

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

DONALD ERIC HAGER, Jr.

Respondent.

Docket Number: CG S&R 08-0043
CG Case No. 3106663

DECISION AND ORDER

Issued: October 1, 2008

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

For Complainant

Lt. Martha A. Rodriguez
Lt. Marie M. Castillo-Bletso
U.S. Coast Guard – Sector New York
212 CG Drive
Staten Island, NY 10305

For Respondent

Raymond Bogan, Esq.
Bogan and Bogan, Esquires, LLC
526 Bay Avenue
Point Pleasant Beach, NJ 08742

PRELIMINARY STATEMENT

The United States Coast Guard initiated this administrative action pursuant to 46 U.S.C. 7703, 33 CFR Part 20, and 46 CFR Part 5 seeking revocation of Respondent Donald E. Hager, Jr.'s Merchant Mariner's License.

On January 16, 2008 the Coast Guard issued its Complaint against Respondent alleging two (2) counts of misconduct and one (1) count of violation of law or regulation. Specifically, the Coast Guard alleges that on October 1, 2007, Respondent, as operator of the SEA FOX: 1) possessed marijuana and OxyContin in violation of 46 U.S.C. 7703 and 46 CFR 5.27; further, a crewmember was found to be in possession of heroin; that heroin, OxyContin and marijuana are dangerous drugs, and their presence on SEA FOX amid the crew's belongings constitutes association with dangerous drugs by Respondent; 2) possessed a handgun without proof of a permit to possess the handgun in the State of New Jersey, in violation of 46 U.S.C. 7703, New Jersey Statutes Annotated (N.J.S.A.) 2C:39-5b, and 46 CFR 5.33; and 3) did not possess the proper permit to fish for Atlantic Tuna, in violation of 46 U.S.C. 7703, 16 U.S.C. 1801 *et seq.*, 46 CFR 5.33 and 50 CFR 635.4. The Coast Guard proposed Revocation on each count.

Respondent filed his timely Answer on February 4, 2008 denying all factual allegations. He also denied the jurisdictional allegation that he was operating under the authority of his license.

The Coast Guard issued Amended Complaints on March 6th and March 25th, 2008. Those amendments added the New Jersey statute citation as well as the 16 U.S.C. 1801, et seq. citation to the Magnuson-Stevens Fishery Conservation and Management Act, to counts two and three, among other things. The last Amended Complaint, dated

March 25, 2008, was used to conduct the hearing. That Complaint was further amended at the hearing substituting the term, “owner’s representative” for the word “owner” in the first allegation of count three.

The hearing was held in New York, New York on April 22, 2008 and reconvened again on May 1, 2008, so that the parties could submit additional evidence on the appropriate sanction if the allegation of marijuana possession is found proved.

Lieutenant Martha A. Rodriguez and Lieutenant Marie M. Castillo-Bletso represented the Coast Guard. Raymond Bogan, Esq. appeared on behalf of Respondent. The Coast Guard presented the testimony of six (6) witnesses and introduced eighteen (18) exhibits. Respondent, through counsel, presented the testimony of two (2) witnesses and introduced two (2) exhibits. The witnesses and exhibit list is contained in Attachment A.

The Coast Guard submitted a post hearing brief but did not submit proposed findings. Counsel for Respondent submitted a post hearing brief together with proposed findings of fact and conclusions of law. The Coast Guard also submitted a reply brief and rebuttal to Respondent’s proposed findings on July 1, 2008. Respondent’s proposed findings of facts and conclusions of law together with corresponding rulings on each are contained in Attachment B.

