or to protect navigable waters

This statute is clearly of limited scope. Suspension and revocation authority under a charge of violation of law is limited to violations of certain kinds of laws or regulations,

¹ N.B.: For simplicity, references in this Decision are to exhibits and transcript pages as numbered in the SANCHEZ case. The substance of the references applies in all nine cases, although the numbering may vary somewhat.

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viz., those intended to promote marine safety or to protect navigable waters. NTSB Order No. EM-125 (Commandant v. Cain), aff'g Appeal Decision 2385 (CAIN). 18 U.S.C. 1001, in contrast, is explicitly general in its intent and scope ("Whoever, in any manner . . . within the jurisdiction of any department or agency . . . "). It cannot be fairly described as a law "intended to promote marine safety or to protect navigable waters."

Consequently, the charge and specification as written in each of these cases is flawed: the specifications fail to state an offense cognizable under the stated charge. If, as the specifications allege, Appellants violated 18 U.S.C. 1001 (false official statement), that activity would only fall within the ambit of a charge of misconduct, vice violation of law, for purposes of suspension and revocation proceedings. See 46 U.S.C. 7703(1)(B); 46 C.F.R. 5.27.

B

However, the inquiry does not end with the wording of the charge and specification. At one time, any variance in proof from the pleadings was considered a fatal flaw. See 2a Moore's Federal Practice 8.03. But the trend in modern pleadings is to provide notice of the proceedings rather than to make a ritualistic recitation of details. See Appeal Decision 2326

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(McDERMOTT), citing Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C.Cir. 1950); Cf. Fed. R. Civ. Procedure 8(a),(e). Thus, even if jurisdiction is not properly asserted in the charge sheet, it may be harmless error if it is cured at the hearing. See ARMSTRONG, supra. As I have repeatedly held, there can be no challenge of issues which were actually litigated where there was actual notice and adequate opportunity to correct surprise. Appeal Decisions 2504 (GRACE); 1776 (REAGAN) (aff'd sub nom. Commandant v. Reagan, NTSB Order No. EM-9); 1792 (PHILLIPS); see also Kuhn, supra.

The Kuhn doctrine applies to the issue of jurisdiction as well as to the merits of the specification. In Appeal Decision 2062 (O'CALLAGHAN) (aff'd in rel. part sub nom. Commandant v. O'Callaghan, NTSB Order No. EM-62), I remarked, obiter,
[S]o long as the matter of jurisdiction was litigated,
it would not be fatal to have mislabelled the statutory
authority in the pleadings

O'CALLAGHAN, supra; see also Appeal Decisions 2478 (DuPRE), 2188 (GILLIKEN).

Consequently, notwithstanding the jurisdictional flaw in the pleadings, I must examine the records in these cases to determine whether jurisdiction was established. If the records establish violations of a law within the limited reach of 46 U.S.C. 7703(1)(A), then the charges as pled can stand. Alternatively, if the records show that Appellants had notice of, and an opportunity to contest, a charge of misconduct (pursuant to 46

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U.S.C. 7703(1)(B), vice 7703(1)(A)), then the specification may stand. See GRACE; REAGAN; PHILLIPS; see also Kuhn, supra.

C

The records do not support a charge of violation of law (46 U.S.C. 7703(1)(A)) because there is no evidence of a violation of a law "intended to promote marine safety." It only remains to be determined whether the records show that Appellants had actual notice of, and an opportunity to contest, a charge of misconduct. See GRACE, REAGAN, PHILLIPS, supra; see also Kuhn, supra. No other inquiry is required because the records offer no support for the other possible charges of negligence, incompetence, or the drug offenses. See 46 C.F.R. 5.23.

In finding sufficient jurisdictional basis in each of these cases for the charges of violation of law, the ALJ cited Kuhn, supra, to resolve the peculiar reference to 18 U.S.C. 1001 in the specification. D&O [SANCHEZ] at 11. However, while the Decisions and Orders mentioned the Kuhn requirements of actual notice and opportunity to correct surprise, the ALJ did not point to anything in the hearing records that he found to satisfy those requirements. Id. Nor do I find any.

Instead, it appears that the ALJ relied on statements by counsel for Appellants that acknowledged the legal sufficiency of each specification. D&O [SANCHEZ] at 11, citing Respondent's

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Exhibit F. However, 46 C.F.R. 5.525 (c), as I have interpreted it, places a duty on the ALJ to have defective charges withdrawn. See Appeal Decisions 2326 (McDERMOTT), 2407 (GONSALVES). This regulation operates in conjunction with the Kuhn holding and provides guidance for applying it. McDERMOTT, supra. As I explained in McDERMOTT,

"The Kuhn doctrine is an effective administrative tool when used to make amendments to specifications to avoid unreasonable delays in proceedings. However, amendments should not substantially change the specification.

. . . The . . . Kuhn doctrine . . . is appropriate when applied in accordance with 46 C.F.R. 5.20-65 [now 5.525]."

In all of these cases, instead of having the charge withdrawn, the ALJ effectively modified the charge to match the evidence of bribery. ("The well-litigated issue in this rather protracted proceeding is simply whether [Appellant] paid a bribe to an admittedly corrupt civilian Coast Guard employee" D&O [SANCHEZ] at 11; ". . . charge of bribery was proved . . .", D&O [SANCHEZ] at 16.) Furthermore, this modification was not made on the records, where Appellants might have disputed it or at least had notice. Instead, it was merely implied in the ALJ's written discussion. *Id.* A change in the charge which alters the jurisdictional footing is a substantial change which should have resulted in the charge being withdrawn. See GONSALVES, supra. Unlike the hypothesis addressed in O'CALLAGHAN, there was no litigation of the jurisdictional issue in this case. TR of 27

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October 1992 [SANCHEZ] at 5.

CONCLUSION

There is no cure in the records to the flaw in the pleadings, i.e., the absence of jurisdiction over Appellants' actions under a charge of violation of law, and the absence of notice of, and an opportunity to contest, a charge of misconduct. Instead, the records suggest that the original inapposite charge and specification led to a complete misunderstanding between the Investigating Officer, Appellants (through their counsel) and the ALJ as to what had to be shown to find the charge proved. While there is little doubt that Appellants improperly paid a corrupt civilian Coast Guard employee, Appellants were not charged appropriately to that offense, nor was substantial evidence of any other offense introduced.

The findings of the ALJ lack jurisdictional support in the records as discussed. It follows that the Orders of the ALJ must be reversed.

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In view of my decision, there is no need to reach Appellants' specific arguments on appeal. I therefore decline to do so.

ORDER

The charge and specification in these nine cases are DISMISSED, without prejudice to any other charges, criminal or otherwise. The Orders of the ALJ are VACATED.

/S/ A. E. Henn —

Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this
21st day of June 1995.