

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 23791
Issued to: Allan F. Hitt, III

DECISION OF THE COMMANDANT ON APPEAL FROM DENIAL OF APPLICATION FOR
ATTORNEY'S FEES AND EXPENSES
UNITED STATES COAST GUARD

2312

Allan F. Hitt, III

This appeal has been taken in accordance with 5 U.S.C. 504 and 49 CFR Part 6.

By order dated 21 July 1982, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia denied Appellant's application for attorney's fees and expenses incurred as a result of defending himself against a charge of misconduct brought by the Coast Guard against his Operator's license. One specification supported the charge of misconduct. It was alleged that, while serving as Operator aboard tug LARK, under authority of the license above captioned, on or about 0650 on 11 April 1982, while transiting the Nanticoke River Entrance, Appellant wrongfully failed to perform his duties by leaving the tug bridge without proper relief. Appellant pled guilty to a concurrently filed negligence charge.

The hearing was held at Norfolk, Virginia on 11 May 1982. At the conclusion of the hearing, the Administrative Law Judge rendered an order in which he dismissed the misconduct charge and specification.

The written decision was served on 26 May 1982.

Appellant made timely application to the Administrative Law Judge for attorney's fees and expenses related to the R. S. 4450 proceeding pursuant to the Equal Access to Justice Act (EAJA); Pub. L. 96-481, 94 Stat. 2325, 5 U. S. C. 504; and the regulations implementing EAJA for the Department of Transportation at 49 CFR Part 6. The DOT regulations implementing EAJA state that eligible applicants may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding. 46 CFR 6.9. Appellant pled guilty to a negligence charge and defended against a charge of misconduct. The Administrative Law Judge dismissed the misconduct charge at the conclusion of the hearing; thus, Appellant seeks to recover one-half of the attorney's fees incurred in the administrative proceeding.

The Coast Guard filed an answer which sought to establish substantial justification for preferring the charges and thus relieving the government of liability for the fees and expenses claimed by the provisions of EAJA.

OPINION

I

The Administrative Law Judge repeated the stipulation of facts jointly sponsored by the parties which describe the essential facts of the case:

(1) respondent was serving under the authority of his license at the time and place charged in the specification; (2) respondent left the tug's bridge `for no more than four to five minutes in order to have a bowel movement in the vessel's head'; (3) weather was clear and visibility good; (4) `no close quarters situation with other vessels existed'; and (5) the helm was turned over to Earl Johnson and he was instructed to `hold a straight course towards a distant landmark.'
Decision and Order of May 26, 1982, p.10.

Testimony revealed that Earl Johnson was an unlicensed crew member (the engineer) aboard the tug and that he had worked aboard tugs in

various capacities for approximately thirty-five years.

As recited in the Decision of the Administrative Law Judge, the statute involved here (46 U. S. C. 405(b)(2)) reads in pertinent part:

An uninspected towing vessel in order to assure safe navigation shall, while underway, be under the actual direction and control of a person licensed by the Secretary to operate in the particular geographic area and by type of vessel under regulations prescribed by him.

The Administrative Law Judge opined that the preferment of the misconduct charge was reasonable in view of the statute, the regulation, and Commandant's Appeal Decision No. [2058](#) (*SEARS*) (May 10, 1976), upon which Appellant's defense was premised. The *SEARS* decision articulates certain circumstances which justify a temporary absence from the wheelhouse. In *SEARS*, the Commandant states (*id.* at pp. 5,6):

The temporary absence from the wheelhouse of the licensed operator (officer of the watch) on an uninspected towing vessel is not, in every case, an absolute violation of 46 U. S. C. 405(b)(2), as this absence does not necessarily constitute relinquishment of 'actual direction and control' over the vessel. If the circumstances are such that an unlicensed crew member can temporarily steer the vessel, without any appreciable increase in risk to its safe navigation, then the licensed operator may momentarily leave the wheelhouse (after giving appropriate instructions to the crewman) and still maintain 'actual direction and control.'

The Commandant further stated:

Thus, in a situation where the course is straight, the visibility good, and the traffic sparse, the licensed operator might allow an unlicensed mate to take the wheel for training purposes. And where the proven navigational competence of the crew member is high, the licensed operator might briefly leave the wheelhouse and still maintain actual control of the vessel.

In his decision, the Administrative Law Judge opined that the Commandant in *SEARS* was providing for the kinds of circumstances presented in the case at bar. The Administrative Law Judge found that Appellant's action did not violate the above mentioned law as interpreted by the *SEARS* decision and misconduct had not been proved. In his decision on Appellant's Application for Attorney's Fees and Expenses, however, he found that the Government's interpretation of the *SEARS* decision was reasonable. He noted:

Indeed, as frequently occurs in adjudicatory proceedings, reasonable people differ as to the correct application of conflicting interpretations of the law. Thus, it is the function of the judge to consider both arguments and, in his wisdom, to apply that which will best render justice. The failure of the Government to prevail on the misconduct charge does not mean that its interpretation of the law was *ab initio* unreasonable. Rather, here it was simply one of two possible alternatives. EAJA Decision and Order of 21 July 1982, pp.8,9.

II

The EAJA mandates an award when an agency fails to prevail in an adversary adjudication, unless the Administrative Law Judge determines that special circumstances render an award unjust, or the position of the agency "as a party to the proceeding was substantially justified." 5 U. S. C.504(a)(1).

Congress has characterized the "substantially justified" standard as one of reasonableness:

The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made.

