UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

JASON WAYNE KOVALESKI

Respondent.

Docket Number: CG S&R 05-0250
CG Case No. 2342552

Order Granting Summary Decision

Issued: February 8, 2006

Issued by: Thomas E. P. McElligott, Administrative Law Judge

Preliminary Statement

On April 26, 2005, the Coast Guard Investigating Officers (IOs) stationed at Panama City, Florida initiated an administrative proceeding against Respondent Jason Wayne Kovaleski's Coast Guard issued license, certificate, and/or merchant mariner's document for Conviction for a Dangerous Drug Violation, as prohibited by 46 U.S. Code 7704(b). *Coast Guard Complaint*, April 26, 2005 served by the IOs personally on Respondent. Respondent filed an Answer to the Complaint, raising defenses to the Coast Guard's allegations. *Respondent's Answer*, May 12, 2005. On August 1, 2005, the Coast Guard served and filed a motion for summary decision and proposed revocation as an appropriate order. *Coast Guard Motion for Summary Decision*, Aug. 1, 2005. Four days later, the Honorable Jeffie J. Massey denied the motion for summary decision, 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.'" *Order Denying Motion for Summary Decision*, Aug. 5, 2005, at 2.

On August 23, 2005, the Coast Guard amended its Complaint, including more detailed factual allegations. *Coast Guard Amended Complaint*, Aug. 23, 2005. Respondent filed an Answer to the Amended Complaint, alleging that the Coast Guard investigating officer "left out an important element of the charge he is seeking revocation for." *Respondent's Answer to the Amended Complaint*, Sept. 27, 2005, at 1. After Hurricane Katrina struck New Orleans and surrounding communities, this case was reassigned from the Honorable Jeffie J. Massey stationed in New Orleans to Judge Thomas E. P. McElligott, see *Notice of Reassignment*, dated Oct. 6, 2005. Judge McElligott then ordered the parties to: (1) prepare lists of witnesses and exhibits; and (2) to serve the lists on the other party and file copies with the ALJ Docketing Center. *Order*, Oct. 11, 2005. The Coast Guard IOs filed a witness and exhibit list, see *Coast*

Guard Witness and Exhibits List, Oct. 12, 2005, but Respondent did not. On December 9, 2005, the Coast Guard again moved for summary decision, arguing that there were no genuine issues of material fact left to be determined, and requesting an order of revocation in accordance with 46 CFR 5.59. *Coast Guard Motion for Summary Decision*, Dec. 9, 2005, at 1. Subsequent to this, Respondent filed a cross-motion for summary decision and asked that his case be dismissed.[1] *Respondent Motion for Summary Decision*, Dec. 25, 2005, at 1. The Coast Guard IOs have not responded to Respondent's cross-motion.

Discussion

Motions for Summary Decision

Pursuant to 33 CFR 20.901(a), "[a]ny party may move for a summary decision in all or any part of the proceeding on the grounds that there is no genuine issue of material fact and that the party is entitled to a decision as a matter of law." An ALJ may grant a party's motion for summary decision "if the filed affidavits, the filed documents, the material obtained by discovery or otherwise, or matters officially noted show that there is no genuine issue of material fact and that a party is entitled to a summary decision as a matter of law." Id. at 20.901(b).

In his Answer to the Coast Guard Complaint, Respondent raises defenses to the Coast Guard's allegations. *Respondent's Answer*, May 12, 2005, at 1. Essentially, Respondent argues

[1] Respondent also requested summary decision in a letter to Judge Massey, which he attached to his Answer to the Coast Guard Amended Complaint and submitted in September. See *Respondent's Answer to the Amended Complaint*, Sept. 27, 2005. It does not appear that the Coast Guard was served with a copy of this letter. As such, a copy of Respondent's original request for summary decision is included with this order in Attachment A. Respondent's request and supporting arguments are extremely similar to those of the motion for summary decision Respondent made in December. See *Respondent Motion for Summary Decision*, Dec. 25, 2005. The Coast Guard Investigating Officers (IOs) have already been served with a copy of the Respondent's motion for summary decision filed in December.

that none of the drug paraphernalia was his own, and that he was only present at the location or hotel room where the drug paraphernalia was found for ten minutes. Id. Respondent stresses that "[i]t was [his] word vs. an officers [sic]." Id. Respondent argued he could not afford to take the criminal matter to trial, so, "[u]nder advice from [a] lawyer, [Respondent] paid a fine and was charged with a misdemeanor." Id. Respondent's Answer, however, attacks the Florida criminal court charge of Respondent's possession of drug paraphernalia itself, rather than the charge of Conviction for a Dangerous Drug Law Violation the Coast Guard has asserted. In accordance with Coast Guard rules and regulations, however, the Florida state criminal court's judgment must be considered conclusive. See 33 CFR 20.1307(c) (stating that "[a] judgment of conviction by a Federal or State court for a violation is conclusive in the proceeding if an S&R proceeding alleges conviction for … [a] violation of a dangerous-drug law"). As such, to the extent that Respondent's arguments call into question the judgment of the state criminal court that he was in possession of drug paraphernalia after Respondent Kovaleski pleaded no contest to possession of drug paraphernalia, they will not help him in this administrative proceeding.

