

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

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Complainant

vs.

Johnny Rex Dean

Respondent.

Docket Number: CG S&R 05-0278
CG Case No. 2328553

ORDER

Issued: November 10, 2005

Issued by: Walter J. Brudzinski, Administrative Law Judge

Procedural History

This Order is issued in accordance with 33 CFR sections 20.710 and 20.902(c) in that the undersigned rendered his initial decision orally from the bench at the close of the hearing on November 3, 2005 at MSO Morgan City, Louisiana. Finding that Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7704(b) and that the Coast Guard proved the charge alleged in the Complaint, the undersigned revoked Respondent's document at the close of the hearing.

The Coast Guard initialed this Complaint on May 11, 2005 alleging "Conviction of a Dangerous Drug Law Violation" in that Respondent was convicted of Possession of Cocaine in the State of Louisiana on December 9, 1998. The Coast Guard also charged Respondent with Misconduct in that on July 11, 2001 he failed to disclose this conviction on his Merchant Mariner's License Renewal Application in violation of 46 CFR 10.201(h). The Respondent made timely Answer to the Complaint and requested a hearing.

The Chief Administrative Law Judge assigned this matter to Judge Jeffie Massey of New Orleans, Louisiana on May 24, 2005. Due to the disruptions caused by Hurricane Katrina, it was reassigned to Judge Walter J. Brudzinski and the matter was eventually set for hearing to commence on November 3, 2005. On October 28, 2005, the Coast Guard filed a Motion to Amend the Complaint requesting that the Misconduct allegation be removed because it was filed after the time limitation for service of a Complaint alleging Misconduct of the type specified. That left only one allegation, Conviction for a Dangerous Drug Law Violation, for hearing. The undersigned granted the Motion and the hearing commenced on November 3, 2005 at MSO Morgan City, Louisiana.

The Coast Guard was represented by LTJG Adam Bryant, USCG and ENS Timothy Tilghman, USCG. The Coast Guard introduced three exhibits. Respondent appeared *pro se*; that is, he represented himself. He testified on his own behalf. His statement was essentially the same as he provided in his Answer to the Complaint so the undersigned marked that as an Exhibit and has included it in the record. Mr. Jimmy Martin, of B and J Martin, Inc. also testified on behalf of Respondent.

Law

Title 46 United States Code, Section 7704(b) is the applicable law which controls allegations of “Conviction for a Dangerous Drug Law Violation.” It reads as follows:

(b) If it is shown at a hearing under this chapter that a holder of a license, certificate of registry, or merchant mariner's document 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, certificate, or document shall be suspended or revoked.

Title 46 Code of Federal Regulations, Section 5.35 is the applicable regulation which controls allegations of “Conviction for a Dangerous Drug Law Violation.” It reads as follows:

Where the proceeding is based exclusively on the provisions of title 46 U.S.C. 7704, the complaint will allege *conviction for a dangerous drug law violation or use of a dangerous drugs or addiction to the use of dangerous drugs*, depending upon the circumstances and will allege jurisdiction by stating the elements as required by title 46 U.S.C. 7704, and the approximate time and place of the offense.

Title 46 CFR 5.59 provides, in pertinent part:

An administrative Law Judge enters an order revoking a respondent's license, certificate or document when –

* * *

(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**, (emphasis added) whether or not further court action is ending, and such charge is found proved. A conviction becomes final when no issue or law or fact determinative of the respondent's guilt remains to be decided.

Complaint

The Complaint, as served, cites as statutory authority 46 U.S.C. 7704(b) and 46 U.S.C. 7703. As regulatory authority, it cites 46 CFR 5.27 Conviction for a Dangerous Drug Law Violation and 46 CFR 5.27 Misconduct. Removing the Misconduct charge also removed the citation to 46 U.S.C. 7703 and 46 CFR 5.27 Misconduct. That left 46 U.S.C. 7704(b), cited above, and 46 CFR 5.27.

