UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT and LICENSE NO. 514 725
Issued to: Burton E. Ervast Z-486-984

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2267

Burton E. Ervast

This appeal had been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 2 June 1980, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's captioned license upon finding him guilty of negligence and incompetence. The specifications found proved allege that while serving as Third Mate on board SS PIONEER COMMANDER under authority of the license above captioned Appellant was negligent: (1) on 11 January 1980, during his 0800 1200 watch, by failure to fix the vessel's position, while transiting the San Bernadina Straits, R.P.; (2) on 11 January 1980, during his 2000 to 2400 watch, by failure to fix the vessel's position while transiting the Sibuyan Sea, R.P.; (3) on 24 January 1980, during his 2000 to 2400 watch, by failure to locate the navigation light control panel in order to secure the anchor lights and energize the navigation lights; (4) on 31 January 1980, during his 0800 to 1200 watch, by failure to fix the vessel's position while navigating from Pusan to Chin Hae, Korea; (5) on 31 January 1980, during his 0800 tp 1200 watch, by failure to take anchor bearings to fix the vessel's position after anchoring at Chin Hae, Korea; (6) on 3 February 1980, during his 2000 to 2400 watch, by failure to accurately fix said vessel's position while transiting Osumi Kaykyo (Van Dieman

Strait, Japan); (7) on 15 February 1980, by plotting said vessel's position at 1912 about 15 miles from its true position, while said vessel was in Pearl Harbor Channel, and (8) on 15 February 1980 by plotting an incorrect 2400 dead reckoning position for the vessel; and was incompetent by his acts and omissions, while standing deck watches on a foreign voyage, which demonstrated that he did not possess and exercise the professional skills of an ordinary, prudent, licensed third mate from 11 January to 15 February 1980.

The hearing was held at Seattle, Washington, on 26 and 27 March 1980.

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

The Investigating Officer introduced in evidence the testimony of the Master of SS PIONEER COMMANDER and the following documentary evidence: (1) affidavit of service dated 25 March 1980, showing service of the charges on Appellant on 24 March 1980; (2) Certification of Shipping Articles; (3) certified extract from the official log of 16 February 1980 for SS PIONEER COMMANDER; (4) certified copies of the deck logs of PIONEER COMMANDER dated 11, 24 and 31 January and 3 and 15 February 1980; (5) Department of Commerce charts Nos. 19357 and 19120; (6) the "Bridge Log" of said vessel commencing with the date 25 September; (7) copy of 2 pages from the "Merchant Marine Officer's Handbook"; (8) a certified copy of a "RCA Marine Telegram" from said vessel dated 17 February 1980; (9) the Statement of Prior Record (NONE); and (10) the Investigating Officer's recommendation as to sanction.

In defense, Appellant offered in evidence: (1) the testimony of the Appellant; (2) the testimony of Joseph Pfeiffer, Third Assistant, Electrical; (3) the testimony of Chester Waller, Jr., the "8 to 12" Able Bodied Seaman; (4) letter from Milton H. Soriano, Appellant's counsel dated 1 April 1980; (5) Unsworn statement of Roderick Blanchette, dated 9 February 1980; (6) Unsworn statement of William Hungelmann, dated 9 February 1980; and (8) Statement of Prior Record (NONE), signed by Milton H. Soriano and dated 5 May 1980.

After the hearing, the Administrative Law Judge rendered a

written decision in which he concluded that the two charges and each specification had been proved. He then entered and order revoking all valid licenses issued to Appellant.

The entire decision was served on 3 June 1980. Appeal was timely filed on 26 June 1980.

FINDINGS OF FACT

From 11 January to 15 February 1980, Appellant was serving as Third Mate on board SS PIONEER COMMANDER and acting under authority of his captioned license while the vessel was on a foreign voyage. SS PIONEER COMMANDER (O.N. 290 905) at all relevant times was an oceangoing, inspected merchant vessel of the United States, which is required to carry a master and officers licensed by the U.S. Coast Guard.

Appellant failed to fix the vessel's position while transiting San Bernadino Straits, Republic of the Phillipines (R.P.), during his 0800 to 1200 bridge watch on 11 January 1980. He was assigned to stand that watch and was responsible for navigating the vessel during that period. The master had previously issued a standing order which required the mate on the bridge watch to take bearings and fix the position of said vessel at 15 to 20 minute intervals and immediately after each course change. Since Appellant did not know what points or objects to use for bearings, the master personally took the bearings, and fixed the vessel's position.

On 11 January 1980, during his 2000 to 2400 watch, Appellant again failed to fix said vessel's position while it was transiting the Sibuyan Sea, R.P. He was standing the watch but failed to take any bearings, although there were many landmarks and lights available to use for bearings. Appellant was not familiar with the area and did not know what objects to use for bearing. The master was again obliged to take bearings and fix said vessel's position during Appellant's watch.

On 24 January 1980, Appellant was unable to locate the vessel's navigation light control panel in order to secure the anchor lights and energize the navigation lights, upon getting underway from anchorage at Kure, Japan. This incident occurred after Appellant had been on board for 53 days, and after he had

stood bridge watches.

During Appellant's 0800 to 1200 watch on 31 January 1980, he failed to take bearings or to fix said vessel's position while navigating from Pusan to Chin Hae, Korea. The master was once again obliged to take the bearings and fix the position during Appellant's watch.

