

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

UNITED STATES COAST GUARD)	Docket No. CG S&R 00-0609
)	
vs.)	
)	
HANK J. RAPOZA)	
)	

DECISION AND ORDER

This proceeding is brought pursuant to the authority contained in 46 USC § 7704; 5 USC §§ 551-559; 46 CFR Part 5, and 33 CFR Part 20.

Respondent has been charged in a complaint with having been convicted of violating a dangerous drug law of the State of Washington - - possession of cocaine on or about April 27, 2000.

Respondent holds Coast Guard license number 793349 (Master, Radar Observer-unlimited, and First Class Pilot) and Merchant Mariner's Document number 535-72-9369 (Able Seaman, Wiper and Steward's Department). Respondent has admitted to Coast Guard jurisdiction in this matter. See Answer at paragraph 1.

Respondent denies all factual allegations. He further says he was not convicted of such an offense.

A hearing was held in Seattle, Washington on December 14, 2000. Attorney Thomas Paul represented Respondent. The Coast Guard offered two witnesses and eight exhibits. Respondent offered 6 character witnesses and five exhibits. After much discussion with the parties it was determined the witnesses would not add any probative evidence to a determination and thus, they were excused. Respondent's five exhibits were admitted. Respondent's exhibits 3 and 4 were duplicative of Coast Guard Exhibits 5 and 6 (Drug Court Waiver and Participation Agreement and Court Order of Participation respectively). Coast Guard Exhibits 3, 4 and 8 were excluded as irrelevant.

The principal question then remained whether, for purposes of 46 USC 7704(b), Respondent has been convicted of a state dangerous drug law.

Respondent had been charged with possession of cocaine. His attorney requested the Superior Court for King County, Washington consider him as a candidate for the Superior Court's Drug Court program. CG Exh 7. The King County Prosecuting Attorney agreed and a typical Agreement of Participation was executed. Resp. Exh 3, CG Exh 5.

Subsequently, the Superior Court entered an Order of Participation. Resp. Exh 4; CG Exh 6. Respondent was thus admitted to participate in a deferred adjudication program where he was required to undergo treatment for drug use and was placed under supervision including periodic urinalysis testing. Resp. Exh. 2. At the successful conclusion of the program the drug related charges would be dismissed.

From my reading of the relevant statute and case law for the State of Washington, it appears that the drug court program is a deferred adjudication program designed to reduce or eliminate recidivism. It is also a program explicitly designed to avoid a conviction provided a participant complies with all of the conditions of the program for its prescribed term.¹

The Coast Guard contends, however, this drug court program is pursuant to an *order of the court* and requires as a condition of participation drug treatment, payment of money and supervision of a participant. Thus, it is argued under 33 CFR § 20.1307(d), it is considered to a conviction.

33 CFR §20.1307(d) provides as follows:

If the respondent participates in the scheme of a State for the expungement of convictions, and if he or she pleads *guilty or no contest* or, by order of the court, has to attend classes, contribute time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of the finding of the trial court, the Coast Guard regards him or her, for purposes of 46 USC 7703 or 7704, as having received a conviction. The Coast Guard does not consider the conviction expunged without proof that the expungement is due to the conviction's having been in error. (Italics in original)

If the order allowing Respondent to participate in the drug court program is a conviction for purposes of federal law, then revocation of his license and document are mandatory under 46 USC § 7704. I have no discretion in the matter. 46 USC 7704 provides. in pertinent part:

(b) If it is shown at a hearing under this chapter that a holder of a license . . . issued under this part, within 10 years before the beginning of the proceedings, has been convicted of violating a dangerous drug law of the United States or of a State, the license . . . *shall be revoked*. (Emphasis added.)

¹ The drug court program is provided for in RCW 2.28.170 (Drug Courts). Completion of the program results in a criminal charge being dismissed and no record of a conviction. See for example, *State of Washington v. Taylor*, 1988 Wash. App. LEXIS 60 (1998).

