

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S LICENSE No. 607380, and  
MERCHANT MARINER'S DOCUMENT No. Z10290  
Issued to: Raymond J. GARDNER

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2472

Raymond J. GARDNER

This appeal has been taken in accordance with 46 U.S.C. #7702 and 46 CFR #5.701.

By order dated on 28 September 1987, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended, on six months probation, Appellant's Merchant Mariner's License and Document for a period of one month upon finding proved a Charge of Misconduct, supported by one specification.

The specification found proved under the Charge of Misconduct alleged that Appellant, while serving as Master aboard the ferry CONE JOHNSON, under the authority of the captioned license and document, did, at or about 2:49 PM local time on 21 June 1987, while overtaking a sailing vessel on Galveston Bay, a navigable waterway of the United States, fail to keep out of the way of the overtaken vessel as required by Rule 13 of the Inland Navigation Rules, to wit: the ferry CONE JOHNSON's passage did cause the operator of the sailing vessel to lose control of his vessel.

The hearing was held at Houston, Texas, on 6 August 1987. Appellant appeared personally at the hearing with the

assistance of Mr. Robert Frank Ewels, the Ferry Operations Manager, Department of Highways and Public Transportation, State of Texas. Appellant entered, in accordance with 46 CFR #5.527(a), an answer of deny to the charge and specificarion.

The Investigating Officer introduced in evidence five exhibits and called one witness.

Appellant introduced one exhibit into evidence and called three witnesses. Appellant testified in his own behalf.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved, and entered a written order suspending all licenses and/or documents issued to Appellant for a period of one month. The order was not to take effect provided no charge under 46 U.S.C. #7703, 46 U.S.C. #7704, or any other navigation or vessel inspection law, was proved against the Appellant for acts committed within six months from the date of service of the Administrative Law Judge's Decision and Order upon the Appellant.

The complete Decision and Order was dated 28 September [1987]. The Decision and Order of the Administrative Law Judge was not dated with respect to the year. A full examination of the record indicates that the correct date should have been 28 September 1987. The Decision and Order was served on Appellant by certified mail on 29 September 1987. [Appeal](#) was timely filed and considered perfected on 30 November 1987.

#### FINDINGS OF FACT

At all times relevant, Appellant was the holder of a Coast Guard Merchant Mariner's License No. 607380 and Document No. Z10290. Appellant's license authorized him to serve as Master of steam and motor vessels of any gross tons upon rivers and First Class Pilot of Motor Ferry Vessels of not more than 2,000 gross tons upon the Bolivar Ferry route between Galveston, Texas and Port Bolivar Texas, as well as other endorsements.

By stipulation of the parties, Appellant was acting under the authority of his license and document as a condition of

employment with the Ferry Service of the State of Texas at the time of the alleged incident with the S/V QUMQUAT on 21 June 1987.

The ferry CONE JOHNSON is a double ended ferry with pilot houses on each end. The vessel is equipped with propellers and rudders on each end of the ferry.

At or about 2:46 PM, 21 June 1987, the ferry CONE JOHNSON, with the Appellant serving as master, departed the Galveston ferry landing en route the Bolivar ferry landing.

The S/V QUMQUAT is a 22 foot, sloop-rigged sailing vessel with a white hull and white sails. The top of the mainsail is about 25 feet above the waterline. The S/V QUMQUAT is owned jointly by Mr. Jeffry R. Brown and his wife.

On 21 June 1987, Mr. Jeffry R. Brown was sailing the S/V QUMQUAT, with his wife and four year old daughter on board, in the vicinity of Galveston Channel Lighted Gong Buoy "1", Light List Number 22840, (hereinafter referred to as Buoy One) and Pelican Island Spit Shoal Lighted Buoy "P". Light List No. 22795, at the northern end of Galveston Channel.

The S/V QUMQUAT was in the general area of Buoy One when the ferry CONE JOHNSON left the Galveston ferry landing. Mr. Brown's wife observed the approach of an unnamed ferry, which was underway in Galveston Channel. The first time Mr. Jeffry Brown saw the ferry CONE JOHNSON was when the ferry was approximately 200-300 feet from the S/V QUMQUAT on its port quarter. At the time Mr. Brown first observed the ferry CONE JOHNSON, the ferry's course did not parallel the course of the S/V QUMQUAT, but rather the ferry approached the S/V QUMQUAT on an unknown angle so that the courses were converging.

At the closest point of approach, the angle between the courses of the two vessels was about 90 degrees with the bow of the sailing vessel pointed at the starboard quarter of the ferry. The ferry CONE JOHNSON crossed in front of the bow of the S/V QUMQUAT. No collision or injuries to personnel resulted from the actions of the vessels.

