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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

United States of America
United States Coast Guard

vs.

Merchant Mariner's License 954670
and Merchant Mariner's Document
No. 056-44-2478

Issued to:

ANTHONY PASSARO

Respondent

Docket No. 01-0423

PA Case No. PA01001111

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MARINE SAFETY OFFICE
SAN FRANCISCO

APPEARANCES:

LTJG Lance Lindgren,
LTJG Tim Callister,
For the Coast Guard
Anthony Passaro, Pro se
For the Respondent

BEFORE: **Hon. Parlen L. McKenna**
Administrative Law Judge

DECISION AND ORDER

This suspension and revocation proceeding was instituted by the United States Coast Guard in the discharge of its duty to promote the safety of life and property at sea. It was brought pursuant to the legal authority contained in 46 U.S.C. § 7701-7705 and was conducted in accordance with the procedural requirements of 5 U.S.C. § 551-559, Part 5 of Title 46 and Part 20 Title 33 of the Code of Federal Regulations (C.F.R.).

The hearing in this matter commenced in Alameda, CA on Tuesday, November 20, 2001. LTJG Lance Lindgren and LTJG Tim Calister, USCG duly authorized Investigating Officers of Marine Safety Office, United States Coast Guard, appeared for and represented the Coast Guard. Respondent appeared personally and elected to represent himself. A record of the hearing was made by Reed & Associates, a certified court-reporting firm. A list of the witnesses who testified and the exhibits entered into evidence are set forth in the Attachment A.

Respondent's Merchant Mariner's License No. 954670 and Merchant Mariner's Document No. 056-44-2478 issued by the U. S. Coast Guard, was produced for identification and examination afterwhich it was returned to the Respondent (See Government Exhibit No. 1).

On June 19, 2001, Coast Guard filed a Complaint pursuant to 46 U.S.C. 7703 and 46 C.F.R. 5.27 charging the Respondent with Misconduct as follows:

FACTUAL ALLEGATION:

- (1) That on the evening of February 8, 2001, while acting as duty engineer, you (Respondent) responded to an alarm indicating high water in the starboard forward bilge well at approximately 2245 and later at approximately 2320;
- (2) That in response to each high water alarm, you (Respondent) pumped the bilge water directly overboard. Each of the two overboard discharges was a direct violation of Liberty Maritime Corporation's company restrictions on pumping bilges as set forth in the Vessel Instruction Manual and the Chief Engineer's Standing Order.

On June 27, 2001, the Respondent filed his Answer admitting to the jurisdictional and factual allegations in the Complaint. Respondent further requested to be heard on the Coast Guard's proposed sanction of a twelve (12) months suspension, six (6) months outright, with the remaining six (6) months remitted on twelve (12) months probation.

The findings of fact and conclusions of law which follow are prepared upon my analysis of the entire record, and applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.

FINDINGS OF FACT

1. Anthony Passaro, the Respondent, was at all times the holder of a duly issued Merchant Mariner's License No. 954670 and Merchant Mariner's Document No. 056-44-2478. His license was issued at San Francisco Bay, CA on March 26, 2001. It authorizes him to serve as: Chief Engineer (Limited-Oceans) Steam, Motor, or Turbine of not more than 1600 gross registered tons (Domestic Tonnage), 3000 Gross Tons (ITC Tonnage) of any Horsepower upon oceans; Also Chief Engineer of uninspected fishing industry vessels of any horsepower; Also First Assistant Engineer of Steam, Motor, or Turbine Vessels of any horsepower; Also designated Duty Engineer. (See Additional Endorsements) Steam, Motor, or Turbine Vessels of any horsepower. His document was issued at Los Angeles, CA and authorizes him to serve as: OS, Any unlicensed rating in Engineer Department, Wiper, Respondent's document expires on December 10, 2002 (See Government Exhibit No. 1).
2. Timely and proper notice was given to the Respondent of the date, time and place of hearing.
3. Respondent was fully advised of his right to counsel and stated on the record that he wished to proceed pro se (See November 20, 2001 TR at page 6).
4. The Respondent filed an answer of "admit" to the Misconduct charge and the supporting allegations pursuant to 33 C.F.R. § 20.308.

