

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Michael A. FRYER 221093

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2521

Michael A. FRYER

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By his order dated 17 August 1990, an Administrative Law Judge for the United States Coast Guard at Tampa, Florida suspended Appellant's license for six months, remitted on twelve months probation, having found proved the charges of misconduct and violation of law.

The specification supporting the charge of misconduct alleged that Appellant, while serving under the authority of the above-captioned license as operator of the M/V PRINCESS XANADU OF MONACO (M/V PRINCESS XANADU) on 3 February 1990, operated said vessel without a Certificate of Inspection while carrying more than six passengers.

The specification supporting the charge of violation of law alleges that Appellant, on 3 February 1990, operated the M/V PRINCESS XANADU in the coastwise trade. The vessel has a Certificate of Documentation endorsed only for pleasure.

The hearing was held at Tampa, Florida on 19 and 20 April 1990 and on 10 May 1990. Appellant was represented at the hearing by

professional counsel. At the hearing, Appellant entered an answer of "deny" to the charges and specifications.

The Investigating Officer introduced in evidence 32 exhibits and the testimony of eight witnesses. In defense, Appellant offered in evidence 36 exhibits, the testimony of 10 witnesses, and his own testimony.

The Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been found proved. Subsequently, the Administrative Law Judge issued a written order on 17 August 1990 suspending Appellant's license for a period of six months remitted on 12 months probation. The record does not reflect when the Decision and Order was served on Appellant. However, the record does reflect that Appellant filed a notice of appeal on 29 August 1990 and perfected his appeal by filing an appellate brief on 3 October 1990. Accordingly, absent evidence to the contrary, Appellant's appeal is considered timely and properly before the Vice Commandant for review.

FINDINGS OF FACT

On 3 February 1990, Appellant was serving as Operator on board the M/V PRINCESS XANADU under the authority of Coast Guard issued license No. 221093. Appellant's license authorized him to serve as operator of mechanically propelled passenger vessels as defined in the Act of August 26, 1983 of not more than 100 gross tons upon the Atlantic Ocean, Gulf of Mexico not more than 100 miles offshore between St. Mary's River, Georgia and Rock Island, Florida. The license was issued by the Coast Guard to Appellant at Miami, Florida on 24 September 1985.

The M/V PRINCESS XANADU, O.N. 660847, 81 gross tons, built in Holland in 1966, is documented under the laws of the United States and is authorized under its Certificate of Documentation to be used only for pleasure.

The M/V PRINCESS XANADU was originally purchased by Appellant and his wife as a joint venture. At all pertinent times, the documented owner of the M/V PRINCESS XANADU was Bay Area Charter and Marine Service, Inc. (Bay Area, Inc.). Appellant's wife, Joan M. Fryer is the President and sole stockholder of Bay Area, Inc., doing business as (d/b/a) Royalty Yacht Charters and maintaining an office in St.

Petersburg, Florida.

Appellant is the President and sole stockholder of Cruise Management Services, Inc. (CMS) which maintains its office in the same location as Royalty Yacht Charters. These two business entities also shared expenses and employees.

The function of Bay Area Inc. was to solicit charters for the M/V PRINCESS XANADU for parties of up to 60 individuals. The function of CMS was to provide support services for the vessel, including manning, supplying and fueling.

In January, 1987, Appellant and a Vice President of Tropicana Products, Inc. (Tropicana) negotiated a long-term agreement for the charter of the M/V PRINCESS XANADU. The terms of the agreement reflected that over a five year period Tropicana would receive the use of the vessel for seven days per year (35 total days over the five year period) in consideration of defines small passenger vessel as a vessel of less than 100 gross tons carrying more than 6 passengers. Under the provisions of 46 U.S.C. 3301 and 3311, respectively, a small passenger vessel is subject to inspection and is required to have a Certificate of Inspection. Additionally, under the provisions of 46 U.S.C. 12110, a documented vessel may not be engaged in the coastwise trade of carrying passengers if its Certificate of Documentation is endorsed only for pleasure.

Appearance: Nils Linfors, Jr., Esq., Hayden & Milliken, 5915 Ponce de Leon Blvd. #63, Miami, FL 33146.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's bases of appeal are as follows:

a. The Administrative Law Judge erred in finding that the Coast Guard was not estopped from pursuing the Suspension and Revocation Proceedings considering all the facts and circumstances;

b. The findings of proved of the charges of misconduct and violation of law are not supported by the evidence.

OPINION

I

Before addressing Appellant's stated bases of appeal, an issue must be raised *sua sponte* regarding the charge of violation of law. The supporting specification states:

In that you while serving as aforesaid, on aforesaid vessel, on or about 2000 hours, 3 February 1990 did employ the vessel, documented for pleasure use only, in the coast-wise trade by carrying passenger(s) in Sarasota Bay, FL.

The specification, while alleging a violation of law, fails to state, with specificity, the particular law violated. A specification must be sufficiently adequate to enable the respondent to identify the offense so that he will be in a position to prepare a defense. Appeal Decision [2386 \(LOUVIERE\)](#), Appeal Decision [2277 \(BANASHAK\)](#), Appeal Decision [2174 \(TINGLEY\)](#).

