

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 151408
Issued to: Larry C. Hooton

DECISION OF THE VICE COMMANDANT ON APPEAL FROM
AN ORDER DENYING A REHEARING
UNITED STATES COAST GUARD

2339

Larry C. Hooton

This appeal has been taken in accordance with 46 CFR 5.25-15.

By order dated 11 December 1981, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended Appellant's license for six months, on twelve months probation upon finding him guilty of misconduct. The specification found proved alleged that while serving as a Licensed Operator aboard the P/C SEA HOOK, under the authority of the license above captioned on or about 19 July 1980, and 8, 19, 21, 23, 27 and 28 September 1981, Appellant transported passengers for hire onboard a foreign-built vessel, between Auke Bay, Alaska, and the vicinity of Point Retreat, Alaska.

The hearing was held at Juneau, Alaska, on 17 November 1981. Appellant appeared at the hearing without counsel and presented his evidence which consisted of his oral testimony. He offered neither documentary evidence, not evidence by deposition. He called no witnesses.

The Investigating Officer presented the testimony of two witnesses as well as six documents.

At the conclusion of the hearing the Administrative Law Judge rendered an oral decision in which he concluded that the charge and the specification had been proved. He then served a written order on Appellant, suspending his license for a period of six months, remitted on twelve months probation. The entire decision was served on 11 December 1981. No appeal was taken from the decision.

On 9 September 1982, Appellant petitioned the Administrative Law Judge to reopen the hearing on the basis of newly discovered evidence. In support of his petition, Appellant submitted a U.S. Customs Service ruling number 105764, dated 30 August 1982. In addition, he stated that at a rehearing he would provide testimony or depositions from pilot boat associations or owners as well as previous rulings of the Customs Service regarding the use of foreign-built vessels as pilot boats.

On 26 October 1982, the Investigating Officer submitted a brief in opposition to the granting of Appellant's petition. On 4 November 1982, the Administrative Law Judge denied Appellant's petition in an order issued at Seattle, Washington. On 2 December 1982 Appellant filed a timely appeal from that denial.

FINDINGS OF FACT

In his Decision and Order the Administrative Law Judge specifically found that:

(1) the pilots undertook to travel to or from the pilot station on Respondent's vessel the P/C SEA HOOK, (2) that Respondent accepted the said pilots in each instance as passengers, (3) that Respondent expected to and did receive a substantial benefit for so carrying each pilot, to wit, \$300.00 per trip, (4) that there was no intent by anyone concerned that the transportation be furnished gratuitously or as a matter of hospitality and (5) that the pilots were not in any way connected with the operation of the vessel, her navigation, ownership or business.

This decision was not appealed.

On 12 August 1982, Appellant requested a ruling from the U.S. Customs Service regarding whether a foreign-built undocumented pilot boat may be used to transport ship's pilots. In the facts supplied to the U.S. Customs Service he stated:

It should be noted that the ship's pilot is qualified and does assist in the operations and radio communications aboard the 42-foot undocumented pilot boat...

Customs ruling 105764 of 30 August 1982 was supplied in response to Appellant's inquiry. It states in pertinent part:

A foreign-built undocumented vessel owned by a United States citizen is used to transport the ship's pilots between points in Alaska. The pilot assists in "the operations and radio communications" aboard the undocumented vessel.

.....

Title 46, U.S. Code, section 289, and other statutes (see, e.g., Title 46, U.S.C., section 65i) prohibit the transportation of passengers between points in the United States in unqualified vessels, that is, foreign vessels and vessels lacking proper documentation. Section 4.50(b), Customs Regulations (19 CFR 4.50(b)) defines a passenger as any person carried on board a vessel who is not connected with the operation of such vessel, her navigation, ownership or business.

.....

Customs has held in several prior unpublished decisions that the use of a vessel as a pilot boat is not a use in trade. (See also *S.F. Bar Pilots Association v. United States*, T.D. 46787 (Cust. Ct. 1933)). Accordingly, a foreign-built vessel may be used as a pilot boat.

Previous Customs rulings have allowed the use of foreign-built

vessels as pilot boats because the pilots as owners and operators of the vessels were not passengers. See Customs Rulings 216.131 of 18 May 1968, 216.131 of June 1972.

BASES OF APPEAL

As bases for his appeal, Appellant urges that:

1. The Administrative Law Judge erred in refusing to re-open the hearing to allow him to present Customs ruling 105764 of 30 August 1982, previous Customs rulings, and testimony and depositions from other pilot associations regarding use of foreign-built pilot boats.

2. The Judge's decision is inconsistent with Coast Guard enforcement practices in the Ninth and Thirteenth Coast Guard Districts; and

3. "The Coast Guard's enforcement of 46 U.S.C. 289 in the Seventeenth Coast Guard District is inconsistent."

APPEARANCE: Larry C. Hooton, *pro se*

OPINION

I

Appellant first contends that the Administrative Law Judge erred in refusing to reopen the hearing. I disagree.

Customs ruling 105764 of 30 August 1982 does not provide justification to reopen the hearing. the facts on which it is based are different from those in the case at hand. In it the U.S. Customs Service continues to interpret the applicable law in the same manner as it did previously and as the Administrative Law Judge did. Neither are the previous Customs rulings and testimony from pilot associations which Appellant alludes to described, nor are reasons given why they could not have been presented at the hearing. They, therefore, provide no cause to reopen the hearing and will not be discussed further.

The Administrative Law Judge found that the pilots which Appellant transported "... were not in any way connected with the operation of the vessel, her navigation, ownership or business" and that Appellant received \$300.00 per trip for carrying each pilot. The facts on which the U.S. Customs Service based ruling 105764 included the pilot assisting in "the operation and radio communications" aboard the vessel and did not include the compensation given Appellant. These are critical differences.

The conclusion in the Customs ruling that a foreign-built vessel may be used as a pilot boat because such use is no a use in trade is based on existing law and previous Customs rulings. The law and previous rulings depend on the fact that pilots are not generally passengers on pilot boats because they own and operate them. As discussed above, that is not the situation here.

Before a petition to reopen a hearing is granted, 46 CFR 5.25-5 requires that the petitioner among other things state:

(3) ... why the evidence would probably produce a different result favorable to the person found guilty.

(4)... whether or no the additional evidence was known to the petitioner at the time of the hearing ... and why the petitioner, with due diligence, could not have discovered such new evidence prior to the date the hearing was completed.

46 CFR 5.25-10(b) states

The petition shall only be granted when new evidence is described which has a direct and material bearing on the issues, and when valid explanation is given for the failure to produce this evidence at the hearing.

Appellant has not satisfied these requirements.

II and III

In reference to his second and third bases of appeal,

Appellant has failed to describe any evidence, newly discovered or otherwise, in support of his contentions. In addition, he failed to raise those bases in his petition to have the Administrative Law Judge reopen his hearing. He may not raise them for the first time on an appeal from the denial of his petition. 46 CFR 5.25-15(a).

CONCLUSION

The Administrative Law Judge did not err in denying Appellant's petition to reopen the hearing.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington on 4 November 1982 is AFFIRMED.

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

Signed at Washington, D.C., this 18 day of Jan. 1984.

***** END OF DECISION NO. 2339 *****

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