After careful review of the entire record, including the witness testimony, applicable statutes, regulations and case law, I find the Coast Guard **PROVED** that Respondent possessed marijuana and OxyContin. The allegation that Respondent associated with dangerous drugs is **NOT PROVED**. Further, I find that the Coast Guard **PROVED** that Respondent possessed a handgun without the proper permit in violation of N.J.S.A. 2C:39-5b. Finally, Count 3 is **NOT PROVED**.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. At all relevant times mentioned herein and specifically on October 1, 2007, Respondent, Donald E. Hager, Jr., was the holder of Coast Guard Merchant Mariner License Number: 1086376. (Tr. at 26-27; IO Ex. 1)¹.
2. Sea Fox Inc. of Atlantic Highlands, New Jersey, employed Respondent as Master of the SEA FOX at all times relevant to this case. (Tr. 1 at 28-30, 32; IO Ex. 2).
3. Respondent's parents owned Sea Fox, Inc. However, Respondent was the contact person for all dealings with the Coast Guard. (Tr. 1 at 31, 74-8, 89).
4. On September 30, 2007, the SEA FOX departed on a 24-hour fishing trip from Atlantic Highlands, New Jersey. (Tr. 1 at 32, 35).
5. The SEA FOX's Certificate of Inspection required that it be manned by a licensed Master. (IO Ex. 2).
6. The crew aboard the SEA FOX for the September 30 to October 1, 2007 fishing trip was comprised of two (2) captains (Emil Jaskot and John Lind) and 2 deckhands (Daniel Ward and Dennis Doherty). (Tr. 1 at 36; Resp. Ex. A).
7. Respondent participated in the fishing trip for recreation purposes, not as a paid crew member. (Tr. 1 at 36, 235).

¹ Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. Vol. ___ at ___). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (IO Ex. ___); Respondent's Exhibits are as follows: Respondent followed by the exhibit number (Resp. Ex. ___); ALJ Exhibits are as follows: ALJ followed by the exhibit number (ALJ Ex. ___).

8. A Coast Guard Boarding Team lead by Boatswains Mate First Class William Weiss boarded the SEA FOX on October 1, 2007 to perform a safety inspection while it was returning to Atlantic Highlands, New Jersey. (Tr. 1 at 39, 97).
9. Captain John Lind was at the helm piloting the SEA FOX when the Coast Guard boarded it. (Tr. 1 at 240).
10. Respondent was sleeping when the Coast Guard boarding began. (Tr. 1 at 40, 241-42).
11. Upon arrival of the Coast Guard boarding team, Captain Lind awakened Respondent who proceeded to the pilothouse to investigate. Petty Officer Weiss approached Respondent. (Tr. 1 at 40-42, 99).
12. Respondent identified himself to Petty Officer Weiss as the master of the SEA FOX. (Tr. 1 at 99-101; 130, 137).
13. There was no current permit for tuna fishing onboard the SEA FOX during its boarding on October 1, 2007. (Tr. at 102, 116, 140).
14. During the transit to its homeport, Respondent took control of the SEA FOX and maneuvered it to the dock at Atlantic Highlands, New Jersey. (Tr. 1 at 130, 142).
15. New Jersey State Trooper Brian McGuire, Marine Special Services Squad, also observed Respondent operating the SEA FOX. (Tr. 1 at 148, 150).
16. Respondent admitted to Trooper McGuire that he was the owner. (Tr. at 150).
17. Captain John Lind admitted Respondent docked the SEA FOX and helped Captain Lind bring the boat into the slip. (Tr. at 244-45).

18. Shortly after the SEA FOX's arrival, the New Jersey State Police boarded it to search for drugs. (Tr. 1 at 149, 194).
19. Trooper McGuire observed Respondent reach into his pants pocket, pull out two baggies, and "drop them onto the [deck] ground." (Tr. 1 at 150).
20. Trooper McGuire picked up the baggies and placed them into his pocket. (Tr. 1 at 150-51).
21. One baggie contained dry green vegetation and the other baggie contained 16 light blue pills with no markings of an over-the-counter drug. (Tr. 163-64).
22. The baggies were maintained through chain of custody and analyzed at the New Jersey State Police Lab. The contents were shown to be 1.80 grams of oxycodone, a Schedule II Controlled Dangerous Substance, and 1.14 grams of marijuana, a Schedule I Controlled Dangerous Substance. (IO Ex. 9; Tr. at 159-61, 209, 217-218).
23. During the search of the SEA FOX, a handgun, later identified as a .357 caliber Glock 31 semi-automatic pistol, capable of being discharged, was found inside a gym bag belonging to Respondent. (Tr. 1 at 151; IO Ex. 10).
24. Respondent admitted that the handgun in question belonged to him; that he legally purchased it in Florida; that he brought it back to New Jersey, and was under the assumption that he could legally possess it in New Jersey. (Tr. 1 at 170).
25. Respondent informed Trooper McGuire that the contents of the baggie containing OxyContin belonged to him; that he had a history of bad back