S. Rep. No. 96-253, 96th Cong. 1st Sess. (1979) to accompany S.265, at 6; H. R. REP. No. 96-1418, 96th Cong. 2d Sess. at 10, *reprinted in* (1980) *U.S. Code Cong. and Ad. News*

4953, 4971.

And both Committees emphasize that:

The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial possibility of prevailing.

S. Rep. No. 96-253, *supra*, at 7; H. R. Rep. No. 96-1418, *supra*, at 11.

In 49 CFR 6.5(a), the Department of Transportation acknowledged the applicability of EAJA to R. S. 4450 proceedings. The regulations establish that "no presumption arises that the agency's position was unjustified simply because the agency did not prevail." 49 CFR 6.9. The Department of Transportation noted, in the preamble to its final rule, that this language, derived directly from the House and Senate Committee Reports, has been restated "in order to make perfectly clear that the test is not whether the government lost the case, but whether the government can show that its case had a reasonable basis in law and in fact." 48 FR 1069, January 10, 1983.

According to the legislative history of the Act, the language "substantially justified" was adopted from the standard in Rule 37, Federal Rules of Civil Procedure (F. R. Civ. P.). S. Rep. No. 96-253, *supra*, at 21; H. R. Rep. *supra*, at 18. The Senate Report expressly refers to the notes of the Advisory Committee on Civil Rules concerning the 1970 amendments to Rule 37(a)(4), (F. R. Civ. P.).

Rule 37(a)(4), (F. R. Civ. P.) provides that reasonable expenses, including attorney's fees, shall be awarded to the prevailing party on a motion for an order compelling discovery unless the court finds that the position of the losing party was "substantially justified." The standard was characterized by the Advisory Committee's notes on the Rule, as follows:

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. *But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.*

48 F. R. D. at 540 (emphasis supplied). Thus, according to the Advisory Committee, Rule 37(a)(4), (F. R. Civ.P) contemplates an award only where "no genuine dispute exists."

A brief survey of recent cases arising under Rule 37(a)(4). (F. R. Civ. P) reinforces the notion that fees are not awarded absent "captious or frivolous conduct." *Baxter Travenol Laboratories Inc. v. Lemay*, 89 F. R. D. 410 (S. D. Ohio 1981); an "indefensible" position (where the losing party had conceded the relevance of the documents withheld and that no privilege existed, and had failed to show that the requests were overly burdensome), *Persson v. Faestel Investments, Inc.*, 88 F. R. D. 668 (N. D. Ill. 1980); or failure to answer, object to or request additional time in response to a discovery request, *Shenker v. Sportelli*, 83 F. R. D. 365 (E. D. Pa. 1979); *Addington v. Mid-American Lines*, 77 F. R. D. 750 (W. D. Mo. 1978). The standards applied to Rule 37(a)(4), (F. R. Civ. P) have been "reasonableness," *SCM Societa Commercial S.P.A. v. Industrial and Commercial Research Corp.*, 72 F. R. D. 110 (D. Tex. 1976) or "good faith," *Technical, Inc. v. Digital Equipment Corp.*, 62 F. R. D. 91 (N. D. Ill. 1973).

Thus, by expressly adopting the Rule 37(a)(4), (F. R. Civ. P) standard in the Act, Congress has indicated its intent that fees should not be awarded against the government unless the government's position is found to be unreasonable or the government has sued or defended in a situation where no genuine dispute exists. Support for this position emerges as well from reported cases dealing with EAJA awards. The reasonableness test was

specifically adopted in *Alspach v. District Director of Internal Revenue*, 527 F. Supp. 225, 229 (D. Md. 1981).

III

With the passage of the Equal Access to Justice Act, Congress intended to ensure that agencies such as the Coast Guard would carefully evaluate their cases and elect not to pursue those which were weak or tenuous. At the same time, the language of the Act clearly protects the government agency when its case, though not prevailing, has a reasonable basis in law and fact. After careful review of the proceedings, I conclude that the dismissed charge and specification were reasonable in law and fact. The violation by Appellant of the previously cited statute and regulation was proved by the stipulated facts. The *SEARS* decision, however, articulated circumstances which might justify a temporary absence from the wheelhouse, such as occurred in the case at bar. The Coast Guard pursued the misconduct charge in the face of the *SEARS* decision, based upon the apparent belief of the Investigating Officer that the engineer who relieved Appellant was not qualified to do so within the meaning of *SEARS*. At the hearing, Mr. Johnson, the engineer, testified that although he could steer the tug, he had no navigational experience and could not read a chart. Further, while steering the given course, he in fact passed the black Wicomico River Entrance Buoy #1 off his starboard side instead of his port side, violating the most basic piloting fundamental of always passing black buoys on the port side when headed inland from sea.

The fact that the Coast Guard investigating officer's application of the *SEARS* case is more restrictive than that adopted by the Administrative Law Judge does not render it unreasonable. I do not take a position here on whether the Administrative Law Judge properly dismissed the case. The issue to be determined in this appeal is whether the Government was substantially justified in preferring charges against Appellant. I conclude that it was. Thus, I affirm the decision of the Administrative Law Judge denying Appellant's Application for Attorney's Fees and Expenses.

ORDER

The order of the Administrative Law Judge denying Appellant's Application for Attorney's Fees and Expenses, dated at Norfolk, Virginia on 21 July 1982, is AFFIRMED.

J.S. GRACEY
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D. C., this 22d day of May 1983.

***** END OF DECISION NO. 2312 *****

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