

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 574160
Issued to: Patrick E. BUTTNER

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2425

Patrick E. BUTTNER

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 17 December 1984, an Administrative Law Judge of the United States Coast Guard at Alameda, California, suspended Appellant's license for three months remitted on nine months' probation upon finding proved the charged of negligence. The specification found proved alleges that while serving as Pilot aboard the S.S. CORNUCOPIA, under the authority of the captioned document, on 1 June 1984, Appellant navigated the vessel in a negligent manner, resulting in an allision with and the dragging off-station of the San Francisco Bay, Blossom Rock Buoy (LLNR 592).

The hearing was held at Alameda, California, on 5 and 18 September 1984.

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

The Investigating Officer introduced in evidence six exhibits and the testimony of two witnesses.

In defense, Appellant introduced in evidence three exhibits, his own testimony , and the testimony of two additional witnesses.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been proved, and entered a written order suspending all licenses and documents issued to Appellant for a period of three months, remitted on nine months' probation.

The complete Decision and Order was served on 19 December 1984. Appeal was timely filed on 7 January 1985 and perfected on 5 November 1985.

FINDINGS OF FACT

At all relevant times on 1 June 1984, Appellant was serving as Pilot aboard the S.S. CORNUCOPIA under the authority of his license which authorizes him to serve as Master, Ocean Steam or Motor Vessels, Any Gross Tons; Radar Observer; and First Class Pilot on certain waters including San Francisco Bay and its tributaries. The S.S. CORNUCOPIA is a United States flag steam -propelled, steel-hulled tank vessel approximately 630 feet in length. The CORNUCOPIA held a Certificate of Documentation endorsed for "registry" and "coastwise license." On 1 June 1984, the CORNUCOPIA was enroute from Kenai, Alaska, to San Francisco Bay/Sacramento with a cargo of anhydrous ammonia.

Appellant boarded the CORNUCOPIA at the San Francisco Bar Pilot Station at 2202 on 1 June 1984, assumed control of the vessel as pilot, and proceeded inbound via the main ship channel, passing under the Golden Gate Bridge at 2241. The weather was clear, and visibility was unlimited. Ahead was Blossom Rock Buoy, a charted, moored steel buoy six feet in diameter. The buoy is painted green, and is fitted with a radar reflector, a wave-actuated bell and an interrupted quick-flashing green light. The buoy is anchored over Blossom Rock with an 8500-pound concrete sinker in 40 feet of water.

The CORNUCOPIA continued inbound at a speed of approximately 7 knots through the water. There was also a flood current of about 2 knots astern, resulting in a over-the-ground speed of approximately 9 knots. When the vessel was approximately 1/2 mile south and slightly east of Alcatraz Island, the master advised Appellant that radar showed the buoy to be 3/4 mile dead ahead. Approximately one and one-half minutes later, Appellant ordered 10 degrees left rudder and reduced the engine speed from slow ahead to dead slow ahead. The vessel responded "reluctantly" to port. Shortly thereafter, the master asked Appellant whether the vessel was going to clear the buoy. Appellant then realized that the vessel was in danger of striking the buoy and ordered 20 degrees left rudder. With the CORNUCOPIA on a collision course with buoy, which was only one or two ships lengths away, Appellant ordered hard left rudder and full ahead on the vessel's engines. He then ordered the engine the engines stopped, then hard right rudder, then full ahead. The CORNUCOPIA allided with the Blossom Rock Buoy on the starboard side in way of the No. 2 cargo tank, resulting in the buoy anchor chain becoming wrapped around the vessel's propeller. The vessel was required to anchor while divers cleared the buoy and chain from the propeller.

APPEARANCE: Robert C. Chiles, Esq., Hall, Henry, Oliver, and McReavy, 100 Bush St., Suite 1200, San Francisco, California 94104.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends:

1. The Investigating Officer failed to establish jurisdiction.
2. The proceedings did not conform to the enabling statute.
3. Certain actions of the Investigating Officer denied Appellant due process.

OPINION

I

Appellant urges that the Investigating Officer failed to establish that Appellant was acting under authority of his license at the time of the allision. This argument is without merit.

Jurisdiction in this case is premised on 46 U.S.C. 8502, which, at the time of this occurrence, provided, in pertinent part:

- (a) A coastwise seagoing vessel, when not sailing under register and when underway (except on the high seas) shall be under the direction and control of a pilot licensed under section 7101 of this title. . .