The allegations in the Complaint, as served, reads as follows:

FACTUAL ALLEGATIONS ---Conviction for Dangerous Drug Law Violation

1. The Coast Guard alleges that:
 - a. On 06/17/1998, the Respondent was arrested by the Lafourche Parish Sheriffs Department for Possession of Crack Cocaine.
 - b. On 12/09/1998, the Respondent pled GUILTY to the above-mentioned charge.
 - c. The Respondent was sentenced to three years of active probation with conditions.
 - d. By pleading guilty to Possession of Crack Cocaine, the Respondent violated a dangerous drug law.

Amendments to the Complaint

While the Complaint still alleges 46 CFR 5.27 as the regulatory authority for this “Conviction” offense., it is more appropriate to cite 46 CFR 5.35 as noted above. Therefore, the Complaint is hereby amended to reflect 46 CFR 5.35 in place of 46 CFR 5.27 (Misconduct) as regulatory authority for “Conviction of a Dangerous Drug Law Violation.” The Administrative Law Judge may amend Complaints to correct minor errors that do not affect notice to the Respondent or to his ability to prepare a defense. See Appeal Decision 2388 (MANLEY) (1985)

citing Kuhn v. C.A.B., 185 F.2d 839 (D.C. Cir. 1950); Appeal Decision 2393 (STEWART) (1985); Appeal Decision 2309 (CONEN) (1983).

As prescribed in 46 CFR 5.35 above, the Complaint will “allege jurisdiction by stating the elements as required by title 46 U.S.C. 7704, and the approximate time and place of the offense.” 46 U.S.C. 7704(b) recites two main elements: 1) that one must be a holder of a license, certificate of registry, or merchant mariner's document issued under this part; and 2) within 10 years before the beginning of the proceedings, have been convicted of violating a dangerous drug law of the United States or of a State; and 3) if the allegation is found proved, the license, certificate, or document shall be suspended or revoked.

Although it was known by all parties and proved at the hearing that the conviction occurred within the last 10 years and that Respondent was a holder of a Merchant Mariners license at the time of the conviction, it is necessary to amend the Complaint further to conform to the requirements of 46 CFR 5.35 and the proof offered at hearing. Therefore, the “Conviction for Dangerous Drug Law Violation” allegation in the Complaint is amended by adding or substituting the language which is underlined as follows:

a. On 06/17/1998, the Respondent was arrested by the Lafourche Parish, Louisiana Sheriffs Department for Possession of Crack Cocaine.

b. On 12/09/1998, the Respondent, a holder of a Coast Guard license, pled GUILTY and was convicted of Possession of Cocaine.

c. The Respondent was sentenced to serve five (5) years, with all but 90 days suspended on conditions of 3 years active probation with random drug screens and random searches of his person or property.

d. Respondent was convicted of violating a dangerous drug law of the United States or of a State within 10 years before the beginning of these proceedings.

Since these amendments are recitations of the law and regulations or information contained in documents that had been in Respondent's possession, the additions and changes merely conform the allegations to the proof and do not affect notice or Respondent's opportunity to litigate. Id.

Coast Guard's Proof

To prove that Respondent was a holder of a license, certificate of registry, or merchant mariner's document, the Coast Guard introduced a completed CG Form 719B, Application for License as Officer, Staff Officer, Operator, and Merchant Mariner's Document, a form completed by Respondent on July 11, 2001 to renew his license. The completed form reflects that Respondent's last license, #772925, was issued to him on June 10, 1996. Taking official notice that licenses are issued for periods of 5 years, that document shows that Respondent was a holder of a license on the date he was convicted.

To prove that Respondent was arrested for Possession of Crack Cocaine and convicted of Possession of Cocaine, the Coast Guard introduced certified copies of the Lafourche Parish Report of Arrest and Judgment of Conviction reciting essentially the allegations in the charge. After the Coast Guard introduced those exhibits, it rested.

