UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	ON APPEAL
MERCHANT MARINER LICENSE	:	NO. 2674
Issued to: JASON WAYNE KOVALESKI	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 CFR Part 5, and the procedures in 33 CFR Part 20.

By a Decision and Order (hereinafter "D&O") dated February 8, 2006, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Houston, Texas, revoked the merchant mariner license of Mr. Jason W. Kovaleski (hereinafter "Respondent") upon finding proved a charge of *conviction for a dangerous drug law violation*.

The specification found proved alleged that Respondent was convicted of "Possession of Drug Paraphernalia" on August 13, 2002, by a Florida court.

PROCEDURAL HISTORY

On April 26, 2005, the Coast Guard issued a complaint against Respondent alleging conviction of a dangerous drug law in that Respondent was convicted on August 13, 2002, in Panama City, Florida, of "Possession of Drug Paraphernalia." [Complaint at 2] On May 12, 2005, Respondent filed an Answer to the complaint on which he indicated

that he was convicted of a misdemeanor. [Answer at 1] Respondent further explained that he decided to plead guilty to a misdemeanor rather than fight the charge and attempt to testify against his friend and a police officer. [*Id.*] On August 1, 2005, the Coast Guard served and filed a Motion for Summary Decision and proposed revocation as the appropriate sanction. [D&O at 2; Coast Guard Motion for Summary Decision] The original ALJ, from New Orleans, Louisiana, denied the Motion for Summary Judgment, noting that there remained "a genuine issue of fact as to whether or not the offense of 'Possession of Drug Paraphernalia' constitute[d] a violation of a 'dangerous drug law.'" [D&O at 2; Order Denying Motion for Summary Decision at 2] On August 23, 2005, the Coast Guard amended its Complaint to include more detail describing the conviction of "Possession of Drug Paraphernalia." [D&O at 2; Amended Complaint at 2] Respondent answered the Amended Complaint on September 27, 2005, and indicated the Coast Guard "left out an important element of the charge," however, Respondent did not specify what element was omitted. [D&O at 2; Answer to Amended Complaint at 1]

After hurricane Katrina devastated New Orleans and the surrounding communities, the case was reassigned from the ALJ in New Orleans to an ALJ located in Houston, Texas. [D&O at 2; Notice of Reassignment] The new ALJ ordered the parties to prepare and serve the appropriate lists of witnesses and exhibits in accordance with 33 C.F.R. § 20.601. [Order dated October 11, 2005; D&O at 2] The Coast Guard filed an exhibit and witness list while Respondent did not. [D&O at 2] On December 9, 2005, the Coast Guard again moved for Summary Decision and the Respondent filed a cross motion to dismiss the case on December 25, 2005. [*Id.* at 3] The Coast Guard did not reply to the Respondent's cross motion. [*Id.*]

The ALJ granted the Coast Guard's Motion for Summary Decision on February 8, 2006. [D&O at 10] In response to a request by Respondent, the ALJ Docketing Center extended the deadline for filing the Appeal Brief until June 7, 2006. Respondent perfected his appeal by filing his Notice of Appeal and Appeal Brief on May 25, 2006. The Coast Guard filed a Reply Brief on July 10, 2006. Therefore, this appeal is properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard was represented by MST2 Barry K. Hollenbeck of U.S. Coast Guard Marine Safety Detachment Panama City, Florida.

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued merchant mariner license. [D&O at 6]

Respondent was convicted of "Possession of Drug Paraphernalia" in Panama City, Florida, on August 13, 2002. [D&O at 10; Amended Complaint at 2] The Coast Guard discovered this conviction and initiated a suspension and revocation proceeding against Respondent's mariner credential in accordance with 46 U.S.C. § 7704(b) and 46 C.F.R. §§ 5.35 & 5.59. [Amended Complaint at 1-2] Respondent did not contest the fact that he was convicted of "Possession of Drug Paraphernalia;" rather, he claimed that he has never used drugs, never failed a drug test, and that he did not want to testify against his friend in court. [Answer to Amended Complaint at 2]

BASES OF APPEAL

Respondent has raised several issues on appeal. However, according to 33 C.F.R. § 20.1001(c), parties may only appeal summary decision cases on the following bases: the

case presented material issues of fact which required a hearing to be resolved or, in granting summary decision, the ALJ failed to consider evidence that a party would have presented (as to a material fact).

In this case, the ALJ determined that there was no genuine issue of material fact in dispute because Respondent did not deny being convicted of "Possession of Drug Paraphernalia." As a result, the ALJ granted the Coast Guard's Motion for Summary Decision. [D&O at 10] In so doing, Respondent was denied a hearing. [*Id.*] On appeal, Respondent has neither offered, nor claimed that he could offer, evidence to show that he was not convicted of "Possession of Drug Paraphernalia." [Appeal Brief; Answer to Amended Complaint] In addition, there are no factual issues in dispute. Therefore, Respondent has not met the prerequisites to appeal a Summary Decision under 33 C.F.R. § 20.1001(c).

