UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

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| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD | : | |
| | : | DECISION OF THE |
| vs. | : | |
| | : | VICE COMMANDANT |
| LICENSE NO. 036785 | | |
| | : | ON APPEAL |
| : | : | NO. 2622 |
| | : | |
| Issued to: Jonathan D. NITKIN | : | |

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701, and the procedures in 33 C.F.R. Part 20.

By a Final Order dated May 26, 2000, an Administrative Law Judge (ALJ) of the United States Coast Guard at Miami, Florida suspended Appellant's above-captioned license for five (05) months; the first month suspension was outright and the remaining four (04) months were remitted on twelve (12) months probation. By a Decision and Order (D&O) dated April 14, 2000, the ALJ had found proved a charge of *misconduct* alleging a violation of Rule 34 (d) of the 1972 Collision Regulations (COLREGS). The Appellant had also been charged with two additional specifications of *misconduct* (violating Rules 14 and 8 (e) of the COLREGS) and a charge of *negligence* supported by a single specification. However, the ALJ found these additional allegations not proved**.** Accordingly, this appeal involves only the charge and specification of *misconduct*, violation of Rule 34 (d), for failure to sound the danger signal under circumstances in which it is required.

The hearing was held on November 9 and 10, 1999 in Miami, Florida. Appellant appeared with counsel and entered a response denying the charges and specifications. The Coast Guard Investigating Officer (I.O.) introduced into evidence the testimony of five witnesses and thirteen exhibits. Appellant introduced into evidence his own testimony, three additional witnesses and two exhibits.

The ALJ's Final Order was mailed to Appellant on May 26, 2000, but the record does not reflect when it was received. Appellant filed a Notice of Appeal (Appeal) on May 30, 2000, and received a copy of the Transcript (TR). Appellant received a temporary license on June 5, 2000, under the authority of 46 C.F.R § 5.707, and perfected this Appeal on July 21, 2000, by filing his brief. This Appeal is properly before me.

APPEARANCE: Keller & Houck, P.A. (Andrew W. Anderson, Esq. and Robert D. Tracy, Esq.) for Appellant. The Coast Guard Investigating Officers were LT Mark Hammond and LT Eric D. Henly.

## FINDINGS OF FACT

This Appeal arises out of a collision between the tank ship S/S CHELSEA and the container ship M/V MANZANILLO at approximately 2356 hours on January 29, 1999 in the vicinity of Miami Harbor Sea Buoy. At the time, Appellant was serving as a "federal" pilot aboard the CHELSEA, under the authority of the above captioned license. The CHELSEA was transiting outbound; the MANZANILLO was inbound. The collision occurred south of the Port of Miami Channel Buoy "M". See D&O at 10, para. 29. It is undisputed that at all material times prior to the collision, both vessels were in sight of one another. Appellant was in constant radio communication with Pilot Fernandez on the MANZANILLO. See TR at 73, 78, 84, 459, 499.

As the two vessels approached each other, Appellant radioed Pilot Fernandez and proposed a starboard to starboard passage, which the ALJ found was customary, given the prevailing weather and current conditions at the time. See D&O at 7-8. Pilot Fernandez agreed to the starboard to starboard proposal. See D&O at 8; TR at 86, 92-93. As the vessels maneuvered toward each other, however, Pilot Fernandez on MANZANILLO became concerned that CHELSEA was maneuvering in such a way as to cause him concern that they would not be able to pass starboard to starboard. See TR at 71. Accordingly, Fernandez called Appellant on the radio and proposed that the passing be changed to port to port. Both Appellant and the CHELSEA's Master disagreed. Appellant replied over the radio rejecting Fernandez's proposed change, and that Appellant still thought they could (indeed that they must) pass starboard to starboard.

See D&O at 37; TR at 72. Fernandez replied that he did not think so, and again requested a port to port passing. See TR at 72.

Meantime, aboard the CHELSEA, the vessel's Master, Captain Moran, who testified at the hearing by deposition, reacted to the MANZANILLO's proposal to pass port to port rather than starboard to starboard as previously agreed, with "shock". See Respondent's Exhibit 1 at 31, (hereinafter Resp. Ex.). Moran exclaimed, "No way. We can't make that." See Resp. Ex. at 27; TR at 98-102. He completely agreed with Appellant's rejection of the port to port passing proposal.

