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10 November 2005

## MEMORANDUM

From: Chief Administrative Law Judge

Reply to G-CJ Policy Letter 05-02  
Attn of: G Jordan  
202 267-2940

To: Distribution

Subj: APPROPRIATE SANCTIONS IN DRUG CONVICTION CASES

Ref: (a) Pub. L. 108-293, Title IV, § 402 (Aug. 9, 2004)  
(b) H.R. CONF. REP. NO. 108-617  
(c) 46 CFR 5.59  
(d) 46 U.S.C. 7704 (2003)  
(e) Draft MSM

1. **Purpose.** This policy letter sets out Coast Guard ALJ Program policy concerning the proper interpretation of 46 CFR 5.59 in light on the amendments to 46 U.S.C. 7704(b). This regulation still mandates revocation in Drug Conviction Cases while the statutory language has been changed to permit suspension or revocation in such cases. 46 CFR 5.59 should be considered to be in full force and effect and revocation is the only appropriate sanction in the absence of a settlement agreement or a proposed sanction that is less than revocation.

2. **Background.** Prior to 1984, the statute concerning Drug Use and Drug Convictions (46 USC 239a) stated that the Coast Guard may revoke merchant mariner credentials in such cases. Coast Guard policy and pertinent regulations mandated revocation. The NTSB found that revocation was discretionary on the part of the Commandant and that the regulations only mandated revocation on the part of the ALJ. As a result, the statute was amended in 1984. 46 USC 7704 mandated revocation in all drug use and conviction cases except in drug use cases where cure was established. Subsequently, Appeal Decision 2335 (Sweeney) (198X) and its progeny established a regime for establishing cure. A disconnect was seen because cure was not available in cases where a mariner was convicted of possession of personal use amounts of drugs. A legislative fix was proposed and the result was HR 2443.

a. H.R. 2443 became law on August 9, 2004, when the President signed the Coast Guard and Maritime Transportation Act of 2004 ("Coast Guard Authorization Act"). The Coast Guard Authorization Act amended 46 U.S.C. 7704(b) by inserting "*suspended or*" after "*shall be.*" See Pub. L. 108-293, Title IV, § 402 (Aug. 9, 2004) (Reference (a) and Enclosure (2)). The new law now provides for suspension or revocation if it is shown at a hearing that a holder of a license, certificate of registry, or merchant mariner's document was convicted of violating a dangerous drug law of the United States or of a State within 10 years before the beginning of the proceedings. Id.;

b. Congressional intent illustrates that paragraph (b) was specifically amended in order to provide the ALJ to approve settlement agreements when drug convictions cases involve minor drug offenses. See H.R. CONF. REP. NO. 108-617, at 78 ("The Coast Guard seeks the discretion

to suspend a mariner’s credentials in dangerous drug law conviction cases. Use of that discretion will allow the use of Settlement Agreements to resolve cases involving minor drug convictions.”)

- c. The purpose for the amendment was set out in the Conference Report as follows:

*Section 402. Removal of Mandatory Revocation for Proved Drug Convictions in Suspension and Revocation Cases*

Section 402 of the House bill would remove the automatic requirement to suspend a merchant mariner's credentials in every document suspension and revocation case involving a drug conviction, thereby giving the Coast Guard Administrative Law Judge additional discretion in appropriate cases involving minor offenses.

Section 306 of the Senate amendment contains an identical provision under a different heading.

The Conference substitute adopts the Senate provision.

Under current law, a merchant mariner's credential (MMC) must be revoked if the credential holder is convicted of violating a State or Federal drug law, or found to use, or be addicted to, a dangerous drug. However, if evidence of proof of cure is provided, the credential of a drug user or addict need not be revoked. No option other than revocation is provided for a drug offense conviction.

In 1994, the Coast Guard began using Settlement Agreements to resolve suspension and revocation cases without a hearing. These have been particularly successful in cases involving drug use where the Administrative Law Judge (ALJ) need not revoke credentials if the holder provides satisfactory proof of cure. The Coast Guard seeks the discretion to suspend a mariner's credentials in dangerous drug law conviction cases. Use of that discretion will allow the use of Settlement Agreements to resolve cases involving minor drug convictions. The Coast Guard believes that granting ALJ's discretion to approve settlement agreements will improve the administration of the MMC program by removing the requirement for a hearing and revocation in every case involving a drug conviction. This will allow minor cases to be settled quickly leaving resources available to focus on more serious cases.