The question here is whether Respondent's participation in the drug court program is a conviction for purposes of federal regulations and law? The question is not whether it constitutes a conviction under state law.

Respondent argues, nevertheless, that I am bound by state law when determining what constitutes a conviction. He refers me to Commandant Decisions on Appeal No. 2355 (Rhule), 2611 (Cibulka) and 2435 (Baber).

The answer to these questions will require my examination of the relevant CDOAs, the federal regulations and the intent behind them.

My reading of CDOA 2355, 2611 and 2435 tells me that a reference to state law is necessary only where there is a plea of *nolo contendere* (no contest). These cases do not stand for the proposition that I am bound to apply state law in every circumstance.

Thus, I must look to the regulations and federal law to ascertain whether the deferred adjudication involved here will be treated under federal law as the equivalent of a conviction.

When 33 CFR § 20.1307(d) was added to the 1999 revision of the Coast Guard's procedural rules, a comment was received stating that the term "conviction" was not clearly defined. The writer recommended the adoption of the definition found at 46 CFR Part 10, which dealt with applications for licenses and documents. The Coast Guard responded that 33 CFR § 20.1307 established a definition of the term "conviction" that was both adequate and consistent with the definition in 46 CFR Part 10. See 64 Fed. Reg. at p. 28060 (May 24, 1999). The definition of *conviction* is found at 46 CFR § 10.103 and provides in relevant part as follows:

. . . . If an applicant pleads guilty or no contest, is granted *deferred adjudication*, or is required by the court to attend classes, make contributions of time or money, receive treatment, submit to any manner of probation or supervision, or forego appeal of a trial court's conviction, then the applicant will be considered to have received a conviction (Italics added)

The relevant provisions of 33 CFR § 20.1307(d) and 46 CFR § 10.103 are virtually identical except for the words "granted deferred adjudication." The comment response is clear. The two rules are intended to be consistent.

Moreover 33 CFR § 20.1307(d) is also a restatement of 46 CFR § 5.547, which was repealed with the adoption of 33 CFR § 20.1307(d). 46 CFR § 5.547 provided:

The judgment of conviction for a dangerous drug law violation by a Federal or State court is conclusive in proceedings under this part. If as part of a state

expungement scheme the respondent pleads guilty or no contest *or is required by the court* to attend classes, make contributions of time and money, receive treatment or submit to any manner of probation or supervision or forego appeal of the trial court finding, the respondent will be considered, for the purposes of 46 U.S.C. 7704, to have received a final conviction. A later expungement of the record will not be considered unless it is proved that the expungement is based on a showing that the court's earlier "conviction" was in error (Emphasis added)

However, 33 CFR § 20.1307(d) changed the wording in 46 CFR § 5.547 after the words "guilty or no contest", by changing *or is required by the court* to *or by order of the court*. The obvious intent was to clarify that the expungement program would be separate and distinct type of program from an order for treatment, supervision, and payment of money.

Stated differently, the change in 33 CFR § 20.1307(d) to *an order of the court* changes the context. Provision is made for both a state expungement scheme and a court ordered program where a person is to attend classes, contribute money or receive drug treatment. This change achieves the objective of consistency between 33 CFR § 20.1307(d) and 46 CFR § 10.103 to include the concept of *deferred adjudication*.

It is therefore, my interpretation of the current regulations, that the Coast Guard treats drug diversion programs, which are deferred adjudications, as convictions.

I am bound to follow these regulations. Based on undisputed Respondent's Exhibits 3 and 4 (CG Exhibits 5 and 6) Respondent has been admitted by court order to a program of drug treatment and supervision. Such an order is considered a conviction under 33 CFR § 20.1307(d) and 46 CFR § 5.59(b) for which revocation of a license and document is mandatory under 46 USC § 7704(b).

As a result Respondent's license and document are revoked.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

DATED: December 14, 2000.



Edwin M. Bladen
Administrative Law Judge.