However, the record reflects that Appellant, represented by professional counsel, did not object to the charge and specification at the hearing. Furthermore, the record reflects that Appellant fully understood the gist of the charge and specification and was able to develop a reasonable, cogent defense. There may be no subsequent challenge of issues which are actually litigated, if there was actual notice and opportunity to cure surprise. Appeal Decision [2386 \(LOUVIERE\)](#), Appeal Decision [2166 \(REGISTER\)](#), Appeal Decision [2509 \(BRYANT\)](#).

Accordingly, the charge of violation of law will stand.

II

Because of the disposition of this case, Appellant's basis of appeal regarding the doctrine of estoppel need not be discussed.

Upon a thorough review of the record, I concur with Appellant that the finding of proved to the charge of misconduct is not supported by substantial evidence.

Appellant claims that the evidence in the record reflects that a bonafide bareboat charter agreement existed between Royalty Yacht Charter, Inc. and the charterer, Tropicana. Appellant urges that the owner of the M/V PRINCESS XANADU divested itself of command, possession and control of the vessel. He further claims that the charterer understood the nature of the bareboat charter and fully and knowingly accepted control and responsibility as an owner *pro hac vice*.

I agree. The record reflects that although Bay Area, Inc. is the documented owner of the vessel, Appellant himself personally acted as charter agent and maintenance manager for the vessel. Appellant, rather than a representative of the owner, Bay Area, Inc., negotiated charter agreements and detailed arrangements of charters. [TR Vol. B, pp. 8, 75]. Appellant also interviewed and hired employees including the vessel's engineer and the tour director. [TR Vol. B, p. 58; Vol. A, pp. 92-93]. Furthermore, Appellant, rather than a representative of Bay Area, Inc., authorized payment for vessel repairs and parts even though the checks were drawn on Bay Area, Inc.'s account. [TR Vol. B, p. 63].

In fact, representatives of Tropicana negotiating with Appellant believed him to be the owner. The testimony of Tropicana's attorney who negotiated terms of a charter agreement at a meeting with Appellant reflects that Appellant's conduct was ostensibly that of the owner of the vessel. [TR Vol. B, p. 8]

Additionally, former employees acknowledged that Appellant, rather than any representative from Bay Area, Inc., exerted significant control over the M/V PRINCESS XANADU - control normally reserved to and exerted by the owner. The former cruise director of the vessel indicated that Appellant controlled all aspects of the operation and chartering of the vessel, issuing all directives and orders. [TR Vol. A, p. 114].

Moreover, the record reflects that the actual President (sole shareholder) of the corporation owning the vessel, Joan Fryer, was not actively involved with the operation of the vessel, its chartering or the management of the charter company. [TR Vol. A, pp. 26, 92-93].

The foregoing clearly demonstrates that Appellant served as the charter agent, employment agent and director, supervisor of all maintenance, disbursing of funds and vessel operator. Notwithstanding

the fact that Appellant was the ostensible owner of the M/V PRINCESS XANADU, the crucial issue is whether control of the vessel was transferred to the charterer, Tropicana, thus creating a bareboat charter. In this regard, the existence of a valid bareboat charter is determined by the charter agreement "in light of the surrounding circumstances and the manner in which they are treated by the parties." Appeal Decision [2363 \(MANN\)](#).

The testimony of the Tropicana Vice-President, who actually negotiated the charter agreement and represented Tropicana, reflects that Tropicana did fully understand and accept that it was the owner *pro hac vice* of the vessel.

Q So, you are telling the Court that you knew that when you signed the contract Tropicana was assuming total control and responsibility of that vessel during the period of the charter?

A Yes, we understood that. That's what we challenged and questioned and then ended up accepting reluctantly, but yes [TR Vol. A, pp. 59-63].

Q Now, didn't Mr. Fryer tell you that in order for him to--or rather in order for Tropicana to bareboat the charter, that you had to assume the responsibility, control, navigation and possession of the vessel and that if you didn't do that, he would not charter the boat to you?

A I don't remember his exact words, but in fairness, that was the message that we received. [TR Vol. A, p. 51]

On this issue, it is significant that subsequent to executing the five year commitment to charter the M/V PRINCESS XANADU, Tropicana attempted to amend the charter, not desiring to retain the liabilities reflected in the language of the charter. Appellant, negotiating as the ostensible owner, refused to agree to such changes. Tropicana, however, willingly continued to operate under the charter agreement since under the charter's provisions, it would have lost money had the agreement been terminated. [TR Vol. B, pp. 29, 30]. This amounted to a business decision by Tropicana contrary to the advice of its Corporate Counsel. The record provides no evidence that Tropicana executed the charter agreement under duress or coercion.

Tropicana's Corporate Counsel who negotiated with Appellant regarding the proposed amendments, testified that notwithstanding the terms of this contract, in her opinion, Tropicana did not have control and possession of the vessel. [TR Vol. B, pp. 37-40]. However, the Counsel's opinion is not factually supported by the record. On the contrary, Tropicana procured additional property and personal injury insurance to cover the liability and risks concomitant with becoming an owner pro hac vice. [TR Vol. A. p. 55, Vol. B, pp. 11-12].

