

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD

vs.

LICENSE NO. 666213

Issued to: JOHN C. MCCARTHY III

: DECISION OF THE
:
:
: COMMANDANT
:
:
: ON APPEAL
:
:
: NO. 2601

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By order dated February 9, 1996, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, revoked Appellant's merchant mariner s license upon finding proved a charge of *negligence*. The single specification supporting the charge was found proved. The specification alleged that appellant, while serving under the authority of his license as a pilot aboard the tankship COASTAL MANATEE, failed to navigate with due caution resulting in the grounding of the tankship COASTAL MANATEE.

The hearing was held in Savannah, Georgia, on November 7, 1995. Appellant was represented by counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of six witnesses. The Investigating Officer also introduced 12 exhibits into evidence. Appellant introduced into evidence the testimony of two witnesses in addition to his own testimony. Appellant introduced two exhibits.

The Administrative Law Judge issued a written Decision and Order (D&O) on February 9, 1996. He found the charge and supporting specifications proved, and stayed the revocation of Appellant s license for six months pending proof of completion of a training program. If respondent submitted proof of completion of the program at the end of the six-month period, the Administrative Law Judge indicated he would entertain a request to substitute an order providing for an outright suspension during the aforementioned six months plus an additional suspension of 12 months on 24 months probation. Otherwise, the revocation was to be in full force and final. The Decision and Order were served on Appellant on February 12, 1996. Appellant filed a timely notice of appeal on March 11, 1996, and perfected it on March 18, 1996.

APPEARANCE: Mr. Frederick Bergen, 123 East Charlton Street, Savannah, Georgia, 31401.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the above-captioned license as the pilot on the T/V COASTAL MANATEE. (Stipulation of Facts, Investigating Officer s (hereafter IO) Exhibit 12). This license qualified him to sail as First Class Pilot, steam or motor vessels of any gross tons upon the waters of the Savannah River, Georgia, from the principal harbor entrance buoy to the Port Wentworth Turning Basin.

The T/V COASTAL MANATEE was at all relevant times a United States-flag vessel. The COASTAL MANATEE is a 19,030 gross ton, single-skin tanker, 617 feet in length. On August 27, 1995, the vessel carried 121,964.09 barrels (5.12 million gallons) of light/medium grade oil.

On August 27, 1995, the T/V COASTAL MANATEE was making a coastwise voyage from Savannah, Georgia, to Lake Charles, Louisiana. (Transcript (hereafter TR) at 20). Between the approximate hours of 1600 and 2100 on that date, Appellant was the conning officer in charge of the safe navigation of the COASTAL MANATEE. (Stipulation of Facts, IO Exhibit 12).

During the inbound transit of the COASTAL MANATEE on the Savannah River, Appellant negotiated a port-to-port passing with the inbound M/V SAN ANTONIO in the vicinity of buoy No 24. (TR at 91-92). The SAN ANTONIO was being conned by Savannah Bar Pilot Capt. Harry Padgett III. Prior to the passing, Capt. Padgett informed Appellant of rainsquall activity in the vicinity of Jones Island Range. Squalls on the Savannah River are common in the summer months. (*Id.* at 88, 101-103, 130, and 186). Appellant did not ask Capt. Padgett for any details about the weather (*Id.* at 186-187). As the COASTAL MANATEE approached buoy No. 17, the vessel encountered a severe thunderstorm squall, which reduced visibility to zero (IO Exhibit 12) and whited out the radar (TR at 168-170).

At approximately 1921 hours, Appellant gave the helmsman a 10-degree right rudder command to make the turn from Tybee Knoll Cut Range to the Jones Island Range. (*Id.*). The COASTAL MANATEE s speed at the time was reduced from full bell to half bell. (TR at 52). At 1923 hours, the speed was further reduced from half bell to slow bell. (*Id.* at 53). Appellant maintained the 10-degree right rudder command for approximately three minutes until the squall subsided. (*Id.* at 170-176). At 1924 hours, Appellant gave the helmsman a command for hard left rudder, and found that the COASTAL MANATEE had run aground. (*Id.* at 68-69).

After 26 minutes aground, the COASTAL MANATEE was refloated. (*Id.* at 80). The vessel proceeded to an anchorage at the direction of the U.S. Coast Guard. (I.O. Exhibit 6). The grounding resulted in no damage to the COASTAL MANATEE (I.O. Exhibit 3), or in any pollution of the waters. (Respondent s Exhibits A, B).