- d. Following the passage of the Authorization Act, the Coast Guard took no action to amend 46 CFR 5.59(b). Rather, the policy was to continue to seek revocation in all drug conviction cases but to allow settlement agreements to be entered into and consent orders to be issued

- e. Coast Guard regulations codified at 46 CFR 5.59 (Reference (c) and Enclosure (4)) prescribe mandatory penalties for certain offenses. Section 46 CFR 5.59 reads as follows:

*5.59 Offenses for which revocation of licenses, certificates or documents is mandatory.*

**An Administrative Law Judge enters an order revoking a respondent's license, certificate or document when—**

(a) A charge of misconduct for wrongful possession, use, sale, or association with dangerous drugs is found proved. In those cases involving marijuana, the Administrative Law Judge may enter an order less than revocation when satisfied that the use, possession or association, was the result of experimentation by the respondent and that the respondent has submitted satisfactory evidence that he or she is cured of such use and that the possession or association will not recur.

(b) **The respondent** has been a user of, or addicted to the use of, a dangerous drug, or **has been convicted for a violation of the dangerous drug laws, whether or not further court action is pending, and such charge is found proved.** A conviction becomes final when no issue of law or fact determinative of the respondent's guilt remains to be decided

46 CFR 5.59 (emphasis added).

f. Subparagraph (b) was intended to implement the former 46 USC 7704(b), which only mandated revocation in Suspension and Revocation cases involving drug convictions. See 46 U.S.C. 7704(b) (2003) (Reference (d) and Enclosure (5)); see also Appeal Decision 2525 (ADAMS) (1991). Following the passage of the Coast Guard Reauthorization Act, no action was taken to amend 46 CFR 5.59(b). Rather, the policy was to continue to seek revocation in all drug conviction cases but to allow settlement agreements to be entered into and consent orders to be issued.

3. **Discussion.** It is well-settled that repeal by implication is not a favored method of statutory construction. See Branch v. Smith, 538 U.S. 254, 273 (2003). An implied repeal will only be found where provisions are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and “is clearly intended as a substitute.” Id. The “cardinal principal of statutory construction is to save and not to destroy.” National Labor Rel. Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937), *followed in* Tallman v. Brown, 105 F.3d 613, 616 (Fed. Cir. 1997). Thus, if fairly possible, legislative regulations must be construed to avoid conflict with a statute. Smith v. Brown, 35 F.3d 1516, 1526 (1994); Trustee of Ind. Univ. v. United States, 618 F.2d 736, 739 (1980) (regulations must be construed so as to harmonize, not conflict, with objective of statute it implements); see also National Muffler Dealers Ass’n v. United States, 440 U.S.472, 477 (1979).

a. While statutory interpretation begins with the plain meaning of the text, see BedRoc Limited, LLC v. United States, 541 U.S. 176, 183 (2004) (“The inquiry begins with the statutory text, and ends there as the text is unambiguous.”), it is also imperative that interpretation of a statute reflect Congressional intent. See generally Chevron U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837, 842-45 (1984). If the agency’s interpretation reflects a permissible construction of the statute and a reconciliation of perceivably conflicting policies, a judge may not substitute its own judgment but must defer to the agency’s interpretation. Georgia v. Shalala, 8 F.3d 1565, 1567 (11<sup>th</sup> Cir. 1993) (citing Id.).

b. In light of the above, the Conference Report clearly states that discretion was given to the ALJ’s for the purpose of allowing respondents convicted of a state or federal drug violation to enter into a settlement agreement with the Coast Guard. H.R. CONF. REP. NO. 108-617, at 78. The fact that 46 CFR 5.59(b) mandates revocation in drug conviction cases does not conflict

with the newly amended 46 U.S.C. 7704(b) when the legislative history is taken into account. Reading the statute and regulation together, it is clear that a judge has no discretion in the absence of a settlement; he must revoke where charges are found proved in drug conviction cases.