Appellant urges that, since the CORNUCOPIA's certificate of documentation was endorsed for both "registry" and "coastwise trade," there is no evidence that the vessel was not under registry at the time; therefore, the vessel was exempt from the federal pilotage requirements.

Jurisdiction, however, is a question of fact. The Investigating Officer is not required to disprove every possible hypothesis.

The Administrative Law Judge found that the CORNUCOPIA was, on the date in question, engaged in the "coastwise trade." (Finding of Fact No. 4, Decision and Order at p. 8.) The record contains ample evidence, including the uncontradicted testimony of the Master (T-19), to support this finding, and I will not disturb it. Accordingly, a federally licensed pilot was required, and jurisdiction was established.

II

Appellant next contends that the charges should be dismissed because the Coast Guard failed to respond to a Freedom of

Information Act (FOIA) request in which Appellant sought information concerning the identification and qualifications of a Coast Guard expert witness, copies of the Form CG-2692 filed by the vessel, statements from percipient witnesses, and copies of all pertinent documents including logs, bell books and vessel documents. Appellant's urges that he was denied a fair hearing because the Investigating Officer did not respond to this request within the time frame established by FOIA. (5 U.S.C. 552(a)(6).) This argument s without merit.

The cited provision of FOIA provided that, after receipt of a request, an agency must inform the requestor of its decision to grant or deny access to the requested records within ten working days. This does not require the agency to release the record within ten days. See 5 U.S.C. 552 (a)(6)(A)(i). Thus, the statute entitled Appellant only to an agency decision, and his contention that he was somehow denied due process in these proceedings is without support. Further, the issue is moot since Appellant has made no showing of any error committed by the Administrative Law Judge, nor of any prejudice he has suffered.¹

III

Finally, Appellant urges dismissal of the charges because the "Investigating Officer's conduct . . . included active interference with Appellant's right to receive a fair hearing." In particular, he complains that the Investigating Officer, in response to his FOIA request, represented that he had no "written statements" when in fact he had a tape recording of an interview with the master of the CORNUCOPIA and a Form CG-2692 produced by the master. He further complains that the Coast Guard failed to identify the expert witness intended to be used in rebuttal of Appellant's expert and that the Administrative Law Judge permitted this witness to remain in the hearing room during the testimony of Appellant's expert witness in violation of 46 CFR 5.20-60. These arguments are without merit.

As noted by the Administrative Law Judge, neither the statutes authorizing these proceedings nor the implementing regulations contain a right to discover the names of witnesses. "The Investigating Officer had no legal obligation to inform Appellant of the names of all witnesses to be called." Appeal Decision 2040 (RAMIREZ).

¹At the initial session of the hearing, Appellant was provided with all the information he requested except the records, if any, identifying the Coast Guard expert witness, who was expected to be called in rebuttal.

Appellant has made no showing that the Administrative Law Judge erred, or that Appellant suffered any prejudice as the result of the alleged conduct of the Investigating Officer. Indeed, at the hearing on 5 September 1984, the Administrative Law Judge ordered production of the master's taped statement. At the same time, the Coast Guard provided Appellant with a copy of the Form CG-2692. After a recess to permit review of the tape, Appellant's counsel cross-examined the master. Thus, any error was harmless.

The Administrative Law Judge, in response to a request from the Investigating Officer that the Coast Guard expert rebuttal witness be permitted to be present in the hearing room during the testimony of Appellant's expert witness, determined that the regulatory requirement to exclude witnesses did not apply to expert witnesses. (T-61.) I find no error or abuse of discretion in this determination. While the reason for excluding witnesses from the hearing room in these proceedings is immaterial, generally, witnesses are excluded to prevent fabrication of testimony by hearing what other witnesses say. Taylor v. United States, 388 F.2d 786 (9th Cir. 1967). Appellant has not shown or alleged any fabrication by the Coast Guard's witness. Assuming arguendo that the expert witness should have been excluded, absent a showing of specific prejudice, failure to exclude a prospective witness is not grounds for dismissal. RAMIREZ, supra.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the Decision and Order of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision of the Administrative Law Judge dated at Alameda, California, on 17 December 1984 is AFFIRMED.

J. C. IRWIN
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C. this 5th day of June, 1986.