The record also reflects that CMS provided the services of supplying, fueling and manning the vessel, with Appellant himself serving as the vessel operator. However, the record also reflect s that Tropicana was given the unfettered choice to select any qualified crew of its choosing and to supply the vessel itself if it so desired. [TR Vol. A, p. 68; Respondent Exhibits B, C].

Furthermore, it is noted that although Appellant's service as the operator may be indicia of retention of control by the owner, that fact alone is inconclusive herein where the record reflects that the charterer had the choice of selecting any operator other than Appellant.

Finally, it is noteworthy that Appellant produced as witnesses several previous charterers. All of these witnesses testified that, regarding their charters, they had been fully advised by Appellant that all control and responsibility for the vessel was transferred to them and that they were free to employ any crew or operator of their choosing. [TR Vol. C, pp. 44-79]. This testimony was consistent with and paralleled the evidence in the case herein.

Based on the foregoing, although there is an indicia of retention of control by Appellant, the Government has not proven by substantial evidence that Appellant retained control of the M/V PRINCESS XANADU to a degree sufficient to vitiate the bareboat charter.

This opinion is consonant with previous decisions regarding bareboat charters. See, *Appeal Decision MANN, supra, Appeal Decision [2496 \(MCGRATH\)](#); Appeal Decision [2490 \(PALMER\)](#).*

Each case involving an alleged bareboat charter must be independently examined with particular regard to the intentions of the pertinent parties and with regard to the conduct of the parties in the

execution of the purported bareboat charter. *United States v. Shea*, 152 U.S. 178, 189, 14 S. Ct. 519, 122 (1894).

MANN, MCGRATH, and PALMER, *supra*, are distinguished in that the purported charterer did not fully understand the nature of the bareboat charter agreement executed and did not consciously accept control of the vessel as an owner pro hac vice. Additionally, in those cases, the vessel owner clearly misrepresented aspects of the charter agreement and the issues of responsibility, liability and control.

Finally, in MCGRATH, *supra*, the owner retained control of the vessel by conduct that was inconsistent with the provisions of the charter agreement. In that case, the owner controlled the operational aspects of the voyage notwithstanding that the charterer had employed an operator other than the owner. In PALMER, *supra*, the charterer was not given the choice to select the operator and crew. Here, Appellant was voluntarily selected by the charterer to serve as the vessel's operator. Appellant's subsequent conduct as the vessel operator was consonant with the agreements executed between Appellant and the charterer, Tropicana.

In the case herein, contrary to the aforementioned cases, the evidence reflects that notwithstanding his position as the ostensible owner, Appellant fully advised a knowledgeable and educated corporate charterer of all of the aspects and elements of a bareboat charter. That charterer freely executed the agreement with the understanding that it had become the owner pro hac vice.

Since the evidence supports the existence of a valid bareboat charter, the operation of the vessel is considered recreational. Accordingly, a Certificate of Inspection was not required as stated in the specification supporting the charge of misconduct. Furthermore, as a recreational vessel, the M/V PRINCESS XANADU was not required to have a Certificate of Documentation endorsed for the Coastwise Trade as stated in the specification supporting the charge of violation of law.

CONCLUSION

The finding of proved to the charges and specifications of misconduct and violation of law of the Administrative Law Judge is NOT

supported by substantial evidence of a reliable and probative nature.

ORDER

The Decision of the Administrative Law Judge dated in Alameda, California on 17 August 1990, is VACATED, the findings are SET ASIDE and the charge and specification DISMISSED.

/S/

MARTIN H. DANIELL

VICE ADMIRAL, U. S. COAST GUARD

VICE COMMANDANT

Signed at Washington, D.C., this 15TH day of February, 1991.

2. PLEADINGS

2.54 Objections

Necessity of raising at hearing

2.90 Specification

Sufficiency of; must state law violated;

Offense must be stated with specificity;

4. PROOF AND DEFENSES

4.32 Due Process

Deficient specification not violation where
notice provided by evidence

6. MISCONDUCT

6.360 Violation of Rule

Failure to have Certificate of Inspection
passenger vessel

11. NAVIGATION

11.14 Certificate of Inspection

Bareboat charter obviates need for

DECISIONS CITED: Appeal Decisions: 2386 (LOUVIERE); 2277
(BANASHAK); 2174 (TINGLEY); 2166 (REGISTER); 2509 (BRYANT); 2362
(MANN); 2496 (MCGRATH); 2490 (PALMER)

STATUTES CITED: 46 USC 7702; 46 USC 2101(35); 46 USC 3301; 46 USC
3311; 46 USC 12110;

REGULATIONS CITED: 46 CFR 5.701;

FEDERAL CASES CITED: U.S. v. Shea, 152 U.S. 178, 14 S. Ct. 519 (1894)

***** END OF DECISION NO. 2521 *****

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