5. The vessel instruction manual for the Motor Vessel Liberty Wa. specifically provides that discharge of bilge water is prohibited except when the oil content of the effluent without pollution does not exceed 15 parts per million. Moreover, company procedures require that any pumping of bilge water over the side be accomplished through a completely functioning oily water separator (OWS) (See Government Exhibit Nos. 6 and 7).
6. The Respondent was fully aware of this policy at the time he pumped the bilge water over the side bypassing the OWS (See November 20, 2001 TR at page 94).
7. The Respondent's answer of "admit" operates as an admission of all matters of fact as charged and constitutes a waiver of all non-jurisdictional defects and obviates the requirement for establishing a prima facie case (Appeal Decision No. 2363 – Arnold; Appeal Decision No. 2376 – Frank; Appeal Decision No. 2458 – German; and Appeal Decision No. 2480 – Lett).
8. The Respondent raised an affirmative defense that he was ordered to do the admitted acts of misconduct by the first assistant engineer - - Mr. Harold Evans (See November 20, 2001 TR at page 95). Based on the entire evidence of record, the Respondent's affirmative defense is rejected.
9. Mr. Evans testified that he instructed the Respondent to pump ballast or clean ocean water from the duct keel directly over the side (See November 20, 2001 TR at page 161). However, Mr. Evans emphatically denies ordering the Respondent to pump bilge (dirty water possibly containing oil) over the side bypassing the OWS (See November 20, 2001 TR at page 162).
10. I find Mr. Evans testimony to be credible.
11. Mr. Evans testimony was supported by the acting Chief Engineer Mr. Cle Collins (See November 20, 2001 TR at pages 117-124).
12. I find Mr. Collins testimony to be credible.
13. Mr. Evans testimony was supported by the Third Mate Mr. Richard Myles (See November 20, 2001 TR at pages 76-92).
14. I find Mr. Myles testimony to be credible.
15. I find that the Respondent's testimony that he was instructed by the first assistant engineer Mr. Harold Evans to pump bilge water over the side bypassing the OWS is not credible.
16. The Respondent has been fired or reprimanded on numerous occasions for failure to follow directions, inability to understand how to complete tasks, and failure to follow standard operating procedures (See Government Exhibit No. 12). Although the Respondent was not charged under 46 U.S.C. § 7703 (Misconduct) for any of these firings, these actions/omissions sound very much like "failure to obey master's/ship officer's order", "failure to obey master's written instructions", and "improper performance of duties related to vessel safety". Each of these offenses carry a recommended sanction of 1-3 months of outright suspension under 46 C.F.R. § 5.569.

17. In its Complaint, the Coast Guard proposed a sanction of three (3) months outright suspension, plus six (6) months remitted on twelve (12) months probation.

18. During the hearing, the Coast Guard requested a proposed sanction of a twelve (12) months suspension, six (6) months outright, with the remaining six (6) months remitted on twelve (12) months probation (See November 20, 2001 TR at pages 270-271). The Coast Guard stated that the basis for the increase in the proposed sanction was the Respondent's employment history and his unwillingness to accept responsibility for his actions.

19. 46 C.F.R. § 5.569 provides for a suggested range of sanctions based upon specific charges. For the type of misconduct proven herein, the range calls for a 1-4 months suspension. However, this regulation is only a guide and the ultimate sanction may be increased or decreased by the judge based upon the facts of each case.

20. Based upon all of the record evidence, I find that the Coast Guard's proposed sanction is reasonable and is hereby adopted. I find the Respondent's employment history to be quite troubling. Moreover, the Respondent's justification for his actions leads me to wonder whether he has willfully lied in this proceeding or is incapable of performing his job duties properly or both. Either way, there can be no doubt that the Respondent must complete assigned tasks as ordered, follow directions, and employ standard operating procedures or risk losing his profession.

21. During the hearing, I asked the Coast Guard to provide a diagram of the ship which included the duct keel, bilge tanks and pumping systems. That diagram was provided post-hearing and is hereby admitted into evidence (without objection) as Government Exhibit No. 14 (See November 20, 2001 TR at pages 30 and 39).

CONCLUSIONS OF LAW

1. The Respondent and the subject matter of the hearing are within the jurisdiction vested in the United States Coast Guard by 46 U.S.C. § 7703; the United States Administrative Procedure, 5 U.S.C 551 et seq.; 46 C.F.R. Part 5; and 33 C.F.R. Part 20.

2. The charge and the underlying specification is proved by plea and separately by the preponderance of the evidence submitted at the hearing.

3. The appropriate sanction in this case is a twelve (12) month suspension, six (6) months outright, with the remaining six (6) months remitted on twelve (12) months probation.

4. The Respondent's affirmative defense is hereby rejected based upon the weight of the record evidence.

DISCUSSION

The Respondent was charged in this case with "Misconduct" which is defined for the purposes of these remedial suspension and revocation proceedings in 46 C.F.R. § 5.27 as follows:

"Misconduct" is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required."


It was convincingly established by plea and separately by the preponderance of the evidence that on the evening of February 8, 2001, while acting as duty engineer, Respondent responded to an alarm indicating high water in the starboard forward bilge well at approximately 2245 and later at approximately 2320. That in response to each high water alarm, Respondent pumped the bilge water directly overboard. Each of the two overboard discharges was a direct violation of Liberty Maritime Corporation's company restrictions on pumping bilges as set forth in the Vessel Instruction Manual and the Chief Engineer's Standing Order.

The Respondent's prior disciplinary record, maintained by the U.S. Coast Guard, indicates a negative prior record. However, the Coast Guard submitted into evidence a summary of letters concerning Respondent's history of employment terminations (See Government Exhibit No. 12). As noted above, this history is quite troubling to say the least.

Based upon the foregoing Findings of Fact and Conclusions of Law and for good cause shown, it is

ORDERED

THAT Merchant Mariner's License No. 954670 and Merchant Mariner's Document No. 056-44-2478 issued to Anthony Passaro, the Respondent herein, and all other valid licenses and/or documents issued to him by the United States Coast Guard, or any predecessor authority, now held by him, are hereby suspended for twelve (12) months, six (6) months outright (effective the date of the issuance of this Decision and Order) with the remaining six (6) months remitted on twelve (12) months probation.



Hon. PARLEN L. MCKENNA
Administrative Law Judge

**Done and Dated this 19th day of March, 2002
Alameda, California**

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