## BASIS OF APPEAL

Appellant raises the following issue on appeal:

1) The Administrative Law Judge's determination that Appellant violated Inland Navigation Rule 13 is not supported by substantial evidence of a reliable and probative character.

Appearance: By Appellant. pro se.

## OPINION

Appellant asserts that the Administrative Law Judge's finding that Appellant had violated Inland Navigation Rule 13 is not supported by substantial evidence of a reliable and probative character. I agree.

The Investigating Officer reviewed the actions of Appellant on 21 June 1987 vis a vis the S/V QUMQUAT and sought to only charge the violation of Inland Navigation Rule 13 as misconduct. In order to prove the specification as charged, the burden was on the Investigating Officer to prove by a preponderance of the evidence that the ferry CONE JOHNSON was in fact overtaking the S/V QUMQUAT, as defined by Inland Navigation Rule 13. Cf. (Appeal) Decision 2468 (LEWIN). Rule 13 defines an overtaking vessel as follows:

"(b) A vessel shall be deemed overtaking when coming up with another vessel from a direction more than 22.5 degrees abaft her beam; that is, in such a position with reference to the vessel she is overtaking, that at night she would be able to see only the sternlight of that vessel but neither of her sidelights."

Therefore, the issue becomes whether there was substantial evidence of a reliable and probative character that the ferry CONE JOHNSON was coming up on the S/V QUMQUAT from a direction more than 22.5 degrees abaft her beam.

The proper standard of proof for a hearing convened pursuant to 46 U.S.C. #7703 is set forth at 46 CFR #5.63:

"In proceedings conducted pursuant to this part, findings must be supported by and in accordance with the reliable, probative, and substantial evidence. By this is meant evidence of such probative value as a reasonable, prudent and responsible person is accustomed to rely upon when making decisions in important matters."

The Investigating Officer must prove the charges and specifications by a preponderance of the evidence. See 46 CFR ##5.63, 5.539; See ([Appeal Decision 2294](#)) (TITTONIS); Cf. ([Appeal Decision 2468](#)) (LEWIN) and *Steadman v. SEC*, 450 U.S. 91, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981), which concluded that the preponderance of evidence standard of proof shall be applied in administrative hearings governed by the Administrative Procedure Act, 5 U.S.C. #551, et seq. Congress has specifically made the provisions of the Administrative Procedure Act, including 5 U.S.C. #556(d). applicable to suspension and revocation proceedings. See 46 U.S.C. #7702.

Conflicting evidence will not be reweighed on appeal if the findings of the Administrative Law Judge can reasonably be supported. The rule in this regard is well established.

"When ... an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, that determination will not be disturbed unless it is inherently incredible."

Appeal Decision 2390 (PURSER), aff'd sub nom *Commandant v.*

Purser. NTSB Order No. EM-130 (1986); ([Appeal Decision 2356](#)) (FOSTER), ([Appeal Decision 2344](#)) (KOHAJDA), ([Appeal Decision 2340](#)) (JAFFE), ([Appeal Decision 2333](#)) (AYALA), ([Appeal Decision 2302](#)) (FRAPPIER), and ([Appeal Decision 2275](#)) (ALOUISE).

Upon review of the record in this matter, I find that the Administrative Law Judge's Specific Findings Nos. 10 and 11, and Ultimate Finding No. 2 with respect to the finding that the ferry was overtaking the sailing vessel are inherently incredible. Cf. ([Appeal Decision 2275](#)) (ALOUISE).

The Administrative law Judge found that the ferry CONE JOHNSON was overtaking the S/V QUMQUAT without indicating the course of the ferry, the heading of the S/V QUMQUAT, the relative position of the two vessels to each other, or the number of degrees the ferry may have been abaft the beam of the sailing vessel.

The only evidence in the record concerning the courses of the two vessels involved consists of the testimony of the operator of the S/V QUMQUAT, Mr. Jeffry R. Brown, the contradicting testimony of Appellant and his witnesses, the documentary evidence consisting of the navigational chart No. 11324 (I.O. Exhibit 41, and Mr. Brown's complaint letter (I.O. Exhibit 5).

