

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 457718 and MERCHANT MARINER'S DOCUMENT  
Issued to: Daniel W. CLUFF No. Z-1199514

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2236

Daniel W. CLUFF

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 25 January 1980, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's United States Coast Guard First Class Pilot's License No. 457718 for 3 months on 12 month's probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as Pilot on board M/V MOSEL under authority of the document and license above captioned, on or about 2 March 1979, while the said vessel in the Chesapeake and Delaware Canal, Appellant failed to navigate the vessel with due caution, thereby causing an allision between the raised heavy lift boom of the vessel and the Reedy Point Bridge.

The hearing was held at Baltimore, Maryland, on 22 May 1979 and adjourned to 7 September 1979, on which date it was concluded.

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

The Investigating Officer introduced in evidence:

a) a stipulation of facts between the government and Appellant that:

1. Appellant was piloting M/V MOSEL at the time the heavy lift boom struck the Reedy Point Bridge at 1158 on 2 March 1979;

2. At all material times, Appellant held both a Federal License and a First Class Pilot's License issued by the Navigation Commission for the Delaware River and its Tributaries, in an agency of the Government of the Commonwealth of Pennsylvania; and

3. M/V MOSEL is registered under the laws of the Federal Republic of Germany.

b) a certified copy of the log of M/V MOSEL dated 2 March 1979, and English translation thereof, noting a "...collision with heavy boom and the Reedy Point Bridge..." at 1158 on said date.

c) a certified copy of the Operating Log of the Chesapeake and Delaware Canal for 2 March 1979, a typewritten copy of which denotes at 1158 that "...the pilot in the MOSEL (D.Cluff) reported that the ship's boom hit the Reedy Point Bridge Span" (with an agreement between the Investigating Officer and Appellant that the said log reads as above);

and

d) a certified copy of the Reedy Point Bridge Damage Assessment Report for 1979, covering the allision to the Reedy Point Bridge on 2 March 1979; accepted in evidence subject to the qualification that Appellant did not have knowledge that all of the damage reported in the document is related to the incident of M/V MOSEL.

In defense, Appellant offered in evidence:

- a) a portion of NOAA Chart No. 12277, Chesapeake and Delaware Canal, showing the eastern end of the canal and Reedy Point Bridge with the bridge and language printed thereon showing clearance highlighted;
- b) a blank copy of a form entitled "Department of the Army Corps of Engineers Waterway Traffic Report" (Eng. Form 3102-R, 1 August 1959), to be completed upon request by vessels transiting the Canal;
- c) Department of Army, Philadelphia District, Corps of Engineers letter dated 4 May 1979, revising Waterway Traffic Report form (noted above) to include information concerning maximum height above water line; and
- d) Appellant's prior Coast Guard disciplinary record.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and supporting specification had been proved. He served a written order on Appellant suspending the Coast Guard First Class Pilot's License issued to Appellant for a period of 3 months on 12 months' probation.

The entire decision was served on 11 February 1980. Appeal was timely filed on 24 March 1980 and perfected on 27 March 1980.

#### *FINDINGS OF FACT*

On 2 March 1979, Appellant was serving as Pilot on board M/V MOSEL and acting under authority of his First Class Federal Pilot's license No. 457718 while the vessel was transiting the Chesapeake and Delaware Canal (C&D Canal).

Appellant's Federal Pilot's license No. 457718 authorized him to serve as First Class Pilot of Steam and Motor Vessels of any gross tons upon the Delaware Bay and River to Trenton, New Jersey, and on the Chesapeake and Delaware Canal from Reedy Point to Chesapeake City, Maryland. The C & D Canal is a Federally owned waterway connecting the Delaware River and Chesapeake Bay. It is

operated by the U.S. Army Corps of Engineers. The use, administration, and navigation of the Canal are regulated by the Corps of Engineers under 33 CFR 207.100. This regulation requires any pilot who pilots in the Canal to have a license for the waterway issued by the U.S. Coast Guard. Section (t). It also requires vessels carrying rods, poles, or other gear extending above the top of the vessel's mast to lower such equipment to a level with the top of the mast before entering the waterway. Section (f). Section (c), *Safe Navigation Required*, states in part that a clearance by the canal dispatcher for the vessel's passage through the waterway shall not relieve the owner, agents, and operators of the vessel of full responsibility for its safe passage.

The Reedy Point Bridge crosses the C & D Canal at a point south of Delaware City, Delaware. The charted vertical clearance of this fixed bridge is 135 feet. This is the first bridge to be encountered when proceeding into the Canal from the Delaware River.