The Coast Guard has charged Respondent with Conviction for a Dangerous Drug Law Violation. *Coast Guard Complaint*, April 26, 2005, at 1; see also *Coast Guard Amended Complaint*, Aug. 23, 2005, at 1. Pursuant to 46 U.S.C. 7704(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.

Thus, to prove its case, the Coast Guard must demonstrate that: (1) Respondent is "a holder of a license, certificate of registry, or merchant mariner's document"; and (2) "within 10 years before the beginning of the proceedings, [Respondent] has been convicted of violating a dangerous drug law of the United States or of a State." Id.

The Coast Guard has properly made all jurisdictional and factual allegations required to prove a violation of 46 U.S.C. 7704(b) by asserting that: (1) Respondent is a holder of License No. 877512, and (2) "[o]n August 13, 2002, ... Respondent was convicted in the County Court of Bay County, FL of Possession of Drug Paraphernalia, a Dangerous Drug Law of the State of Florida." *Coast Guard Amended Complaint*, Aug. 23, 2005, at 1-2. In support of its allegations, the Coast Guard refers to documents evidencing the conviction attached to the Coast Guard Witness and Exhibit List dated September 12, 2005. Had Respondent argued these assertions were incorrect, there would be an issue of material fact and summary decision might not be appropriate. See 33 CFR 20.901. Respondent's Answer to the Coast Guard's Complaint, however, does not raise any argument that calls either element of the Coast Guard's case into question. See *Respondent's Answer*, May 12, 2005, at 1. Rather, Respondent's Answer tries to explain away why he entered the no contest plea upon advice from his attorney in state criminal court for the possession of drug paraphernalia charge and now tries to argue that the drug paraphernalia found was not actually his own. Id. Respondent's arguments focus on whether he was guilty of the state law offense for which he was convicted, but Respondent does not raise any argument which calls into question an element required to prove a Conviction for Dangerous Drug Law Violation. See 46 U.S.C. 7704(b).

Nothing Respondent argued in his Answer weakens the Coast Guard's case for a 46 U.S.C. 7704(b) violation for Conviction for a Dangerous Drug Law Violation. Respondent's arguments suggest that he feels the state court conviction was inappropriate, but, for our purposes, "[a] judgment of conviction by a … State court for a violation is conclusive in the proceeding if an S&R (Suspension and Revocation) proceeding alleges conviction for … [a] violation of a dangerous-drug law." 33 CFR 20.1307(c). The fact that Respondent answered or

pled no contest in a state criminal court upon the advice of Respondent's attorney to the possession of drug paraphernalia violation does not mean that the state criminal court did not enter a judgment of conviction. Indeed, "if [the respondent] pleads guilty or no contest … the Coast Guard regards him or her, for the purposes of 46 U.S.C. 7703 or 7704, as having received a conviction." Id. at 20.1307(d). Respondent did plead no contest to this criminal court charge.

Possession of Drug Paraphernalia as a Violation of a Dangerous Drug Law

Although Respondent did not argue that possession of drug paraphernalia did not constitute a violation of a dangerous drug law, the Honorable Jeffie J. Massey raised this issue. *Order Denying Motion for Summary Decision*, Aug. 5, 2005, at 2 (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'"). As such, it is proper that we address this question today. Although neither 46 U.S.C. 7704(b) or 46 CFR 5.35 defines a dangerous drug law for purposes of establishing a Conviction for a Dangerous Drug Law Violation charge, to argue that the violation of a State of Florida criminal law prohibiting the possession of drug paraphernalia ought not be considered a violation of a law concerning dangerous drugs would be extremely difficult, if not impossible.

There is case law to support the conclusion that a conviction for drug paraphernalia possession may be considered a violation of a dangerous drug law. See generally Appeal Decision 1054 (MARTIN) (1958). In Appeal Decision 1830 (PACKARD) (1971), the Commandant found and ruled on appeal: "that a 'narcotic drug law' is a law designed to regulate and control the use of narcotics drugs, and that a conviction under such a law is a conviction within the meaning of [the Coast Guard statute prohibiting convictions for the