On Appellant's 0800 to 1200 watch on 31 January 1980, he failed to take any anchor bearings to fix the vessel's position after it had anchored at Chin Hae, Korea, despite his attempt to take the bearings. The Master was obliged to take the bearings to insure that the vessel was at a safe anchorage.

Appellant, while standing his 2000 to 2400 watch on 3 February 1980, on the vessel's transit of Osumi Kaykyo (Van Dieman) Straits, Japan, failed to fix the vessel's position accurately. At one point on this watch he fixed the vessel's position as .25 miles offshore when in fact the vessel was plotted by the master as never closer than 2.8 miles from shore. The Master took accurate bearings which Appellant copied into the log book.

Appellant was in charge of the vessel's navigation on departure from Pearl Harbor at 1912, on 15 February 1980. At that time he fixed the vessel's position about 15 miles from its true position as determined by the Master.

On the 2000 to 2400 watch on 15 February 1980, Appellant plotted a 2400 dead reckoning position plotted by the Master. The Master's plotted position was consistent with the vessel's speed of 17 knots at the time, while Appellant's plotted position showed the vessel covering 12.2 miles in two hours (a 6 knot speed).

Appellant graduated from the united States Merchant Marine Academy in 1944 and obtained his Second Mate's license in 1946. He sailed for about 1 1/2 years, until July 1946, when he left the sea. He returned to the sea in 1976, some thirty years later, and sailed periodically as a Third Mate.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that :(1) the decision of the Administrative Law Judge was founded on self-serving statements by the Master and on hearsay evidence; that the decision was not substantiated by charts reflecting the alleged incompetence; and that the order was contrary to the statements of Appellant; (2) it is not incompetence for a licensed officer to be unaware of the location of the anchor lights switch; (3) the decision may not stand without charts to substantiate the erroneous positions; (4) the Master admitted that Appellant was competent and his testimony in this regard was corroborated by other witnesses; (5) the Administrative Law Judge erred in determining that Appellant's evidence which related to his professional schooling and experience, conditions aboard the vessel, and the Master's animosity towards him were without merit and irrelevant; (6) there was no evidence of inattention to duty by Appellant; (7) the cases cited in the Decision are not applicable; (8) Appellant had exhibited excellent navigational skills on vessels prior to his service on PIONEER COMMANDER; and and (9) the master secretly, frivolously, and capriciously interpolated ridiculous log entries adverse to Appellant in retaliation for Appellant's concern over the seaworthiness of the vessel.

APPEARANCE: Soriano & Soriano, Seattle, Washington, by Milton H. Soriano, Esq..

OPINION

Appellant's contention that the Administrative Law Judge's decision was based on hearsay and self-serving statements, which were unsubstantiated by charts and strongly denied by Appellant, lacks merit. The log entries for each violation, which were admitted without objection and without evidence to the contrary, support the decision regarding each specification. See Decision on Appeal No. 2078. In this case, the Master's sworn testimony and charts in evidence also corroborate the log entries. The fact that Appellant's testimony contradicts to some degree the logs, charts, and Master's testimony was known to the Administrative Law Judge. He weighed the credibility of the witnesses and all of the evidence. His decision as to conflicting testimony and the weight to be given will not be rejected on appeal barring a showing that he acted arbitrarily or capriciously. See Decision on Appeal

Nos. 2001, 2030, 2047, and 2078.

A careful review of the record reveals that apparently there was a conflict of personalities between the Master and the Appellant in this case. While Appellant's testimony admits that he had substantial difficulty in finding points to use for bearings in the San Bernandino Straits and that he asked the ,Master which points to use for bearings, this in itself is not necessarily an admission of inability to pilot properly because it may have indicated an attempt on the part of the Appellant to please of appease the Master.The evidence adduced by the Administrative Law Judge indicates that Appellant was competent in celestial navigation which generally requires more skill than piloting. It is difficult to believe that a person competent in celestial navigation would be incompetent in piloting even after not sailing on his license for 30 years, It also should be noted that the Master did not take Appellant off watch because of the alleged incompetence but allowed him to continue to stand watches under his license.

In other areas Appellant's testimony is self-contradictory and is not corroborated by other substantial evidence. There is no indication that the Administrative Law Judge acted arbitrarily or capriciously in giving credibility to the Master and discounting the testimony of the Appellant. His decision in weighing conflicting testimony and the credibility of witnesses will not be disturbed on appeal, barring evidence that he acted arbitrarily or capriciously. Such is clearly not the case here and his decision will stand. However, it is considered that the eighteen month period since Appellant's license was revoked should be sufficient remedial action for Appellant to correct his deficiencies and prevent recurrence of similar problems.

CONCLUSION

The findings on the charge of negligence and each specification thereunder are based on substantial evidence, as are the findings on the charge and single specifications of incompetence. In view of the fact that the Master did not deem it necessary to take Appellant off watches, I conclude that a conflict of personalities aggravated the situation of a trained, licensed officer's having been away from sea duty for about 30 years before

continuing to sail under his license. I consider it appropriate to caution the Appellant and draw to his attention the opportunities available to refresh his memory and abilities in piloting prior to sailing again on his license. However, in view of the long period of time elapsed since revocation of Appellant's license, his license should be returned to him forthwith.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington, on 2 June 1980 is AFFIRMED to the extent of the Findings of Fact and Conclusions; the original order of revocation is MODIFIED to SUSPENSION for a period of eighteen months, which period has already expired.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Acting Commandant
Signed at Washington, D.C. this 12th day of November 1981.

***** END OF DECISION NO. 2267 *****

Top