

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 491561  
Issued to: Franklin DeForest PIERCE

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2204

Franklin DeForest PIERCE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 5 December 1979, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, after a hearing on various dates between 11 July and 26 November 1979, suspended Appellant's license for a period of six months upon finding him guilty of negligence. The single specification of the charge of negligence found proved alleges that Appellant, while serving as pilot aboard SS DEL ORO, under authority of the captioned document, did, on or about 13 June 1979, negligently fail to properly maneuver and control said vessel thus running it aground in the San Joaquin River between buoys numbers 49 and 51.

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

The Investigating Officer introduced into evidence the testimony of two witnesses and six documents.

In defense, Appellant presented no evidence.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of suspension for a period of six months.

The decision was served on 6 December 1979. Appeal was timely filed on 7 December 1979, and perfected on 5 February 1980.

#### *FINDINGS OF FACT*

On 13 June 1979, Appellant was serving as Pilot aboard SS DEL ORO then navigating in the San Joaquin River, California. Because of the disposition of this appeal, no further findings are necessary.

#### *BASES OF APPEAL*

This appeal has been taken from the decision and order of the Administrative Law Judge. Appellant has argued eight separate grounds on appeal. Because of the disposition of this appeal, only the first ground will be addressed.

APPEARANCE: Hall, Henry, Oliver & McReavy, San Francisco, California, by John E. Droeger, Esq.

#### *OPINION*

Appellant contends that the Coast Guard lacked jurisdiction to proceed because he was not "acting under authority of" his license. With this contention I agree.

46 CFR 5.01-35 provides, in part, "[a] person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document held by him either when the holding of such license, certificate or document is required by law or regulation or is required in fact as a condition of employment." For jurisdiction to exist, Appellant must have been required by (1) law, (2) regulation, or (3) as a condition of his employment to hold a Coast Guard issued license before he might have acted as Pilot aboard DEL ORO.

Appellant contends that DEL ORO was sailing "under register" and therefore, pursuant to the exception contained within R.S. 4401 (46 U.S.C. 364), was not required to carry a Federal pilot. There is no evidence within the record which rebuts this contention. Moreover, because the Investigating Officer apparently intended to rely solely upon a "condition of employment" theory of jurisdiction, I am forced to conclude that Appellant is correct, and the DEL ORO was not required by law or regulation to be under the control of a Federally licensed pilot.

The record establishes that the owner of DEL ORO does not require its pilots to hold a Coast Guard issued license. R.7. The Stockton Port District does make the holding of a valid Coast Guard license a prerequisite to issuance of a Stockton Pilot's Commission. R.18. However, as a result of the court's holding in *Soriano v. U.S.*, 494 F.2d 681 (9th Cir. 1974), "the 'condition of employment' test set out in 46 CFR 5.01-35 does not apply to the case of a State pilot acting pursuant to State authority under 46 U.S.C. 211." Decision on [Appeal No. 2094](#). The Administrative Law Judge apparently concluded that this exception to the "condition of employment" test does not apply because Appellant held a pilot's commission issued by an entity which is not a State agency, viz., the Stockton Port District. In drawing this distinction, the Administrative Law Judge has ignored the rationale behind the decision in *Soriano*. The court was concerned with the Coast Guard's impermissible extension of its authority to regulate pilots into an area traditionally reserved for State regulation as codified at 46 U.S.C. 211. Whether the state of California chooses to control pilotage through the enactment of all-encompassing legislation, as it has done for San Francisco Bay [see, e.g., Cal. Harbors & Nav. Code 1100 et seq.], or to delegate its authority to an entity such as the Stockton Port District [see, Cal. Harbors & Nav. Code 6299], is of no concern to the Coast Guard. What does matter is that the Coast Guard is precluded from stepping into the area of State pilot regulation encompassed within 46 U.S.C. 211. Hence, I must conclude that Appellant was not required to hold his Coast Guard issued license as a "condition of employment."

#### CONCLUSION

Because the Coast Guard lacked jurisdiction in this matter, the order of the Administrative Law Judge must be vacated.

*ORDER*

The order of the Administrative Law Judge, dated at San Francisco, California, on 5 December 1979, is VACATED, the findings are SET ASIDE, and the charge DISMISSED.

R. H. SCARBOROUGH  
VICE ADMIRAL, U. S. COAST GUARD  
VICE COMMANDANT

Signed at Washington, D. C., this 12th day of May 1980.

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