It is undisputed that Pilot Fernandez knew immediately that his proposed port to port passing arrangement had been rejected. Nevertheless, Fernandez did not reply; nor did he maneuver his vessel in such a way as to indicate an intention to revert to the agreed starboard to starboard passing. Instead, approximately four minutes later, at 23:53:30 hours, Fernandez turned sharply to starboard, and increased to full ahead to accelerate the rate of turn and notified Appellant of his actions. See D&O at 9, para. 23; TR at 73, 74. This resulted in the two vessels being at risk of collision, such that the collision could not be avoided by the actions of one vessel alone. See D&O at 39, para. 28; TR at 474, 475, 539. Appellant maneuvered to avoid a collision, and immediately communicated by radio to Pilot Fernandez his doubt that what Fernandez was doing would avoid a collision and requested him to "turn to port".

Appellant admits he did not sound the danger signal specified in COLREGS Rule 34 (d) before the collision, which occurred approximately two and a half to three minutes after risk of collision was evident. Pilot Fernandez testified that at the time he turned to starboard, precipitating a risk of collision, sounding the danger signal by either vessel would not have prevented the collision, and "there was nothing at that point the danger signal was going to tell [him] that he did not already know." See TR at 110, 111.

Following the issuance of the Decision finding that Appellant had violated COLREGS Rule 34, but finding that all the other charges had not been proved, the parties were given an opportunity to submit evidence relevant to an appropriate order/sanction. The I.O. submitted no additional evidence, and noting that Appellant had no prior disciplinary record either with the Coast Guard or the Florida State Pilotage Commission, recommended that the ALJ suspend Appellant's license for one (1) month

on four months probation with no outright suspension. The ALJ did not include in his Final Order, or in any other document in the record why the sanction he imposed exceeded the I.O.'s recommendation.

## BASES OF APPEAL

Appellant contends that: (1) under the circumstances in this case, COLREGS Rule 34 does not require sounding the danger signal; or (2) if the Rule does require a danger signal under the circumstances, the immediate radio communication of his concerns to Pilot Fernandez satisfies the intent of the danger signal; and (3) even if he violated COLREGS Rule 34 (d), the sanctions entered against his license are unwarranted, too severe, and excessively harsh.

## OPINION

Appellant contends that he did not have a duty to sound the danger signal under the circumstances of this case. He cites several cases (although no Commandant's Decisions on Appeal) in which the court held that where the peril is discovered so late as to render a signal useless, the failure to sound the danger signal was not a violation of the rule or negligence that produces liability for a collision. See, e.g., Nat'l Steel Corp. v. Kinsman Marine Transit Co., 369 F. Supp. 498, 511 (ED Mich. 1972), aff'd, 492 F2d 364 (6th Cir. 1974); Canal Barge Co. v. S/S. Nancy Lykes, 285 F. Supp. 135, 142 (ED La. 1968). According to Appellant, in such instances, a failure to sound the danger signal does not constitute a violation of COLREGS Rule 34. Thus, Appellant contends the rule only applies when sounding it might do some good to signal the other vessel that the one fails to understand the intentions of the other, or is in doubt as to whether sufficient action is being taken to avoid collision. He points to the case law interpreting the rule based on the court's understanding of the intent of the rule.

Rule 34 (d) of the International Rules for Prevention of Collision (COLREGS) provides, as follows:

> (d) When vessels in sight of one another are approaching each other and from any cause either vessel fails to understand the intentions of the other, or is in doubt whether sufficient action is being taken by the other to avoid collision, the vessel in doubt shall immediately indicate such doubt by

> giving at least five short and rapid blasts on the whistle. Such signal may be supplemented by a light signal of at least five short and rapid flashes.

Appellant's argument does not take account of the difference in purposes of license suspension and revocation proceedings under 46 U.S.C. § 7701 and maritime tort liability cases. License suspension and revocation proceedings have as their principal purpose furthering marine safety. See Appeal Decision 1822 (EVANS), 2581 (DRIGGERS). Maritime liability cases, on the other hand, have as their purpose fixing the parties' respective liabilities. This involves finding the cause(s), which contributed to the casualty that is before the court, and fixing the parties' responsibilities therefor. Thus, where there is a collision, but there is no damage or, there is no fault on the part of the vessel colliding with another one, there is no cause of action. See Marsden's Collisions at Sea, 1-17 (9th ed. 1934) and cases cited therein. In many cases, these two purposes coincide. In such cases, finding negligence, or violation of a rule or regulation that caused, or contributed to a collision will be judged by the same rules and standards in both proceedings. But, where as here, the allegation is a charge of misconduct involving a violation of a rule or regulation, the difference in purposes of the two proceedings becomes more stark.