The heavy lift boom of the M/V MOSEL struck the Reedy Point Bridge at 1158 on 2 March 1979 while Appellant was serving as its pilot. Appellant reported this collision to the Canal Dispatcher. The Canal was temporarily closed to traffic following the collision.

#### *BASES OF APPEAL*

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- 1) the Coast Guard has no jurisdiction to conduct the proceedings appealed from;
- 2) there can be no presumption of negligence which operates against the pilot of a vessel which collides with a fixed object;
- 3) the Administrative Law Judge erred in refusing Appellant's request that the Coast Guard produce its records of prosecutions of state licensed pilots for accidents in the C & D Canal; and

- 4) the penalty imposed by order of the Administrative Law Judge was unjustifiedly more severe than penalties imposed in other cases where the circumstances were similar to those prevailing in the instant case.

APPEARANCE: Palmer, Biezup and Henderson, by Alfred Kufler, Esq. of Philadelphia, Pennsylvania.

### OPINION

#### I

Appellant bases much of his attack on the jurisdiction of the Coast Guard to proceed against his license on the holding in *Soriano v. U.S.A.*, 494 F.2d 681 (9th Cir. 1974). In fact *Soriano* has virtually no effect under the present circumstances. The facts in this case conclusively establish that a Coast Guard license is required by regulation of the U.S. Army Corps of Engineers as a condition of pilotage in the C & D Canal. 33 CFR 207.100(t). See also 33 U.S.C. 1 (providing statutory authority for the regulation cited). *Soriano* merely recognized that the Coast Guard could not proceed against a pilot's federal license when the pilot was acting solely under the authority of his state issued license in state waters. The requirement operative here has the force and effect of federal law for the federal waterway it addresses. As such it is entitled to the respect of other executives agencies, and an R.S. 4450 proceeding is not the appropriate forum in which to raise the validity of such a regulation. 46 CFR 5.20-102. See also Decision on [Appeal No. 1944](#) (properly promulgated regulations will be given full effect in R.S. 4450 proceedings). Since the federal licenses is required by the pervasive federal regulatory scheme controlling use of the C & D Canal the *Soriano* decision is not applicable. I accept the conclusion of the Administrative Law Judge that Appellant, while piloting a vessel in the C & D Canal, was acting pursuant to his Coast Guard license.

It does not appear to me that the mandate of 46 U.S.C. 211 and 46 U.S.C. 215 is impugned by this law. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), recognized that an act of Congress subsequent to the passage of the act of 1789 (codified at

46 U.S.C. 211) could alter or affect pilotage in areas of the United States pursuant to the power of Congress arising under Article 1, Section 8, Clause 3 of the Constitution. Nowhere on the facts of this case does the specter of a state's exercise of its police power in a fashion contrary to the regulations of the Corps of Engineers arise. *Cf. Ray v. Arco*, 455 U.S. 131, 98 S.Ct. 988 (1978) (where state exercise of police power conflicted with federal regulatory scheme).

The power of the Secretary of the Army to issue regulations governing the use, administrative and navigation of navigable waterways is limited by any specific legislative delegation to other departments. 33 U.S.C. 1. Thus, the Secretary possesses authority to require a Coast Guard license as a condition of Canal pilotage, but cannot diminish the authority of the Coast Guard to promote safety of life and property afloat through the R.S. 4450 suspension and revocation process. The Coast Guard retains its authority to prescribe the conditions under which such a license will be granted, renewed, suspended or revoked. It is especially easy to read these authorities *in pari materia* since the underlying purpose and enforcement mechanisms differ. It is well settled that R.S. 4450 proceedings are remedial in nature and not intended as a penal action. This principle so pervades the history of these proceedings as to demand no citation. The Corps of Engineers regulations, however, carry penal sanctions if violated, which are deemed misdemeanors punishable upon conviction in U.S. District Court by fines of \$500 or imprisonment of six months. Thus the Corps meets its specify safety mandate by resort to criminal actions while the Coast Guard responds to its more embracing safety concerns by an administrative proceeding of a remedial nature. Decision on [Appeal No. 2124](#). Appellant is therefore incorrect in attempting to equate these proceedings, even give the superficial procedural similarities between the administration of Title 52 and criminal courts actions. Substance over form is the proper approach in such instances, and the substance of these proceedings is definitely not criminal. It is well within the authority of a government agency to grant a panoply of rights in an administrative proceeding. In fact once granted, an agency must strictly abide by the rights given even if more generous than the rights guaranteed by the Constitution. *Morton v. Ruiz*, 94 S. Ct. 1055, 1074(1964).