Appellant was familiar with the maneuvering characteristics of the COASTAL MANATEE having conned her on prior occasions. (TR at 184). The propulsion, steering and navigational equipment of the

COASTAL MANATEE, including the radar, was functioning properly. (*Id.* at 44, 53-54, and 199-200). In conning the COASTAL MANATEE, Appellant did not use the traditional navigation tools of steering with the aid of the gyrocompass, the 3-minute rule, or dead reckoning. (*Id.* at 198-213). Additionally, Appellant did not use either the depth sounding equipment or the fathometer on the COASTAL MANATEE to assist in navigation of the vessel. (*Id.* at 209).

BASES OF APPEAL

Appellant's bases of appeal are that the Administrative Law Judge:

1. permitted the Coast Guard to "reopen" its case and call witnesses after the Coast Guard had rested its case, which denied Appellant due process;
2. found Appellant negligent when Appellant did no more than make an error in judgment at the time of the grounding;
3. was biased against Appellant, as was the Coast Guard's expert witness; and
4. accepted a "prohibited *ex parte*" recommendation from the Captain of the Port of Savannah in fashioning the orders, which, because the Captain of the Port did not testify, violated Appellant's right of cross-examination.

OPINION

I.

Appellant's first ground of appeal is based on the assertion that the Administrative Law Judge permitted the Coast Guard to "reopen" its case and call witnesses after the Coast Guard had rested its case, which denied Appellant due process.

In accordance with 46 C.F.R. § 5.701(b), only rulings on motions or objections not waived during the proceeding, clear errors on the record, or jurisdictional questions may be considered on appeal. In order to preserve such an issue on appeal, there must have been a valid motion or objection made at the hearing. At no time during the hearing did Appellant make any objection regarding the "reopening" of the Coast Guard's case. As this issue was not raised during the hearing, when evidence and testimony of witnesses from both sides could have resolved the matter, it cannot be raised for the first time on appeal. 46 CFR 5.701(b)(1); Appeal Decisions 2463 (DAVIS), 2458 (GERMAN), 2384 (WILLIAMS), 2376 (FRANK). Failure to object at the hearing waives the issue on appeal. (*DAVIS*), *supra*.

II.

Appellant's next basis of appeal is that holding a 10-degree rudder course when piloting through the Jones Island Range at the time the vessel grounded, as was done by the Appellant in this case, was at most an error in judgment and did not constitute negligence.

Pilots are held to a high standard of care. Appeal Decisions 2378 (CALICCHIO), 995 (SAUNDERS); Atlee v. Packet Co., 88 U.S. 389 (1874), Barbey v. S.S. Stavros, 169 F. Supp. 897 (1959). Atlee states the following regarding the duties of a pilot:

"The harbor pilot is selected for his personal knowledge of the topography through which he steers his vessel He must know where the navigable channel is He must also be familiar with all dangers that are permanently located in the course All this he must know and remember and avoid"

It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of he [sic] lives and property committed to their control, . . . we do not think we fix the standard too high." Pgs.396, 397 (D&O at 12).

The evidence showed that Appellant held a 10-degree right rudder course for three minutes in turning from buoy 17 to Jones Island Range. Appellant gave no order to steady up course for the Jones Island Range. (TR at 53, 73, 175-176 and 197-198). One of the Coast Guard s witnesses, a licensed Savannah River pilot who had been so employed for 18 years, testified that a turn from buoy 17 to the Jones Island Range could be safely sustained for a maximum of 15 seconds. He further testified that he could not conceive of a situation that would require three minutes to turn such a small degree. (TR at 104). In addition, the Coast Guard s expert witness, a licensed Savannah River pilot with 28 years experience, agreed. (*Id.* at 136-138). Moreover, the expert emphasized the imprudence of not giving an order to steady up course after a turn. (*Id.* at 155-156, 137-138, 297).

Appellant s expert witness was a retired pilot with 51 years experience who had never piloted the Savannah River (TR at 257-258), nor was an expert on the Savannah River (*Id.* at 258-259). This expert acknowledged that a pilot is a living chart (*Id.* at 258), that he s paid for his local knowledge (*Id.* at 232), that he knows the river better than anyone else except other pilots (*Id.* at 271), and that the crew relies on him to know the river. (*Id.*).