Thus, in a maritime liability tort case involving a collision, the court's purpose and focus is on determining the faults of each party before it, *insofar as they caused or contributed to the collision*. Id. at 1. There is no liability for fault (negligence or violation of a rule or regulation) in the abstract. In a maritime tort case, if the "fault" could not be said to contribute to the collision, it is not relevant, and is typically dismissed. Id. at 29, and cases in fn. z. Often times (as in the cases cited by Appellant), this dismissal of such faults is couched in terms of there being no violation of the rule in question.

In a license suspension and revocation case, on the other hand, whether the misconduct caused or contributed to the collision is relevant, but it is not a *sine qua non* of the charge. The definitions in 46 C.F.R. Part 5, Subpart B do not contain an element of causing or contributing to a collision or other marine casualty. Thus, in a proceeding based on 46 U.S.C. § 7701, *et. seq*., there can be, as in this case, a charge of *misconduct*,

violation of a regulation, although it was found not to have contributed to the collision. See Appeal Decision 2587 (HUDSON).

Because the principal purpose of a license suspension and revocation is remedial with an emphasis on marine safety, the fact that the danger signal might not have imparted any knowledge to Pilot Fernandez that he did not already know, while relevant, is not determinative. The rule is mandatory in nature, unless Appellant could prove "special circumstances" that justified a departure from the Rules. See Rule 2 (b), 33 U.S.C. foll. § 1602. Appellant apparently recognized this burden. He attempted to carry it by contending that blowing the danger signal would be unsafe; he urged that personnel on the bow might not be able to hear radio communications if the danger signal had been blown. His expert so testified, relying on a finding by the NTSB in its report into the M/V Brightfield allision with the New Orleans Riverwalk on December 14, 1996. There, the Safety Board found that blowing the danger signal had prevented (or would have prevented) the bow watch from hearing the Master's radio communications to drop the Brightfield's anchors prior to the allision. However, Appellant's effort in this regard fell short of carrying his burden, because as the ALJ found, there was ample time – 2 ½ minutes between when the danger signal should have been sounded according to the plain terms of the rule, and the collision – enough time to both sound the danger signal and communicate to the bow. See, e.g., Appeal Decision 2587 (HUDSON).

Appellant also argues that his radio communications fulfilled the intent and purpose, and therefore, satisfied Rule 34 (d), notwithstanding that he did not blow the whistle as required by the plain terms of the rule. I rejected a similar contention in Appeal Decision 2503 (MOULDS). Additionally, in Appeal Decision 2572 (MORSE), the appellant contended that his shouting to the other boater (which was heard at the same time as a whistle signal) satisfied the requirement for a danger signal. I held that Rule 34 (d) is mandatory and shouting is no substitute.

For the reasons set forth, Appellant's first contention, that he did not violate Rule 34 (d), is rejected.

Appellant's second contention is that the sanction awarded was excessive. Appellant cites Appeal Decision 1998 (LE BOEUF), and Appeal Decision 1570 (CANNELL AND SINDA) in support of his contention. In LE BOEUF, I said, "[I]t is

well established that the degree of severity of an order is a matter peculiarly within the discretion of the Administrative Law Judge and will normally not be modified on appeal." In that case, I exercised my discretion to reduce the Order to one month suspension outright and two months suspension on twelve months probation, from three months suspension outright based on a comparison of similar cases. Appeal Decision 1570 (CANNELL AND SINDA) is somewhat similar to Appellant's in that I reduced a sanction of three months suspension on six months probation to an Admonition of record for failing to sound the danger signal, which did not contribute to a collision after finding that the ALJ's findings that other charges had been proved against Cannell's license had, in fact, not been proved. However, in that decision, which involved an appeal of Mr. Sinda's license case also, the ALJ had entered an admonition as to Mr. Sinda's license for a similar finding, thus establishing a benchmark on the facts in that case.

I have also said that, "[a]n order imposed at the conclusion of a case will only be modified on appeal if that order is clearly excessive or an abuse of discretion." See Appeal Decision 2618 (SINN). Appellant has not cited an Appeal Decision that is so similar to this one as to justify my finding the ALJ abused his discretion in selecting an appropriate Order. My independent review of the record in this case does not justify that relief either. I also note that the actual suspension awarded in this case is within the recommended range of orders in 46 C.F.R. § 5.569.

## CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. The ALJ's finding for the proven charge of misconduct, failing to sound the danger signal is correct. The ALJ's Final Order is within his discretion.

## ORDER

The Administrative Law Judge's Decision and Order dated May 26, 2000, is AFFIRMED.

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T. H. Collins

Signed at Washington, D.C. this 15th of March, 2001.