However, Respondent has contested whether a conviction for "Possession of Drug Paraphernalia" is a *conviction for a dangerous drug law violation* as envisaged in 46 U.S.C. § 7704(b). [Appeal Brief] Respondent further contends that, in this case, revocation of his license is inordinately severe. [*Id.*] In order to ensure clarity in how drug paraphernalia laws fit within the dangerous drug law framework of 46 U.S.C. § 7704(b), and to reinforce the proper sanction when a charge under 46 U.S.C. § 7704(b) is found proved, I will independently review the following issues on appeal in accordance with 46 C.F.R. § 5.701:

> *I. The ALJ erred as a matter of law by ruling that a conviction for possession of drug paraphernalia is a conviction for a dangerous drug law violation under 46 U.S.C. § 7704(b).*
>
> *II. The sanction of revocation is inordinately severe.*

OPINION

I.

The ALJ erred as a matter of law by ruling that a conviction for possession of drug paraphernalia is a conviction for a dangerous drug law violation under 46 U.S.C. § 7704(b).

In this case, Respondent does not deny that he was convicted of "Possession of drug paraphernalia." Rather, Respondent asserts, as the original ALJ assigned to the case opined, that it is unclear as to whether his particular conviction constitutes a *conviction for a dangerous drug law violation* under 46 U.S.C. § 7704. [Appeal Brief; Order Denying Motion for Summary Decision at 2; 46 U.S.C. § 7704.] The ALJ who subsequently issued the D&O in this case ruled that a conviction for "Possession of Drug Paraphernalia" does constitute a *conviction for a dangerous drug law violation*. [D&O at 8] Respondent disagrees.

46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35 do not define what constitutes a "dangerous drug law" violation; however, a *dangerous drug* is defined in 46 U.S.C. § 2101(8a) as a "narcotic drug, controlled substance or a controlled substance analog." The precursor to 46 U.S.C. § 7704(b) was 46 U.S.C. § 239a, which required revocation if conviction for violation of a *narcotic drug law* was proved. In 1983, Congress undertook a massive project to attempt to codify numerous maritime and shipping laws in Public Law 89-98. During that project, Congress replaced 46 U.S.C. § 239a with 46 U.S.C. § 7704 and substituted the term *dangerous drug law* for *narcotic drug law*.

In Appeal Decision 1830 (PACKARD), the issue of whether a conviction for possession of narcotic paraphernalia constituted a conviction of a *narcotic drug law* was

addressed. In that case, Mr. Packard was convicted of violating section 11555 of the California Health and Safety Code which prohibited possession of "an opium pipe or any device, contrivance, instrument or paraphernalia used for unlawfully injecting or smoking a narcotic." Appeal Decision 1830 (PACKARD). During the proceedings, it was determined that the statute of which Mr. Packard was convicted was located in the "Illegal Narcotics" chapter of the California Health and Safety Code. [*Id.*] *Packard* held that the placement of the law in that section of the state's code convincingly showed that the law was "designed to regulate and control the use of narcotics drugs" and, as a result, concluded that "a conviction under such a law was...a conviction within the meaning of" the narcotic drug laws. [*Id.*]

The instant case is strikingly similar to the *Packard* case. In this case, Respondent was convicted under Florida Statute 893.147: "Use, possession, manufacture, delivery, transportation, or advertisement of drug paraphernalia." This statute appears within the Florida Statutes Annotated chapter 893 entitled "Drug Abuse Prevention and Control." As such it is clear that the statute that Respondent was convicted under is "designed to regulate and control the use" of dangerous drugs. FL. STAT. ANN. § 893.147; Appeal Decision 1830 (PACKARD). Given the statute's location with the Florida Code, under the rational articulated by *Packard*, the ALJ's determination that Respondent's conviction of "Possession of Drug Paraphernalia" is a *conviction for a dangerous drug law violation* is correct.

II.

The sanction of revocation is inordinately severe.

Respondent next contends that the sanction of revocation is too severe considering both the nature of his conviction and indications from the original ALJ assigned to the case that revocation might not be appropriate in Respondent's case. [Appeal Brief; Order Denying Summary Decision at 2] The ALJ who issued the D&O ruled that "it is clear that only revocation is appropriate in the instant matter" and "I do not have any discretion in this matter; the law states I must revoke." [D&O at 9] In particular, the ALJ noted that when Congress amended 46 U.S.C. § 7704(b) to allow "suspension or revocation" when *conviction for a dangerous drug law violation* is found proved, Congress did not mandate that the Coast Guard change 46 C.F.R. § 5.59, which continues to mandate revocation. [*Id.*] In Coast Guard suspension and revocation cases, an ALJ must follow properly proscribed regulations, and in this case, the ALJ had no other option but to revoke Respondent's license once the *conviction for a dangerous drug law violation* charge was found proved. 46 C.F.R. § 5.59.

Respondent also petitions for immediate renewal of his license and to reinstate his "grace period." [Appeal Brief] This is a claim for clemency, and prior Commandnat Decisions on Appeal dictate that it is not appropriate for clemency requests to be acted upon during suspension and revocation appeal proceedings. *See* Appeal Decisions 2428 (NEAT) and 2435 (BABER). To that end, I note that Respondent may apply for clemency via the procedures set forth in 46 CFR §§ 5.901-5.905.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative

evidence existed to support the findings of the ALJ. Therefore, I find that Respondent's bases of appeal are without merit.

ORDER

The order of the ALJ, dated at Houston, Texas, on February 8th, 2006, is **AFFIRMED.**

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 28th of January, 2008.