Appellant makes much of the decision of the Ninth Circuit in *Bulger v. Benson*, 262 F. 929 (9th Cir. 1920), as support for the proposition that R.S. 4450 proceedings are penal in nature. A more careful review of that case would reveal that the penal statute referred to by the learned court was the Act of June 7, 1897, c.4, 3, 30 Stat. 102, (U.S. Comp. Stat. 7907). 33 U.S.C. 158. The sanction prescribed in that act for violation of the Pilot Rules contained in Section 1 was a penalty of \$50. Since the only express charge in the cited case was for a violation of the Pilot Rules, the court concluded that the Steamboat Inspection Service's effort to revoke the Master's license was inappropriate in the absence of a specific charge addressed thereto. Thus R.S. 4450 was not found to be penal. At 931-32; accord 24 Op. Atty. Gen. 136. In consequence, Decision on [Appeal No. 2124](#) properly controls the penal/remedial question in these proceedings.

## II

Short shrift may be given to Appellant's objection to the use of the presumption of negligence which arises as a result of an allision. Appellant argues that the presumption attaches only to the vessel itself and not to the licensed pilot. This issue was squarely addressed in Decision on [Appeal No. 2204](#) which rejected such an argument and upheld the use of the presumption in the case of an allision with a fixed aid to navigation even where the course of conduct resulting in the allision was recommended by the vessel's master.

Appellant's assertion that in any event the Master of MOSEL bears the fault for the allision is irrelevant. The issue for resolution here is the alleged negligence of Appellant; negligence of others will not serve to excuse the negligence of one accountable in an R.S. 4450 proceeding for his derelictions. Decision on Appeal Nos. [2052](#), [2031](#), [2012](#).

## III

Appellant contends that the lack of previous prosecutions of state licensed pilots for accidents in the C & D raises an equal protection issue. This assertion is founded in the Administrative

Law Judge's denial of Appellant's request for Coast Guard directives or orders to Investigate Officers not to proceed against State Pilots and for records of marine casualty cases involving foreign flag vessels and U.S. flag vessels sailing under register in the C & D Canal for the five years preceding the present incident.

Initially it should be noted that these R.S. 4450 proceedings are not prosecutions, for those reasons discussed at length above. The Administrative Law Judge denied Appellant's request on the grounds that the documents and information requested were not material and relevant to the charge against this Appellant. I concur in the decision of the Administrative Law Judge.

Internal Coast Guard directives or instructions to Investigating Officers directing them not to proceed against State Pilots would, even if existent, be immaterial and irrelevant to this proceeding since the action herein does not involve the state license held by Appellant nor does it involve waters subject to the State which granted appellant a commission. At issue here is the competency and fitness of Appellant to hold, and act pursuant to, his Coast Guard license. It is also irrelevant and immaterial that the vessel involved was foreign flag, except as that fact relates to the jurisdictional issue already resolved. The Coast Guard's statutory authority does not extend to state license and as a consequence the Coast Guard could never have proceeded against a pilot proceeding under his state license in the C & D Canal. By the same token, no state licensed pilot is authorized, as such, to pilot in the Canal, which is wholly under Federal jurisdiction.

The fundamental questions raised here are the Coast Guard's jurisdiction over Appellant and the proof of negligence. It is inconceivable that the denial of Appellant's request could have prejudiced him in any way since no relevant and material evidence could have been elicited thereby.

#### IV

It is well settled that the order to be imposed is peculiarly within the discretion of the Administrative Law Judge and will not lightly be disturbed on appeal. Decision on [Appeal No. 1585](#). Appellant has failed to show that such an order, particularly in light of the potential for personal injury and property damage



attendant to such an incident, is excessive. In light of controlling precedent I therefore find that the order as entered is appropriate. Decisions on Appeal Nos. [1994](#), [1889](#), [1859](#), [1751](#). I expressly reject Appellant's attempt to bring this case within the scope of my decision in Decision on [Appeal No. 1755](#). The standard to which a pilot is held, by virtue of his extensive knowledge of local conditions, etc. persuades me that the imagined negligence of the Corps of Engineers or the Master are insufficient grounds to justify a reduction of the order. *See generally* Decisions on Appeal Nos. [995](#) and [842](#).

*ORDER*

The order of the Administrative Law Judge dated at Baltimore, Maryland, on 25 January 1980, is AFFIRMED.

R. H. SCARBOROUGH  
VICE ADMIRAL, U. S. COAST GUARD  
Vice Commandant

Signed at Washington, D.C., this 23rd day of February 1981.

\*\*\*\*\* END OF DECISION NO. 2236 \*\*\*\*\*

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