4. **Conclusion.** Congress expressed its intent to facilitate settlements by allowing for suspension or revocation in drug conviction cases. Consistent with Congress’s rationale for the amendment, section 46 CFR 5.59(b) provides that if a “respondent . . . has been convicted for a violation of the dangerous drug laws, . . . and such charge is found proved” then revocation is mandatory. Accordingly, in the absence of a settlement agreement, 46 CFR 5.59(b) is controlling and a judge must issue an over of revocation where it is found proved that a mariner was convicted of violating a dangerous drug law.

5. **Current Agency Enforcement Policy.** The Coast Guard in the process of revising the Marine Safety Manual. The Draft MSM is available at the following link. <http://cgweb.comdt.uscg.mil/g-mo/moa/msmchaps.htm> Investigating Officers are authorized to rely on the Draft MSM as establishing agency policy until the new Manual is finalized. The Draft MSM has the following policy on Drug Conviction cases. This interpretation is consistent with current agency enforcement policy. G-MOA is responsible for this policy and it was the office responsible for the Legislative Change Proposal that gave rise to the amendment of 46 USC 7704(b) and for 46 CFR Part 5.

a. The following general policy is given at Draft MSM Section B.5.e.2. Conviction For A Dangerous Drug Law

Mariners with a conviction of any Federal or State laws regarding dangerous drugs within 10 years before the beginning of S&R proceeding shall be issued a complaint in accordance with 46 CFR 5.35. Mariners may be given the opportunity to enter into a settlement agreement . . . If the mariner provides proof that they have had a recent evaluation by a substance abuse professional certifying they are not a user of, or addicted to, dangerous drugs, then the settlement agreement should not require completion of a rehabilitation program, it only needs to require that the mariner prove non-association with dangerous drugs for 1 year. If there is evidence that the mariner is a user of, or addicted to, dangerous drugs, the mariner should only be offered a standard drug use settlement. See Section B.9 for guidance on appropriate sanctions.  
 . . .

b. The following policy as to proposed sanction is given at Draft MSM Section B.9.b. Proposed Order for Drug Conviction Cases

The appropriate order for most violations of dangerous drug laws cases is revocation. The IO may use the following questions to determine if a sanction of less than revocation should be proposed.

- ◆ Is the conviction more than 5 years old?
- ◆ Is there evidence of the mariner’s good character since the conviction?
- ◆ Is there only one (01) drug law violation on the mariner's record?
- ◆ Is there evidence of rehabilitation?
- ◆ Can the mariner articulate reasons to believe the mariner is no longer associated with drugs?
- ◆ Did the conviction occur while the holder of MMCs rather than acting under the

authority of their MMC?

- ◆ Did the conviction involve simple possession (personal quantity) rather than trafficking/attempt to distribute?

If the answer to any of the above is no, the proposed order shall be revocation, if the mariner meets all the above the IO may propose a 12 month suspension. Settlement agreements may be offered to any mariner whose drug conviction offense(s) does not involve distribution, intent to distribute, trafficking, or smuggling.

46 CFR 5.59 is directed towards the ALJ. Even if the Investigating Officer proposes an order of less than revocation, it would appear that section 5.59 remains controlling. This is inconsistent with the language of the conference report. We have informed G-MOA of this disconnect. If an Investigating Officer proposes a sanction of less than twelve months outright, that proposed order is inconsistent with agency policy. Nothing prohibits an ALJ from revoking a credential in a contested case, even if the agency proposed less than revocation if a higher sanction is warranted.

6. **Outstanding Questions.** While statutory/regulatory construction rules appear to answer these fundamental questions, there are still issues that will need to be resolved in the future.

a. Should an ALJ approve a settlement that involves a case that is clearly not a minor offense?

b. Must a settlement agreement contain the Drug Rehabilitation requirements of the current Drug Use settlement or can the Coast Guard enter into an agreement with a mitigated penalty only.

c. If such a mitigated penalty is proposed, must the penalty include only outright suspension? The amended statute states "shall suspend or revoke" not the discretionary language of 46 USC 7703 which has been interpreted to permit admonitions or probationary suspensions.

7. **Caveat.** These policy guidelines are intended as guidance for administrative law judges and employees of the U.S. Coast Guard. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person.

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