Appellant admitted that he did not know where he was upon entering the squall (TR at 175, 190), was trying to "feel [his] way" (*Id.* at 203) and was navigating "by the seat of his pants" (*Id.* at 175, 220). Appellant admitted that he spent several minutes after the squall hit trying to get a visual sighting of a buoy to the exclusion of other navigational aids. This conflicts with the guidance in regulations and with prudent seamanship. "The owner, master or person in charge of each vessel underway shall ensure that . . .[b]uoys alone are not used to fix the vessel s position . . ." 33 CFR § 164.11. Additionally, the Coast Guard s expert witness explained how the turn at Jones Island Range should have been negotiated in the circumstances in which Appellant found himself. (*Id.* at 130-135). "[I]f you come into conditions that cause you to lose visual cues, or the aid of the radar, . . .you don t forget to pilot the vessel by using basic navigational skills, the gyrocompass, and speed versus time." (*Id.* at 150).

Appellant admitted that he did none of the things that the evidence showed a professional pilot would normally do in the event visibility was lost. (*Id.* at 208, 219). The evidence shows that the position in

which Appellant found himself upon entering the squall was one of his own making, and that he did not respond in a reasonable fashion. Appeal Decisions 2516 (ESTRADA), 2325 (PAYNE). Comparing the facts in the case to the definition of negligence in 46 C.F.R. § 5.29, it is apparent that Appellant failed to perform an act (or, in this case, acts) that a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform. (*Id.* at 297-298). Appellant did not simply make an "error in judgment."

Additionally, Appellant disputes certain characterizations made by the Administrative Law Judge regarding the COASTAL MANATEE s course and distance outside the channel just prior to the grounding. The findings of the Administrative Law Judge, however, are amply supported in the record. (Regarding course: Course Recorder, Exhibit 10; TR at 70, 72-73, 149; Regarding distance outside the channel: TR at 126).

The factual findings of the Administrative Law Judge must be accepted unless inherently incredible or not supported by substantial evidence in the record as a whole. Appeal Decisions 2500 (SUBCLEFF), 2333 (AYALA), 2302 (FRAPPIER). As a corollary, if there is sufficient evidence to justify a finding, it is not required that the finding be consistent with all evidence in the record. Appeal Decision 2282 (LITTLEFIELD). Nor will the weighing of conflicting evidence by the Administrative Law Judge be reexamined on appeal if the findings of the Administrative Law Judge can be reasonably supported. Appeal Decisions 2390 (PURSER), Aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986); 2356 (FOSTER), 2344 (KOHAJDA).

III

The third basis of appeal is that the Administrative Law Judge and the Coast Guard expert witness were both biased against the Appellant. Appellant seems to characterize as "bias" and "unfairness" the Administrative Law Judge s refusal to accept Appellant s defense. There is no evidence in the record supporting a charge of bias by the Administrative Law Judge against Appellant. Nor is there evidence of bias of the Coast Guard s expert witness, who had once before testified against Appellant in a previous negligence/grounding case brought by the Coast Guard. (TR at 143). The Administrative Law Judge is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. The Administrative Law Judge, as the presiding official at the hearing, can fully observe the response, character and demeanor of the witnesses in issue. Appeal Decisions 2519 (JEPSON), 2474 (CARMENKE).

IV

Finally, in his appeal, Appellant contends that the Administrative Law Judge accepted a "prohibited *ex parte* recommendation of the Captain of the Port of Savannah who did not testify in this case and whom the Respondent was denied the opportunity and fundamental right to cross-examine." (Brief of Appellant at 17). In his D&O, the Administrative Law Judge said:

The Captain of the Port of Savannah has recommended a sanction which seems to satisfy the Coast Guard's function of providing for the safety of life and property at sea and also give Respondent the opportunity to improve his skills so that he may still perform as a pilot. This recommendation is being followed and the following order issued. (D&O at 20).

The Administrative Law Judge's Order adopted the recommendations contained in the Investigating Officer's Aggravation/Mitigation Summary (IO Exhibit 17). The Summary makes no mention of the Captain of the Port. In his Decision and Order, the Administrative Law Judge said, "The Coast Guard's recommended sanction is IO's Exhibit 17. Respondent's comments have been marked Exhibit G." (D&O at 6). Exhibit G did not address one of the Summary's recommendations, that of completion of a training program. (*Id.*).

The Administrative Procedure Act, 5 U.S.C. §§ 551-59 applies to these proceedings. 46 U.S.C. § 7702. The Act prohibits an Administrative Law Judge from consulting "a person or party on a fact in issue, unless on notice and opportunity for all parties to participate . . ." 5 U.S.C. § 554(d)(1). If a prohibited *ex parte* communication is made, the Administrative Law Judge is required to place either a copy of the communication (if it is written) or a memorandum stating the substance of the communication (if it is oral) on the record. 5 U.S.C. § 557(d)(1)(C).