- because of his career as a fisherman, and that he was prescribed them;
however, he didn't keep the prescription bottle with him. (Tr. 1 at 169-70).
26. Respondent advised Trooper McGuire that the handgun found inside the gym bag belonged to him; that he purchased it in Florida and was under the assumption that he can legally possess it in New Jersey, even though he did not have a firearm ID card in his possession. (Tr. at 170).
27. Respondent previously tested positive for marijuana in a random drug screen. (Tr. 2 at 24).
28. As a result of the positive drug test, Respondent entered into a settlement agreement with the Coast Guard. (Tr. 2 at 24; IO Ex. 12).
29. Respondent failed to complete the terms of the settlement agreement and his mariner credentials were revoked. (Tr. 2 at 28; IO Ex. 16).
30. After his mariner credentials were revoked, Respondent applied for "administrative clemency," a process used by mariners to get their credentials back after they are revoked. (Tr. 2 at 35-41; IO Ex. 16).
31. Respondent's first attempt to receive administrative clemency was denied because he again tested positive for drugs during the administrative clemency process. (Tr. 2 at 41-4; IO Ex. 13 and 18).
32. Ultimately the Coast Guard granted Respondent administrative clemency allowing him to hold Coast Guard credentials. (Tr. 2 at 45).

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. 7701. Administrative actions against merchant mariner

credentials are remedial and not penal in nature. They are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. 46 CFR 5.5. Under 46 CFR 5.19, the Commandant has delegated to Administrative Law Judges the authority to admonish, suspend with or without probation or revoke a mariner's license, certificate or document.

The allegations in this case are brought under the misconduct and violation of law or regulation paragraphs of 46 U.S.C. § 7703(1) which reads as follows:

A license, certificate or registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder – (1) when acting under the authority of that license, certificate, or document – (A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or (B) has committed an act of misconduct or negligence

Acting under the Authority of that License

As shown above, 46 U.S.C. § 7703 (1) requires that the Coast Guard must prove that the Respondent was acting under the authority of his license. A licensed mariner employed in the service of a vessel is considered to be acting under authority of a license, certificate or document when the holding of such license, certificate or document is: 1) required by law or regulation; or 2) required by an employer as a condition of employment. 46 CFR 5.57; Appeal Decision 2620 (COX) (2001). Respondent operated the SEA FOX subsequent to the Coast Guard boarding and maneuvered it to the dock at Atlantic Highlands, New Jersey. The SEA FOX's Certificate of Inspection requires that it be operated by a licensed master. Therefore, Respondent was operating under the authority of his license as master of the SEA FOX at all relevant times.

Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges. 46 U.S.C. 7702(a). The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. 5 U.S.C. 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Investigating Officer to prove the charges are supported by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)). Therefore, the Investigating Officers (IO) must prove by credible, reliable, probative and substantial evidence that Respondent more likely than not committed the violation charged.

