

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 503094 and Document No. Bk-007874
Issued to: William A. Pridgen

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2335

William A. Pridgen

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

By order dated 13 May 1980, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts suspended Appellant's license and document for four months, upon finding him guilty of negligence and misconduct. The specification of the negligence charge alleges that while serving as pilot of the M/V GREAT LAKES, under authority of the license and document above captioned, on or about 9 October 1979, Appellant navigated that vessel in a negligent manner by allowing it to allide with moored construction barges at the Brightman Street Bridge, Fall River, Massachusetts. The specification of the misconduct charge alleges that while Appellant was serving as pilot he did so without a proper endorsement on his license.

The Master of the vessel, Egil K. Pedersen, was also charged with negligence and misconduct.

The hearing was held in joinder with that of the Master at Providence, Rhode Island on 12 October 1979, 8 November 1979, 11 December 1979 and 4 January 1980.

At the hearing, Appellant was not present but was represented by professional counsel. A plea of not guilty to each and specification was entered in Appellant's behalf by the Administrative Law Judge.

The investigating Officer introduced in evidence the testimony of four witnesses and seven exhibits.

In defense, Appellant offered in evidence his own testimony and five exhibits. The Master of the vessel, also represented by Appellant's counsel, testified at the hearing. Two depositions were offered as evidence in mitigation.

At the 4 January 1980 hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charges

and specifications had been proved as to Appellant.

The Decision and Order suspending Appellant's license and document was served on 15 May 1980. Notice of Appeal was timely filed on 4 June 1980 and perfected on 20 August 1982.

FINDINGS OF FACT

On 9 October 1979 Appellant was serving as pilot of the M/V GREAT LAKES, a tank vessel, on her passage from the Shell Oil Docks on the Taunton River at Fall River, Massachusetts, to the Port of New York via the Taunton River and Mount Hope Bay, Massachusetts. Appellant was serving under authority of his Merchant Mariner's Document No. Bk-007874 and his License No. 503094. The license authorizes him to serve as master and first class pilot of steam and motor vessels on certain waters. Appellant does not have a pilotage endorsement on his license for Mount Hope Bay.

While Appellant was serving as pilot aboard the M/V GREAT LAKES on 9 October 1979, the vessel allided with a crane barge moored alongside the east fender system of the Brightman Street Bridge at Fall River, Massachusetts. Appellant was alone in the vessel's wheelhouse. The Master was below in his bunk.

BASES OF APPEAL

This appeal is taken from the order imposed by the Administrative Law Judge. Appellant contends that:

1. He was denied due process because he was not given sufficient time after service of notice of the time and place of hearing to prepare his defense;
2. The 12 October 1979 hearing was improperly held "in absentia"; thus denial of motions at subsequent parts of the hearing as untimely deprived Appellant of his right to a fair hearing; and
3. The conclusion of the Administrative Law Judge that Appellant was guilty of misconduct is wrong as a matter of law and is not supported by substantial evidence.

APPEARANCE: Elizabeth Blair Starkey, Esq.

OPINION

I

Appellant asserts that he was denied due process because he

was not given sufficient time after service of the notice of the time and place of hearing to prepare his defense. This contention is without merit.

The Investigating Officer served Appellant with the charges and specifications on board the M/V GREAT LAKES on 9 October 1979. The hearing date was set for 12 October 1979. Appellant was advised of the Coast Guard's authority to proceed with the hearing "in absentia" if he failed to appear as scheduled. The Investigating Officer also informed Appellant that any request for a continuance of the hearing must be made to, and ruled on by, the Administrative Law Judge. No such request was made prior to the hearing.

The hearing was open on 12 October 1979. Appellant had been working on a two week on-two week off schedule and was due to remain on the vessel for another seven days. Thus, he did not attend the hearing. He was represented by professional counsel retained by his employer. Counsel requested a continuance to enable Appellant to attend personally. The Investigating Officer requested that the proceedings be carried forward to the extent of allowing a subpoenaed witness, who was present, to testify. The Administrative Law Judge determined that Appellant had been duly served with notice of the hearing and that the hearing could therefore be conducted "in absentia." The Administrative Law Judge proceeded, without objection from counsel, and took testimony from the witness with cross-examination by counsel. The hearing was then continued on motion of Appellant's counsel.

The regulations set no minimum time between service of charges and the hearing. 46 CFR 5.05-25 says only that when service is by mail, it shall be sufficiently in advance to give the person charged a reasonable opportunity to prepare a defense. "[T]hree days' notice for hearing cannot be said, as a matter of law, to deny due process. Proceedings of this nature, understandably, must be opened expeditiously, and should be brought expeditiously to conclusion." Appeal Decision No. 1727 (ARNOLD). "Nevertheless, in determining the time and place for the hearing to be held (pursuant to 46 CFR 5.20-30), an Investigating Officer must give due consideration to scheduling difficulties over which a person charged has no control, such as a mandatory sailing." Appeal Decision No. 2228 (DAVIS). The Investigating Officer failed to do this. There does not appear to be any reason that the hearing could not have been delayed another 4 days to allow Appellant to be present. Nevertheless, under the circumstances of this case there is no prejudice to justify reversal.

