

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

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Complainant

vs.

MICHAEL G. DESIMONE

Respondent.

Docket Number: CG S&R 05-0192
CG Case No. 2323513

ORDER

Issued: July 8, 2005

Issued by: Walter J. Brudzinski, Administrative Law Judge

Procedural History

This matter came to be heard on Respondent's request for a hearing following service of the Coast Guard's Complaint alleging that within the last ten years, Respondent was convicted of violating a dangerous drug law of the State of New York, in violation of 46 U.S.C. 7704(b) and 46 CFR 5.35. The undersigned heard this matter on July 6, 2005 in New York, New York, where professional counsel represented Respondent.

At the conclusion of the hearing, the Coast Guard waived its right to submit proposed findings of fact and conclusions of law and asked for a bench decision. After reviewing the

exhibits, hearing the testimony of the witness and oral arguments by the parties, the undersigned found by the preponderance of reliable, probative, and substantial evidence that 1) the Respondent was a holder of Coast Guard license number 1019349 issued on July 2, 2002; and 2) that within 10 years before the beginning of the proceedings (July 12, 2002), Respondent had been convicted of violating a dangerous drug law of the State of New York (Unlawful Possession of Marihuana). As a result, the undersigned revoked Respondent's license. The license was then placed in the custody of the Investigating Officer (IO).

Counsel for Respondent asked for and was granted two weeks to submit additional arguments and proposed findings. "The ALJ may, upon motion of any party or in his or her own discretion, render the initial decision from the bench (orally) at the close of the hearing and prepare and serve a written order on the parties or their authorized representatives." 33 CFR 20.904(c). The next day, July 7, 2005, counsel for Respondent advised the undersigned via facsimile that he would not be filing any post-hearing brief but was going to appeal.

Respondent's Motion to Dismiss

Respondent moved to dismiss the charge, arguing that his conviction was not for a felony or misdemeanor under New York law and as a result could not be treated as such under Coast Guard regulations. He claimed that his conviction was less than a misdemeanor and therefore not a criminal offense or a violation of the National Driver Registry Act of 1982, but similar to a mere "traffic ticket." Respondent's Exhibit A states, in pertinent part, that "[u]nder 46 Code of Federal Regulations subpart 10.103 & 12.01-3(sic): [The term] [c]onviction means the applicant has been found guilty by judgment or plea by a court of record of the United States, the District of Columbia or any State or territory of the United States of a criminal felony or misdemeanor or

of an offense described in section 205 of the National Driver Registry Act of 1982 (49 U.S.C. 30304). . . .”

Respondent’s motion to dismiss was denied. The definition of “conviction” cited in Exhibit A is not applicable to 46 U.S.C. 7704(b) because 46 CFR Sections 10.103 and 12.01-3(sic) are both entitled, “[d]efinitions of terms used in this part.” Therefore, the above definition of “conviction” does not apply outside of 46 CFR Parts 10 and 12. Also, the term “conviction” is not defined in Title 46 U.S. Code. Therefore, the plain language of the statute applies.

Furthermore, the undersigned found no decisions on appeal providing exceptions for those who violated dangerous drug laws where the state treated the offense as other than a felony or misdemeanor. As long as the conviction occurred within ten (10) years prior to the initiation of these proceedings, the severity of the violation is not probative on the issue of whether a respondent was convicted of violating a dangerous drug law. In Appeal Decision 2388 (MANLEY) (1985), the judge’s decision of revocation was reversed partly because the respondent was “convicted of a relatively minor marijuana offense over one year prior to the date on which he was charged.” In the present case, however, the actual amount of marijuana possessed by Respondent was unknown and therefore could not be taken into consideration in rendering a decision. Pursuant to his plea of guilty, Respondent was convicted in Criminal Court for the City of New York, Kings County, for unlawful possession of marijuana and sentenced to imprisonment (time served). IO Exhibit 3.

Sanction

The August 9, 2004 version of 46 U.S.C. 7704 granted discretion to the administrative law judge in allowing him/her to suspend or revoke the credentials of a mariner convicted of violating a federal or state dangerous drug law within the previous ten years. After listening to Respondent's testimony and reviewing the exhibits, the undersigned decided to revoke Respondent's license. During his testimony at the hearing, Respondent attempted to deflect responsibility for his actions surrounding the underlying offense, failed to take responsibility for his conviction despite his plea of guilty, displayed a lack of remorse, and did not demonstrate any attempt at rehabilitation. In Appeal Decision 2377 (HICKEY) (1985), Respondent was "convicted in the U.S. District Court for the District of Maine for conspiring to import large quantities marijuana into the United States." The conviction was the result a of a plea agreement stating that if Respondent pled guilty to Count VII of the indictment, which explained his role in the conspiracy, then all other charges against him and his wife would be dismissed. The Commandant stated that an individual "who wishes to hold a license following conviction for a serious narcotics offense must make an especially strong showing that he is rehabilitated." Since a showing of rehabilitation was not made, the Commandant held that Respondent's license was properly revoked by the ALJ.

In this case, IO Exhibit 2 shows that on or about July 11, 2002, at approximately 3:30 p.m., in Kings County (Brooklyn), New York, the Respondent was observed to be in possession of a quantity of crack cocaine that was recovered from his hand. Exhibit 2 further states that the Respondent was in possession of a quantity of marijuana that was recovered from his person. Respondent was convicted only of unlawful possession of marijuana. IO Exhibit 3. The

disposition of the criminal possession of a controlled substance in the seventh degree (cocaine) charge is unknown.

ORDER

IT IS HEREBY ORDERED that upon finding the above charge **PROVED** against Respondent, his Coast Guard License No. 1019349 is **REVOKED**.

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

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

Done and dated July 8, 2005
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Order was sent to the following individuals and entities by the method indicated below:

LT Richard Gonzalez, USCG
USCG Activities New York
Investigations Department
212 Coat Guard Drive
Staten Island, NY 10305
Phone: (718) 354-4229
Facsimile: (718) 354-4224

Via Facsimile

Frederick W. Meeker, Esquire
7 Dey Street
New York, NY 10007
Phone: (212) 528-1332
Facsimile: (212) 528-1341

Via Facsimile

USCG ALJ Docketing Center
40 S. Gay Street, Rm 412
Baltimore, MD 21202
Phone: (410) 962-7434
Facsimile: (410) 962-1746

Via Facsimile

Alyssa L. Paladino, Esq.
Attorney-Advisor
Office of the Chief Administrative Law Judge
U.S. Coast Guard

Done and dated July 8, 2005
New York, New York

ATTACHMENT A

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.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

COMPLAINANT'S WITNESSES

1. Michael G. DeSimone, Respondent

COMPLAINANT'S EXHIBITS

1. Coast Guard License
2. Charge Sheet / Affidavit
3. Certificate of Disposition

RESPONDENT'S EXHIBITS

- A. Information Sheet
- B. National Driver Registry Act
- C. CHRS Customer Data Report