Misconduct

Misconduct is defined as “human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship’s regulation or order, or shipping articles

and similar sources. It is an act which is forbidden or a failure to do that which is required.” 46 CFR 5.27. The Coast Guard established by a preponderance of reliable, credible, probative, and substantial evidence that Respondent committed misconduct by possessing marijuana and Oxycontin as well as possessing a handgun without a permit as required by New Jersey law. The Coast Guard alleges in the first misconduct charge that Respondent possessed marijuana and OxyContin while acting under the authority of his license in the capacity of master of the F/V SEA FOX. This possession of marijuana and OxyContin (oxycodone) is in violation of N.J.S.A. 2C:35-10. The second misconduct charge alleges that Respondent possessed a handgun without the proper permit in violation of N.J.S.A. 2C:39-5b.

i. OxyContin and Marijuana

The NJ State Troopers boarded the SEA FOX after it docked in Atlantic Highlands, New Jersey and proceeded to question the crew members. (Tr. 1 at 149, 194). After questioning Respondent, Trooper McGuire observed Respondent remove two baggies from his pocket and drop them behind him onto the deck. (Tr. 1 at 150). Trooper McGuire picked up the baggies and, through a proper chain of custody, the baggies were sent to a NJ State Police lab for testing. (Tr. 1 at 159-61). The results of the lab testing was that one baggie contained oxycodone, a Schedule II Controlled Dangerous Substance, 1.80 grams, and the other baggie contained marijuana, a Schedule I Controlled Dangerous Substance, 1.14 grams. (Tr. 1 at 160, 61; IO Ex. 9 page 3).

After advising Respondent of his rights, Trooper McGuire asked Respondent about the contents of the baggies and Respondent admitted that one of the bag's contents was OxyContin. (Tr. 1 at 169). Respondent told him that he had a prescription for

OxyContin because of his bad back, but he did not keep the prescription bottle with him. (Tr. 1 at 169-70).

I find Respondent's testimony that he had a prescription for the OxyContin not credible. Furtively discarding the envelope containing 16 pills of that Schedule II controlled dangerous substance together with another envelope containing marijuana are not actions consistent with legal possession of a controlled prescription drug. Also, he never produced the prescription bottle he claimed to have. Respondent was subsequently indicted for possession of a controlled dangerous substance, to wit: oxycodone, in violation of N.J.S.A. 2C:35-10a(1). (IO Ex. 11). That law states, in pertinent part,

2C:35-10. Possession, use or being under the influence, or failure to make lawful disposition

a. It is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog, **unless the substance was obtained directly, or pursuant to a valid prescription or order form from a practitioner**, (emphasis added) while acting in the course of his professional practice, or except as otherwise authorized by P.L.1970, c. 226 (C.24:21-1 et seq.). Any person who violates this section with respect to:

(1) A controlled dangerous substance, or its analog, classified in Schedule I, II, III or IV other than those specifically covered in this section, is guilty of a crime of the third degree except that, notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine of up to \$35,000.00 may be imposed;

* * *

(4) Possession of **50 grams or less of marijuana**, (emphasis added) including any adulterants or dilutants, or five grams or less of hashish is a disorderly person.

* * *

I take official notice under 33 CFR 20.806 that OxyContin is the brand name; that OxyContin contains oxycodone, the medication's active ingredient; and that Oxycodone is an opiate. Coast Guard mandatory drug testing under 46 CFR Part 16 and 49 CFR Part 40 prescribe that each specimen must be tested for opiates, as well as for marijuana, cocaine, PCP, and amphetamines. (46 CFR 16.113).

Based upon the credible testimony of Trooper McGuire and the State Police Laboratory Report showing that the pills discarded by Respondent are oxycodone, and further, that Respondent had no valid prescription, I find the allegation in Count one that Respondent possessed OxyContin is **PROVED**.

Concerning Marijuana, Trooper McGuire observed Respondent furtively discarding the baggies from his pocket. The lab report confirmed that one of the baggies contained marijuana. Therefore, that part of Count one alleging possession of marijuana is **PROVED**. Respondent was not indicted for possession of marijuana, perhaps because the amount in question was only 1.14 grams, and, as noted above, N.J.S.A. 2C:35-10a (4) provides that possession of 50 grams or less of marijuana is punishable as a “disorderly person.”