In this case, Appellant had actual notice of the hearing and the record indicates no effort on his part to obtain a continuance

before the hearing. His interests at the first session were protected by counsel, who cross-examined the sole witness and moved for a continuance. The Administrative Law Judge proceeded with the hearing only as far as was necessary to avoid burdening the witness who was already present and waiting with having to depart without testifying and then having to return at a future date. If necessary, that witness could have been recalled; however, Appellant did not request this. At the second session of the hearing Appellant's new counsel conceded that the counsel at the first session of the hearing was authorized to represent Appellant. Three more sessions were held, beginning four weeks after the first session. Appellant was represented by counsel at all of them and appeared and testified at one. Under the circumstances, the Administrative Law Judge did not err in proceeding as he did. Appellant was not prejudiced by the short time between service of the charges and the date of the hearing.

II

Appellant argues that the 12 October 1979 hearing held "in absentia" was null and void. I do not agree.

At the initial hearing, Appellant was not present but professional counsel appeared to represent him. In the absence of a written authorization from Appellant for counsel to act on his behalf, it was appropriate for the Administrative Law Judge to ascertain that Appellant had been duly served with notice before proceeding in his absence, pursuant to 46 CFR 5.20-25. The Judge's use of the term "in absentia" to refer to Appellant's absence was simply descriptive. Appellant retained all his rights. A plea of "not guilty" was entered, preserving his right to defend. Counsel made a motion on his behalf and cross-examined the witness. Appellant was given notice of future hearings. In the second session, when Appellant's counsel objected to characterization of the proceedings as "in absentia," the Judge made it clear that he simply intended to preserve Appellant's rights fully.

Appellant contends that he was denied his rights to a fair hearing since the Administrative Law Judge denied motions made at the second session (by new counsel) on grounds that they have been made at the first session. The two motions, for a separate hearing and for change of venue, were ones for which timeliness is important. The Judge specifically raised the question of joinder at the initial hearing and counsel did not object. Appellant's new counsel conceded at the second session when he made the motion for separate trials that counsel at the first session was authorized to represent Appellant. In addition, the Administrative Law Judge considered both motions on their merits, and did not decide the motions "largely on the grounds that [they were] not timely," as

Appellant asserts.

As to proceeding in joinder, I note that counsel requested separation of the cases on behalf of the Master, not Appellant. The Administrative Law Judge's decision was not an abuse of discretion. Numerous cases in the past have been conducted in joinder. A typical case involves the master and the pilot involved in a particular incident in which, as in this case, their relative responsibilities were at issue. I approve this procedure, as it is efficient, ensures a just result as between the two parties, and enhances the fact finding process so essential to the remedial purpose of these proceedings, without curtailing the rights of the parties. I have specifically sanctioned joinder of proceedings involving not only the master and pilot of one vessel but also the pilot of a second vessel involved in the same incident. Appeal Decision No. 2096 (TAYLOR & WOODS).

Appellant alleges that "because the proceedings were held in joinder, there was only scant opportunity to show the standard of care to which Appellant should have been held. A review of the record shows that a great deal of emphasis was placed on Captain Pedersen's [the Master] lack of responsibility." Yet a review of the record also shows that Appellant had every opportunity to present a defense. He could have exercised his right to present a defense to whatever extent he thought was necessary. Appellant contends, moreover, "The hearing in joinder, with the two respondents represented by a single attorney, effectively precluded proper consideration" of the factors involved in Appellant's case. But Appellant was not obliged to be represented by the same attorney as the other respondent. He chose that course himself.

The motion for change of venue was specifically to move the proceeding from Providence, Rhode Island to New York after the testimony of the local witnesses was taken (after the second session), although there was some argument from counsel implying that he might have preferred all the sessions to be in New York. The Judge considered: that the motion had not been made until the second session, that the incident occurred near Providence, that the witnesses were near Providence, and that Appellant and his witnesses were located a relatively short distance from the hearing site. These were all appropriate factors, Appeal Decision No. 2143 (FOSTER, SEBASTIAN & CAMERON) and No. 982 (STRASSMAN). The Judge specifically noted that moving the proceeding to another port and another Judge after testimony had been taken would not be in the interest of justice, as it would deprive the eventual finder of fact of the opportunity to observe all the witnesses. The Judge did not abuse his discretion in denying the change of venue.

Appellant contends that the conclusion of the Administrative Law Judge that Appellant was guilty of misconduct for piloting the vessel without a proper pilotage endorsement is wrong as a matter of law and is not supported by substantial evidence. Appellant concedes that he did not possess the proper pilotage endorsement; however, he argues that custom and practice in the shipping industry, as well as Coast Guard policy, allow the steering of a vessel by someone who does not have a proper pilotage endorsement for an area, provided that someone "in effective control" possesses the necessary endorsement. Neither the Master nor Appellant had the proper endorsement. Nevertheless, Appellant contends that he was not responsible for determining whether or not the Master had the necessary endorsement.

Coastwise seagoing steam vessels such as the M/V GREAT LAKES are required to sail under the control and direction of pilots licensed by the Coast Guard. 46 USC 364. Appellant's employer testified that there is "a custom and practice in [the shipping] industry which permits [Appellant] to conn the vessel ... so long as the pilot with the proper pilotage endorsement is in the pilot house." However, assuming that this is correct, even if the Master had had the necessary endorsement, it would not help Appellant because at all relevant times the Master was below and in his bunk, whereas Appellant was in the wheelhouse alone and navigating the vessel. The vessel was clearly under the control and direction of Appellant. The Administrative Law Judge properly found Appellant guilty of misconduct.

CONCLUSION

There is substantial evidence of a reliable and probative character to support the findings of the Administrative Law Judge. The hearing was properly conducted in accordance with the applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts, on 13 May 1980 is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 9th day of December 1983.

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