

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 441494
Issued to: Robert J. LOWEN, BK-335952

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2074

Robert J. LOWEN

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 28 August 1975, and Administrative Law Judge of the United States Coast Guard at New York, New York, revoked the radar observer endorsement issued to Appellant and suspended his licenses for a period of six months upon finding him guilty of misconduct. The specification found proved alleges that while serving under authority of the license above captioned, on or about 13 August 1973, Appellant did wrongfully and knowingly obtain from the United States Coast Guard, at Coast Guard Marina Inspection Office, Baltimore, Maryland, a renewal of a radar endorsement to his Master's license No. 441494, through the presentation of a false document attesting to his satisfactory completion of the Radar Safety and Navigation Course at the Maritime Institute of Technology and Graduate Studies, which course he had in truth and in fact not satisfactorily completed; the false document concerned being, Maritime Institute of Technology and Graduate Studies' Certificate of Advanced Training Collision Avoidance Radar, dated 26 January 1973, which document, if valid, would have lawfully entitled him to said endorsement under the authority of 46 CFR 10.02-9(a) (5).

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 numerous documents including stipulations, depositions, correspondence, and publications, and the testimony of two witnesses.

In defense, Appellant offered in evidence similar documentary material and his own testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking the endorsement as radar observer and suspending all licenses issued to Appellant for a period of six months.

The entire decision was served on 5 September 1975. Appeal was timely filed and perfected on 20 April 1976.

FINDING OF FACTS

On 13 August 1973, Appellant, acting under authority of his license, applied for renewal of his license at the Marine Inspection Office, Baltimore, Maryland, and was issued a renewal license with a endorsement as radar observer.

The detailed findings necessary in the initial decision are not required here in view of the disposition to be made of the case. It is enough to add that Appellant had been given by one Hopkins, Dean of Administration at the Maritime Institute of Technology and Graduate Studies (MITAGS), a certificate of completion of training in the use of radar for collision avoidance, with the spoken assurances that Appellant, as a developer of the course and former demonstrator of equipment used in the school, was preeminently qualified for the certificate and that the certificate would be accepted by the examining officer at the Coast Guard office in satisfaction of Coast Guard requirements. Appellant presented the certificate accordingly, no discussion of it took place at the Coast Guard office, and the license was routinely

renewed.

Earlier, an instructor at MITAGS had been issued a renewal of license as master with radar observer endorsement at the same Baltimore office without demonstration or examination and without production of a certificate from any school. This fact was known to Appellant when he renewed his license.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that the evidence is insufficient to support a finding that the specification was proved, particularly with respect to the confusion of documents relied upon to establish the requirements for renewal of a license. In view of the disposition to be made, Appellant's other bases for appeal need not be reviewed.

APPEARANCE: Marvin E. Schwartz, Esq., New York City

OPINION

I

This case is similar in many respects to the one considered in Decision on [Appeal No. 2062](#) and the issues raised by Appellant are in great part the same. Issues dealt with there, however, need not be considered here because a variety of circumstances makes a different result necessary.

The case here was rested upon correspondence constituting an approval of MITAGS for the purpose of issuance of certificates, on a certain state of the Federal regulations governing radar observer endorsements for licensed deck officers, and on the testimony of the examining office who handled the transaction at the Marine Inspection Office at Baltimore when Appellant renewed his license.

In No. 2062 the Appellant was a party to the arrangements and understandings entered with the Coast Guard with respect to MITAGS and was chairman of the Board of Trustees overseeing the operation of the school. Appellant here, although he was an officer of the

union of which the other Appellant was president and had earlier assisted in the development of the use of the radar collision-avoidance techniques presented at the school, was not, or was not shown to be, a party of the arrangements and understandings, was not involved in the accompanying correspondence, and was not connected *ex officio* with supervision or operation of the school.

For Appellant to be found to have committed misconduct as alleged he must be shown to have actual or constructive notice that his actions were wrongful.

II

On 13 August 1973, the date of renewal of Appellant's license, the regulations applicable to renewals directed that an Officer in Charge, Marine Inspection, either require that the applicant "demonstrate" his knowledge of radar use or determine that the applicant was familiar with radar use through written examination. However, 46 CFR 10.02-9(e) (5) stated that " a certificate of successful completion of a radar simulator course...approved by the Commandant...is acceptable evidence of...continuing qualification...without the exercise or examination specified...." For the moment, this is the only regulation of concern. Quibbling aside, it directed that an applicant for a renewal of deck officer license with radar observer endorsement, in the situation of Appellant, either " demonstrate" his proficiency under subparagraph (3) present evidence in the form of a certificate from an approved school under subparagraph (5). The written examination called for by subparagraph (4), while undoubtedly an acceptable method of qualification, was not one of the *sine qua non* alternatives for Appellant.

It was the contention of the Investigating Officer (and the Administrative Law Judge so found) that MITAGS was a school approved under this provision, that the approval of the school's certificate was conditioned upon the recipient's actual attendance for a period certain in a course administered by the school, that the presentation of the certificate was in fact a claim to have so participated, that acceptance of the certificate by the examining officer implied reliance on the conditions imposed, and that Appellant was aware of all these elements or was on proper

constructive notice.

The facts in this case do not add up to the necessary knowledge on the part of Appellant that would render him culpable.