Respondent's Case

Respondent testified on his own behalf admitting that he was convicted of the charge in question but that he was with a friend in a parking lot when his friend gave him some cash and told him to walk over to a stranger and ask him for a "dime." Respondent claimed that he did not know what the word "dime" meant in narcotics street parlance. Respondent went on to say

that he was arrested and pled guilty on the advice of his court appointed attorney who never asked him what happened. His testimony followed the language contained in his “Defense statements” which he filed with his Answer to the Complaint. To capture more accurately what Respondent said, I have marked his “Defense statement” as Respondent’s Exhibit 1 and now include it as part of the record.

Respondent’s employer, Mr. Jimmy Martin, was sworn and testified that Respondent has worked for him for the last 3 and one half years; that he has never failed a drug test; that he has never displayed any actions considered to be misconduct; that he was a victim of circumstances; that he has paid his debt to society; that he pled guilty on advice of his attorney; and that to revoke his license unfairly imposes a hardship on his current family as well as and children from previous marriages. Finally, Mr. Martin opined that Respondent has rehabilitated and that to punish him further by revoking his license is an injustice.

At the close of the hearing, I asked the parties if they wished to submit proposed findings of fact and conclusions of law. After explaining the concept of proposed findings and conclusions to the Respondent and his employer, both parties declined to submit anything further. I then announced that I will recite my findings and conclusions from the bench and follow up with a written order as provided by the regulations. I announced that the judgment of conviction proved by the Coast Guard was for a dangerous drug law violation; that at the time of his conviction, 12/09/1998, Respondent was the holder of a validly issued Merchant Mariners license; and, that the conviction was within 10 years of these proceedings. Therefore, I found the charge proved.

Sanction

I explained that although 46 U.S.C. 7704(b) provides for either revocation or suspension, the regulations found at 46 CFR 5.59 clearly prescribe that administrative law judges must revoke in those case where it is found proved that a respondent has been convicted for a violation of the dangerous drug laws. I also advised that the provision in 46 U.S.C. 7704(b) for suspension is to allow Coast Guard investigating officers to enter into settlement agreements when they deem it appropriate and in the interest of maritime safety. Since I have found the allegations proved, I have no discretion but to follow the prescriptions of 46 CFR 5.59(b) and revoke Respondent's license.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that upon finding the above charge **PROVED** against Respondent, his Coast Guard License (No. 952488), previously turned over to the Coast Guard Investigating Officer on November 3, 2005, 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.

Done and dated November 10, 2005
New York, NY

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

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:

LTJG Adam Bryant,USCG
ENS Timothy Tilghman, USCG
MSO Morgan City
Investigations Department
800 David Drive, Rm 232
Morgan City. LA 70380-1304
Phone: (985) 380-5339
Facsimile: (985) 380-5379
(Via Facsimile)

B and J Martin, Inc.
Attn: Mr. Jimmy Martin
o/b/o Johnny Rex Dean
P.O. Box 448
Cut Off, LA 70345
Phone: (985) 632-2727
Facsimile: (985) 632-4481
(Via Facsimile)

Johnny Rex Dean
307 East 37th Street
Cut Off, LA 70345
(Via First Class Mail)

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

Done and dated November 10, 2005
New York, NY

Regina V. Thompson
Paralegal Specialist, Assistant to the
Administrative Law Judge
Phone: (212) 668-2971
Facsimile: (212) 825-1230

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

NONE

COMPLAINANT’S EXHIBITS

1. Lafourche Parish Sheriff’s Office Report of Arrest, 1 page.
2. Criminal Case Minutes of the 17th District Court, Parish of Lafourche – Thibodaux, Louisiana, (Judgment of Conviction) 1 page
3. CG Form 719B, Application for License as Officer, Staff Officer, Operator, and Merchant Mariner’s Document, 3 pages

RESPONDENT’S EXHIBITS

- A. Defense statements, 1 page

ALJ’S EXHIBITS

1. Copy of Respondent’s U.S. Merchant Marine Officer’s License #952488, 2 pages