Mr. Brown's testimony does not establish that the ferry CONE JOHNSON was overtaking the S/V QUMQUAT within the meaning of Rule 13. Mr. Brown is not clear as to the location of the alleged incident. At best it occurred within approximately a 200 yard diameter circle drawn by Mr. Brown on I.O. Exhibit 4. (Transcript at pp. 37, 38). Mr. Brown could only state that he was in the general area of Buoy One as a ferry was leaving the Galveston ferry landing. (Transcript at pp. 40-41). As to what happened after the ferry left the landing, Mr. Brown testified he was a little uncertain about that, since he was really not concerned about the ferry coming out. (Transcript at p. 41). Mr. Brown testified that the first time he actually saw the ferry was when it was about 200-300 feet away. (Transcript at p. 49). Mr. Brown never established what his course was in degrees. Mr. Brown, on several occasions. Pointed to the chart to indicate tracklines or positions, but his gestures were not adequately described for the record. (Transcript at pp. 35-37, 39, 40, 42). References to charts and diagrams during a witness'

testimony must be made clear on the record. ([Appeal Decision 2164](#)) (MURPHY); ([Appeal Decision 2453](#)) (WEDGEWORTH). Mr. Brown had no first hand knowledge of the course taken by the ferry CONE JOHNSON as it approached his position. (Transcript at p. 63). The CONE JOHNSON was one of two ferries operating in Galveston channel at the time of the alleged incident. (Transcript at pp. 60, 63). There is no evidence in the record that the ferry CONE JOHNSON was the ferry that Mr. Brown believes followed the entire track Mr. Brown drew on the chart, I.O. Exhibit 4. (Transcript at pp. 60. 63-65). In this regard, he relied on the observations made by his wife. (Transcript at pp. 42, 49, 64). Since Mrs. Brown did not testify as a witness at the hearing, her statements with regard to the ferry CONE JOHNSON are hearsay. Although hearsay is admissible in these proceedings if reliable, Mr. Brown did not relay sufficient information regarding what his wife actually may have seen or told him on 21 June 1987 to be helpful in determining whether the ferry was overtaking the sailing vessel as defined by Rule 13. (Transcript at pp. 42. 49, 64). This reliance on incomplete hearsay, destroys the foundation for allowing Mr. Brown to lay out the courses of the ferry CONE JOHNSON on the navigational chart, I.O. Exhibit 4. Similarly, the chartlet prepared by Mr. Brown and attached to I.O. Exhibit 5 lacks an adequate foundation for the same reasons.

Similarly, Mr. Brown's first hand knowledge concerning the relative positions of the S/V QUMQUAT and the CONE JOHNSON as the ferry neared its closest point of approach does not satisfy the definition of Rule 13. His testimony equally supports the argument that the ferry was not overtaking the sailing vessel. Mr. Brown's testimony in this regard was as follows:

Mr. BROWN: The first time I really saw the ferry is when he was, oh, between, maybe 200 feet away, two to 300 feet. And...

ALJ: Behind you?

Mr. BROWN: Behind me approaching from the port quarter. (Transcript at p. 49).

ALJ: And, then. what happened?

Mr. BROWN: ...He wasn't exact (sic) parallel. It was more of an angular path so that our paths were converging.

ALJ: Well, did he cut across your bow? Is that what you're saying?

Mr. BROWN: Yes, he did.  
(Transcript at p. 50).

ALJ: But, I mean, what was the relationship between you two vessels when you say he was 30 feet ahead of you or closest to you? Is he...

Mr. BROWN: At that point...at the point of closest...

ALJ: ...beam to beam, or was he across your bow or what?

Mr. BROWN: At the point of closest approach, we were at about 90 degrees. My bow was aimed toward his starboard quarter at about 90 degrees. That was the closest approach. (Emphasis added). (Transcript at p. #i..

The Administrative Law Judge asked Mr. Brown to compare the actions of the ferry with the requirements of Rule 13. Mr. Brown did not do so and the Administrative Law Judge never resumed this line of questioning. (Transcript at p. 45). The Administrative Law Judge states that he found Mr. Brown's testimony credible. (Decision & Order, pp. 8. 10). However. the Administrative Law Judge did not adequately discuss the testimony of any of the other witnesses, especially Captain Robinson who testified that the ferry's maneuvering suggested by Mr. Brown was most unlikely, if not impossible. (Transcript at pp. 125-130). The Administrative Law Judge failed to point out conflicting testimony and to resolve these conflicts on the record through adequate findings. Appeal Decision 1285 (DONOVAN). The weight of the evidence does not substantially support the findings by the Administrative Law Judge that the ferry CONE JOHNSON was overtaking the S/V QUMQUAT within the requirements of Inland Navigation Rule 13.

## CONCLUSION

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 and order of the Administrative Law Judge dated on 28 September 1987, at Houston, Texas, are VACATED, the findings are SET ASIDE, and the charge and specification are DISMISSED.

/S/ Clyde T. Lusk, Jr.  
Vice Admiral, U. S. Coast Guard  
Vice Commandant

Signed at Washington, D.C. this 12th day of October 1988.

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