Marijuana and OxyContin are Controlled Dangerous Substances. The possession of marijuana and OxyContin without a valid prescription violates New Jersey law. Further, they are also the subjects of the mandatory Transportation Workplace Testing Program described in 49 CFR Part 40 and 46 CFR Part 16.

Paragraph three (3) of Count one alleges that crewmember Dennis Doherty was found by NJ State Police to be in possession of a substance later verified as heroin. Paragraph four (4) alleges that heroin, OxyContin and marijuana are dangerous drugs,

and their presence on SEA FOX, amid the crew's belongings constitutes association with dangerous drugs by Mr. Hager. No evidence was presented that Mr. Hager was aware that Dennis Doherty possessed heroin and no evidence was presented that Mr. Hager was aware that heroin was amid the crew's belongings. Absent Respondent's awareness of the presence of other dangerous drugs, that part of Count one alleging his association with dangerous drugs is **NOT PROVED**.

ii. **Handgun**

After Trooper McGuire advised Respondent of his rights, Respondent admitted that the handgun in question belonged to him; that he legally purchased it in Florida; that he brought it back to New Jersey, and was under the assumption that he could possess it legally in New Jersey. (Tr. 1 at 170). Based on Respondent's statements, it can reasonably be inferred that he did not have a permit to possess the handgun in New Jersey as required by law. Therefore, I find that Respondent did not have a permit to possess a handgun in New Jersey.

New Jersey Statutes Annotated (N.J.S.A) 2C:39-5b provides, in pertinent part, "Handguns. Any person who knowingly has in his possession any handgun, including any antique handgun without first having obtained a permit to carry the same as provided in N.J.S.A. 2C:58-4, is guilty of a crime of the third degree if the handgun is in the nature of an air gun, spring gun or pistol or other weapon"

N.J.S.A. 2C:58-4a provides, "Scope and duration of authority. Any person who holds a valid permit to carry a handgun issued pursuant to this section shall be authorized to carry a handgun in all parts of this State, except as prohibited by section 2C:39-5e. . . . All permits to carry handguns shall expire 2 years from the date of issuance"

Subsection b provides, in pertinent part, “Application forms. All applications for permits to carry handguns, and all applications for renewal of such permits, shall be made on the forms prescribed by the superintendent. . . . “

In light of the above, I find that Count two **PROVED**.

Violation of a Law or Regulation

Count three alleges that on October 1, 2007, Respondent did not possess the proper permit to fish for Atlantic Tuna, in violation of 46 U.S.C. 7703, 16 U.S.C. 1801 *et seq.*, 46 CFR 5.33 and 50 CFR 635.4. Under 46 U.S.C. 7703 (1) (A) a license or merchant mariner’s document may be suspended or revoked if the “holder -- when acting under the authority of that license, certificate, or document -- has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or **any other law, or regulation intended to promote marine safety or to protect navigable waters.**”

(emphasis added).

Title 46 CFR 5.33 reads as follows:

Where the proceeding is based exclusively on that part of title 46 U.S.C. section 7703, which provides as a basis for suspension or revocation a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or **any other law or regulation intended to promote marine safety or to protect navigable waters,** (emphasis added) the complaint must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.

In this case, the Coast Guard states 16 U.S.C. 1801 et seq. and 50 CFR 635.4, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the regulations prescribing a permit to fish for, take, retain or possess Atlantic Tuna. It is clear that 16 U.S.C. 1801 et seq. and 50 CFR 635.4 are not part of 46 U.S.C. subtitle

II or a regulation prescribed under that subtitle. Therefore, it is necessary to determine whether the Magnuson-Stevens Act and this regulation is “any other law or regulation intended to promote marine safety or to protect navigable waters.”