In Appeal Decision 2487 (THOMAS), the appellant had contended that the Administrative Law Judge's order was issued without the fulfillment of an alleged promise made by the Commanding Officer, U.S. Coast Guard Marine Safety Office San Juan, Puerto Rico, that he would recommend probation for Appellant. In that case we held that the selection of an appropriate order is the sole responsibility of the Administrative Law Judge. 46 C.F.R. § 5.569(a). He is not obligated by any promises or representations made by any party. Recommendation and/or argument as to an appropriate order by either the Investigating Officer or the respondent is optional. (*Id.*).

No mention is made of an *ex parte* communication between the Administrative Law Judge and the Captain of the Port anywhere in the record. We will not infer that an *ex parte* communication occurred when there is no evidence of such a communication. Mere characterization by the Administrative Law Judge that the sanction awarded was based on a recommendation made by the Captain of the Port does not *ipso facto* mean that the two had a conversation about this case.

An order will not be disturbed unless it is obviously excessive or unless an abuse of discretion is proven. Appeal Decision 2423 (WESSELS). In Appeal Decision 2294 (TITTONIS), the Master of a containership was charged with negligently failing to navigate at a safe speed, negligently failing to use all available means to determine if a risk of collision existed, and negligently making a succession of small course alterations thereby contributing to a collision. The Administrative Law Judge found the charges and specifications true. In affirming the findings of the Administrative Law Judge, I held as follows:

Appellant finally argues that the sanction in this case, a twelve-month outright suspension

and a twelve-month suspension on probation for twelve months is excessive, harsh, and contrary to the policy and practice of the Coast Guard. The policy and practice of the Coast Guard is to promote, foster, and maintain the safety of life and property at sea. 14 U.S.C. 2, 88. *See Decision on appeal 1106 (LABELLE)*. The purposes of these proceedings include remedial action 46 CFR 5.01-20, (*See decision on Appeal 2167 (JONES)* and the cases cited therein) and the education of merchant mariners. The judge considered Appellant's lack of a prior record, his level of experience, and the surrounding circumstances in determining a sanction appropriate to him and this incident. The judge's order also reflects his consideration of the remedial nature of the proceedings. (Decision and Order, page 31). In the absence of a clear abuse of discretion, I will not modify a Judge's order. Nothing here justifies a lesser sanction.

TITTONIS, *supra*. In the instant case, there is nothing inherently unreasonable about the Administrative Law Judge's orders, including the order for the Appellant to complete a training program. The program ordered by the Judge includes:

- a. twelve trips as an Apprentice Pilot under the tutelage of a First Class Pilot on deep draft vessels (drafts greater than 25 feet) transiting from the Savannah River Sea Buoy to Savannah either in an inbound or an outbound direction. Six of these transits must be conducted after sunset. Two of such transits must be completed within the last sixty days of this six month period to ensure recency in respondent's regained proficiency; and
- b. completion of a certified Bridge Management Asset Training Course offered at any one of several Maritime Training Institutes throughout the country. (D&O at 21).

The entry of an appropriate order is peculiarly within the discretion of the Administrative Law Judge absent special circumstances. Appeal Decisions 2484 (Vetter), 2313 (STAPLES), 2240 (PALMER). In issuing the order, the Administrative Law Judge took into consideration that Appellant was found negligent in 1990 for improper navigation and again in 1993 for grounding a tank barge, for which his license was suspended (IO Exhibit 16; D&O at 5). Based on the facts of this case and Appellant's past record, not only do I find no impropriety in the order, I find the order to be appropriate and necessary. Appellant alleges no irreparable injury as a result of any of the orders or any injury because he could not cross-examine the Captain of the Port.

Based on review of the record in this case, there does not appear to be an improper *ex parte* communication that was taken into account by the Administrative Law Judge. However, even if there was error in the Administrative Law Judge's failure to specify the circumstances of the recommendation by the Captain of the Port, it was harmless error and Appellant was not thereby prejudiced.

CONCLUSION

The findings of the Administrative Law Judge are supported on the record by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable laws and

regulations.

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ORDER

The Decision and Order of the Administrative Law Judge dated 9 February 1996 is affirmed.

/S/

R. D. HERR

Vice Admiral, U. S. Coast Guard

Acting Commandant

Signed at Washington, D.C., this 15 day of June, 1998.