III

Looking first to the regulations, knowledge of which is chargeable to Appellant, for standards governing the conduct of an applicant in Appellant's position, we find that there were at the time two bearing upon certificates from schools in connection with radar observer endorsements. One of these, 46 CFR 10.05-46, specified certain schools as approved by the Commandant, MITAGS not being one of them, and indeed limited the possibility of approval to "Government operated schools." Had Appellant consulted this list he might have had reason to believe that MITAGS was not approved at all, in which case he could only have hoped to rely on an error at the Baltimore Marine Inspection Office for acceptance of the certificate. Had this been all, there would have been no support for the allegation necessary to the charges here that the document, "if valid, would have lawfully entitled [him] to [an] endorsement...." Necessarily, however, it was the Investigating Officer's position that this provision of the regulations was entirely unrelated to 46 CFR 10.02-9(e) (5); it is necessary to find here that MITAGS was in fact approved for the purpose. It is repeated that the regulation held solely applicable here, on this theory, while not on its face confined to Government operated schools, does not identify and individual school but speaks only of one "approved by the Commandant."

The vehicle for approval of the MITAGS course was a reply sent to a letter from Captain O'Callaghan, President of the Masters, Mates and Pilots, writing in his capacity as chairman of the Board of Trustees of the Maritime Advancement, Training, Education and Safety Program a trust which operates MITAGS. Thus letter was dated 27 January 1971. The reply was a letter dated 10 February 1971, addressed to Captain O'Callaghan as Chairman of the Board of Trustees, signed by the Chief, Officer of Merchant Marine Safety, at Coast Guard Headquarters. This letter authorized approval for "all men successfully completing your course of instruction outlined in your curriculum...." The approval stated was for purpose of both 46 CFR 10.02-9(e) (5) and 46 CFR 10.05-46(d). The

letter also declared that notice of the approval would be published in the Federal Register.

Appellant was not an immediate party to this correspondence, there is no evidence that he had knowledge of it or its specific contents, and no notice relative to the matter was published in the Federal Register.

The letter of 10 February 1971 mentioned a "curriculum" which had apparently been submitted independently of the letter of 27 January 1971, although no time period for the course is specified. In this connection two documents were also introduced into evidence without objection. One was a brochure celebrating the dedication of new physical facilities of MITAGS in February 1972, published some time after "mid-May" 1972. Although described as a "brochure of courses offered" it is, in pertinent part, merely descriptive of the equipment available at the school. The other document is a "summary" of a course, undated, outlining a schedule of four weeks. No connection with Appellant was established for this material.

A second exchange of correspondence relative to MITAGS approval took place in the latter part of 1972. On this occasion, one A. Sanford Limouze, Executive Director of MITAGS, by letter of 21 July 1972 requested approval of a two week course of training for purposes of 46 CFR 10.02-9(e) (5) and 46 CFR 10.05-46(d). No reference to the earlier correspondence or "approval" was made. The reply to this, dated 25 September 1972, authorized approval as to 46 CFR 10.02-9(e) (5) but "withheld" approval as to 46 CFR 10.05-46(d) until such time as the latter could be amended to eliminate the reference to "Government operated" with respect to schools. Again, no reference was made to the earlier correspondence or approval, nor did it appear that the earlier ("four week" course?) approval under 46 CFR 10.05-46(d) had been withdrawn.

No connection between Appellant and this correspondence was shown, nor was there publication in the Federal Register. Unlike the case of the 1971 correspondence, this correspondence was circulated among a limited Coast Guard internal distribution. The form in which it was circulated was not within an approved directive system pursuant to CG-199-1 (*The Coast Guard Directive System*) and constituted, of course, no kind of notice to

Appellant. (For this reason, in considering another document withdrawn from the hearing record, the Administrative Law Judge erred in taking official notice of another such "directive" to form the predicate for a finding of fact, since the document in question did not qualify as an approved Coast Guard directive.) Appellant, of course, had no knowledge of this material circulated through certain Coast Guard internal channels.

The two week course, purportedly approved on this occasion for purposes of 46 CFR 10.02-9(e) alone, was never effectuated. This leaves the actual state of affairs in some confusion and additionally militates against any inference of knowledge, actual or imputed by law, on the part of Appellant.

What is found then, in this record, is no more than that Appellant was told by a third party, one Hopkins, a Senior Instructor and Dean of Administration at MITAGS, that he was entitled to a MITAGS certificate and that the Coast Guard would accept it in lieu of demonstration or examination for a renewal of his license. The examiner for licensing in Baltimore did in fact routinely accept without question the certificate presented by Appellant. Here again the examiner was relying on internal Coast Guard advisory material of which Appellant could have no knowledge.

IV

It is true that the Administrative Law Judge was not impressed with Appellant's disclaimer of intent to deceive in his acceptance of the certificate and his presenting it to the Examiner. However, rejection of the testimony of Appellant as suspect, or even as inherently unbelievable, does not establish the truth of a contrary or contradictory proposition. Decision on [Appeal No. 894](#). There must be substantial evidence for the other proposition. The mere fact that Appellant was an officer of the Union who had earlier assisted in the setting up and demonstration of the simulators installed at the school does not establish privity to the unpublished correspondence between officers of the school itself and Coast Guard officials and unpublished instructions to Coast Guard personnel.

CONCLUSION

The evidence is insufficient to establish that Appellant "wrongfully and knowingly" obtained from the United States Coast Guard a renewal of his license through the presentation of a false document. Because of the action to be taken there is no need to look to the terms of the formulation of the Administrative Law Judge's order.

ORDER

The order of the Administrative Law Judge entered at New York, New York, on 28 August 1975, is VACATED. The findings are SET ASIDE, and the charges are DISMISSED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 20th day of September 1976.

INDEX

Application for License Renewal
fraud, knowledge needed

Coast Guard
unauthorized directives, effect of

Fraud
actual or constructive notice needed

Official notice
Coast Guard policy, unauthorized directives

Person Charged
rejection of testimony, not establishing opposite

Radar Observer
regulations for endorsement

Regulations

lack of publication, effect of

Substantial Evidence

not created by mere rejection of testimony

***** END OF DECISION NO. 2074 *****

[Top](#)