Section 1801 lists the “purposes” of the Magnuson-Stevens Act to include: conservation of fishery resources, enforcement, promotion of domestic commercial and recreational fishing, regional fishery management councils, development of underutilized fisheries, and promotion and protection of essential fish habit. The terms “promote marine safety” and “protect navigable waters” are not listed under that section, nor are they listed under congressional “findings,” or “policy.” Further, the terms “promote marine safety or to protect navigable waters” are not found in the Act’s regulations at 50 CFR Part 600. However, they are mentioned at 16 U.S.C. 1851(a) (10) under *National standards for fishery conservation and management*. Subsection (a) (10) reads, “Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.” A plain reading of that section together with section 1801 reflect that the purpose of the Magnuson-Stevens Act is not to promote safety of human life at sea but “conservation and management measures shall, to the extent practical, promote safety of human life at sea.” To put it another way, enforcing the Magnuson-Stevens Act shall not be at the expense of safety at sea.

While the Coast Guard has established that Respondent did not possess the proper permit to fish for Atlantic Tuna, I find that the Magnuson-Stevens Fishery Conservation and Management Act is not “any other law or regulation intended to promote marine safety or protect navigable waters.” Therefore, Count three is **NOT PROVED**.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Donald E. Hager, Jr. and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. 7703, 46 CFR Part 5, and 33 CFR Part 20.
2. At all relevant times, Respondent was operating under the authority of his license.
3. Respondent committed misconduct by possessing marijuana.
4. Respondent's possession of marijuana was not experimental.
5. Respondent committed misconduct by possessing OxyContin without a valid prescription.
6. Respondent did not have a permit to possess the handgun in New Jersey.
7. Respondent committed misconduct by possessing a handgun in New Jersey without a permit as required by New Jersey Statutes Annotated 2C:39-5b.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984); 46 CFR 5.567. Title 46 CFR 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174. Moreover, it is the nature of this administrative proceeding to “promote, foster, and maintain the safety of life and property at sea.” The recommended sanction for misconduct relating to “use, possession, or sale of dangerous drugs” is

revocation. 46 CFR § 5.569(d). However, there is an exception allowed as set forth in 46 CFR § 5.59.

In this case Respondent committed an act of misconduct by wrongfully possessing marijuana and OxyContin. In a charge of misconduct for wrongful possession of marijuana, 46 CFR § 5.59(a) allows an ALJ to “enter an order less than revocation when satisfied that the use, possession or association, was the result of experimentation by respondent.” Additionally, 46 CFR § 5.59(a) requires that the respondent submit “satisfactory evidence that he or she is cured of such use and that the possession or association will not recur.”

The Coast Guard presented evidence that Respondent had previously tested positive for marijuana during a random drug test. (Tr. 2 at 24). As a result of the positive drug test, Respondent entered into a settlement agreement. *Id.* Ultimately, Respondent failed to comply with the settlement agreement and his Coast Guard credentials were revoked. (Tr. 2 at 28). As a result of his credentials being revoked, Respondent applied for administrative clemency. (Tr. 2 at 35-41). The Coast Guard denied his request because he tested positive for drugs during the administrative clemency process. (Tr. 2 at 41-4). Respondent was ultimately granted administrative clemency on his second request and allowed to hold Coast Guard credentials. (Tr. 2 at 45).

Further, Respondent admitted to Trooper McGuire that two vials found in his gym bag contained synthetic urine that he purchased online so that he could pass a urine test. (Tr. 1 at 169). Therefore, it is reasonable to infer that Respondent’s possession of marijuana was not experimental. It is also reasonable to infer that Respondent continues to use dangerous drugs.

Two previous positive drug screens, a failure to complete cure, current non experimental possession of marijuana, evidence of present intent and capability to falsify future drug screens, and possession of OxyContin without a valid prescription are inconsistent with the promotion of safety at sea. Further, Respondent presented no evidence of cure. Therefore, the only appropriate sanction is **REVOCATION**.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent, Donald Eric Hager, Jr.'s, License and all other Documents held by Respondent are **REVOKED**. Respondent is to turn over his license and all other Documents, if any, to the Investigating Officer at Coast Guard Sector New York immediately.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (**Attachment C**).

**WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD**

Done and dated October 1, 2008
New York, New York

ATTACHMENT A – Witness and Exhibit List

Witness List

Coast Guard

1. Captain Donald E. Hager, Jr. (Respondent)
2. Lieutenant Jonathan Robuck (USCG)
3. Boatswain Mate First Class (BM1) William Weiss
4. New Jersey State Trooper Brian McGuire
5. Commander Kelly M. Post (USCG)
6. Robert Mutto – Criminal Investigations Division (EPA)

Respondent

1. Captain John Lind
2. Captain Emil Jaskot

Exhibit List

Coast Guard

1. Respondent's Merchant Mariner's License #108637, two (2) pages.
2. SEA FOX Certificate of Inspection, three (3) pages.
3. American Professional Captains Association (APCA) letter dated October 8, 2007 listing employees of Sea Fox who are current members of the APCA Drug Consortium, one (1) page.
4. APCA letter dated October 8, 2007 listing Sea Fox crew member who were drug tested during a reasonable cause drug test, with results, one (1) page.
5. National Marine Fisheries Service permit status for SEA FOX, two (2) pages.

6. Eight (8) digital photographs dated October 1, 2007 showing Atlantic Tuna from SEA FOX, eight (8) pages.
7. New Jersey State Police Arrest Reports for Donald E. Hager, four (4) pages.
8. New Jersey State police Investigation Report, six (6) pages.
9. Evidence Submission Review, Receipt, and Certified Laboratory Report for drugs, three (3) pages.
10. Evidence Submission Review, Receipt, and Certified laboratory Report for a .357 SIG caliber Glock semiautomatic pistol, three (3) pages.
11. Indictment 08-03-0667 of Dennis Doherty and Donald Hager for Possession of a Controlled Dangerous Substance and Unlawful Possession of a Weapon , 3 pages.
12. Consent Order Approving Settlement Agreement, dated October 20, 1999, (3 pages); Joint Motion for Consent Order dated September 20, 1999 (2 pages), and Motion for Approval of Settlement Agreement and Entry of Consent Order dated September 20, 1999 (2 pages) all pertaining to Donald E. Hager, Jr. in case number 99-0016.
13. Drug test result for collection dated February 4, 2000 showing positive for cannabinoid, 137 ng/ml for Donald E. hager, Jr.
14. Return to work letter dated March 27 2000 and signed by Richard M. Abramowitz, M.D., one (1) page.

15. CPC Behavioral Healthcare letter of April 28, 2000 stating that Donald Hager successfully completed substance abuse treatment on August 11, 1999, one (1) page.

16. Shebell & Shebell Attorneys at Law letter dated December 18, 2001 enclosing letter application for clemency for Donald E. Hager as the result of the Consent Order entered on October 20, 1999.

17. Shebell & Shebell Attorneys at Law letter dated January 15, 2002 stating that it is forwarding 12 negative drug screens, two (2) pages.

18. Coast Guard Activities New York letter 16722 dated March 22, 2002, indicating that the drug screen submitted included a positive test for marijuana metabolite on February 10, 2000. The letter further advises that the application for Administrative Clemency is returned, two (2) pages.

Respondent

- A. SEA FOX List of passengers and crew for September 30th, two (2) pages.
- B. N.J. State police Supplemental Investigation Report, three (3) pages.

ATTACHMENT B – Proposed Findings of Fact and Conclusions of Law

Respondent's Proposed Findings of Fact

- 1) The testimony indicated that there were, on the day in question, two Masters/Captains and two deckhands on board the F/V "SEA FOX". (T-30, 51). Emil Jascot and John Lind were Captains/Masters on October 1, 2007. (T-30) The deckhands were Daniel Ward and Dennis Doherty. (T-30)

ACCEPTED AND INCORPORATED

- 2) Donald E. Hager, Jr. was on board that day as a fisherman, not as a Captain or crew member. (T-194)

ACCEPTED AND INCORPORATED

- 3) The Coast Guard proffered a document which was not a log book but a manifest of people on board an offshore fishing trip. (T-194 and 195)

NEITHER ACCEPTED NOR REJECTED – no determination was made concerning whether the document was a log book or manifest

- 4) The manifest, which had been prepared prior to sailing, included the name of Donald E. Hager, Jr. and a number of other persons who were on board not as crew members, but to fish. Like Hager's listing of his acquired designation of "Captain", those other persons were listed as "crew" members, although they were not acting in any official capacity that day.

NEITHER ACCEPTED NOR REJECTED – no determinations were made concerning the manifest

- 5) At the time the Coast Guard boarded the vessel, Donald E. Hager, Jr. was sound asleep, and had been sound asleep the entire way in from the Hudson Canyon. He was awakened by the Captain. (T-198)

ACCEPTED IN PART – no determination was made as to whether Respondent was sound asleep the entire way in from Hudson Canyon, the only finding made was that he was asleep when the Coast Guard boarded the vessel.

- 6) Donald E. Hager, Jr. is not, and was not, an owner of the Sea Fox or the corporation holding same. He was, according to Coast Guard testimony, an "owners' representative" (T-40) or primary Captain from previous experience, but not an owner. (T-40)

ACCEPTED

- 7) The evidence produced by the Complainant regarding the Fishing Permit history statement was obtained from the National Marine Fisheries Service (NMFS). The document shows that the Permit had expired for a short time in 2005, but does not show that it was expired in October, 2007.

REJECTED – See Decision and Order

- 8) Testimony from Petty Officer William Weiss verified that there was no proof that the Fisheries Permit had expired. (T-95) The exhibit proffered by the Complainant failed to verify that the permit was no longer valid. (Exhibit 11).

REJECTED –See Decision and Order

- 9) The F/V “Sea Fox” has held valid Fisheries Permits, including for tuna.

ACCEPTED to the extent that SEA FOX held a valid permit prior to the incident

- 10) The F/V “Sea Fox “ had previously spent winters in Bradenton, Florida (T-27).

NEITHER ACCEPTED NOR REJECTED

- 11) Respondent purchased a hand gun in the State of Florida with the appropriate permits and authority (T 141; Exhibit H-01 regarding the State Police Investigation).

NEITHER ACCEPTED NOR REJECTED – See Decision and Order

- 12) The subject gun was not loaded. (T-138)

ACCEPTED

- 13) Deckhand Dennis Doherty is not an owner or operator of the F/V “Sea Fox”. Dennis Doherty has not been shown to be related to, or personal friends with, Donald E. Hager, Jr. (or anyone else in the crew). Dennis Doherty has not been shown to have worked a single day after this incident in which he was alleged to have possessed heroin. (T-193)

ACCEPTED – See Decision and Order

- 14) Trooper Brian A. McGuire testified that he picked up what purportedly was marijuana and oxycontin/oxycodone from the deck, put them into his civilian clothing, and carried them around in such for over three hours prior to putting them into an evidence bin. (T-124)

ACCEPTED AND INCORPORATED IN PART

- 15) Donald E. Hager, Jr. was directed to take a drug test after the incident in question and tested negative. (Exhibit 4)

ACCEPTED – The Coast Guard alleged possession, not use

- 16) Trooper McGuire testified that Donald E. Hager, Jr. had informed him of having been prescribed oxycontin/oxycodone for back troubles. (T-140)

ACCEPTED AND INCORPORATED

ATTACHMENT C

NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket

Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
- (ii) Reasons supporting the appeal; and
- (iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

- (1) The party has petitioned the Commandant in writing; and
- (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION and ORDER was sent via Federal Express to the following parties and entities:

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Done and dated October 1, 2008
New York, New York

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