violation of a dangerous drug law]." Id. The Commandant decided on appeal that if the possession constituted possession of narcotic paraphernalia under the applicable state statute – in PACKARD, Section 11555 of the California Health and Safety Code – "that section is a narcotic drug law within the meaning of [the Coast Guard statute.]" Id. Furthermore, the Commandant considered "[t]he placement of Section 11555 of the California Heath and Safety Code in the 'Illegal Narcotics' chapter" to be convincing in determining whether such a violation was a violation of a dangerous drug law. Id. Ultimately, the Commandant concluded that the drug paraphernalia possession conviction was indeed a conviction for a narcotic drug law violation as prohibited by the Coast Guard statute. Id. On further appeal, the National Transportation Safety Board affirmed the Commandant's finding and appeal decision "that appellant ha[d] been convicted of a narcotic drug law violation … while holding seaman's documents." Commandant v. Packard, 1 NTSB 2301 (Order EM-21, 1972). Although 46 U.S.C. 7704(b) refers to "a dangerous drug law" rather than a narcotic drug law, the definition set forth in PACKARD should still apply. This is to say that "a law designed to regulate and control the use of narcotics drugs" is properly termed a dangerous drug law. See Appeal Decision 1830 (PACKARD) (1971).

In the instant matter, the Coast Guard IOs alleged Respondent Kovaleski was convicted for possession of drug paraphernalia, an offense prohibited by Chapter 893 of the 2002 Florida Statute. *Coast Guard Amended Complaint*, Aug. 23, 2005, at 2. Using the PACKARD analysis, I look to the placement of the paraphernalia possession law within the state statute and the intended purpose of the law. Appeal Decision 1830 (PACKARD) (1971). In the case at hand, the applicable Florida law appears in Chapter 893, "Drug Abuse Prevention and Control." See *Coast Guard Amended Complaint*, Aug. 23, 2005, at 2. This title suggests that the laws

contained therein are indeed intended to prevent and control dangerous drug use; to argue otherwise would be unreasonable.

Thus, while "dangerous drug law" is not defined by statute or regulation, the Commandant has held "that a 'narcotic drug law' is a law designed to regulate and control the use of narcotics drugs, and that a conviction under such a law is a conviction within the meaning of [the Coast Guard statute prohibiting convictions for violations of dangerous drug laws]." Appeal Decision 1830 (PACKARD) (1971). As such, if possession of drug paraphernalia is prohibited by a federal or state law meeting the PACKARD requirements, conviction for such possession may properly be considered a Conviction for a Dangerous Drug Law Violation, as prohibited by 46 U.S.C. 7704(b).

Conclusion

The parties' cross-motions for summary decision indicate an agreement that there are no genuine issues of material fact left to be determined in this matter. I concur with the parties that there remain no questions of fact relevant to the Conviction for Dangerous Drug Law Violation charge for which the Coast Guard seeks revocation of Respondent's license. Since "there is no genuine issue of material fact," our analysis rightfully shifts to whether either moving party "is entitled to a summary decision as a matter of law." Id. at 20.901(b).

The Coast Guard IOs have properly made all required jurisdictional and factual allegations to prove a violation of 46 U.S. Code 7704(b) by asserting that: (1) Respondent is a holder of License No. 877512, and (2) "[o]n August 13, 2002, ... Respondent was convicted in the County Court of Bay County, FL of Possession of Drug Paraphernalia, a Dangerous Drug

Law of the State of Florida." *Coast Guard Amended Complaint*, Aug. 23, 2005, at 1-2. While Respondent asserted defenses in his Answer, his arguments focused on whether he was guilty of the state criminal law offense for which Respondent Kovaleski pleaded no contest and was convicted. Id. Respondent did not raise any arguments which call into question the elements required to prove a Conviction for a Dangerous Drug Law Violation. See id.; see also 46 U.S.C. 7704(b). As such, I find the charge of Conviction for a Dangerous Drug Law Violation, in violation of 46 U.S.C. 7704(b), to be proved. The Coast Guard Investigating Officers are entitled to summary decision as a matter of law. Respondent's motion for summary decision is denied.

The Coast Guard IOs have requested a sanction of revocation in this matter. I agree with the Coast Guard that revocation is appropriate. Although the statute indicates that both suspension and revocation are appropriate sanctions for Conviction for a Dangerous Drug Law Violation, see id., it is clear that only revocation is appropriate in the instant matter. When the Coast Guard and Maritime Transportation Act, Pub. L. 108-293, Title IV, § 402 (Aug. 9, 2004), amended 46 U.S.C. 7704(b), it changed "shall be revoked" to "shall be suspended or revoked. Amending the 46 U.S.C. 7704(b) language in this way was intended to "allow the use of Settlement Agreements to resolve cases involving minor drug convictions." H.R. Conf. Rep. No. 108-617, at 78 (2004). While the Coast Guard and Maritime Transportation Act granted "[t]he Coast Guard the discretion to suspend a mariner's credentials in dangerous drug law conviction cases," the Act did not amend 46 CFR 5.59, which mandates revocation if a charge of Conviction for a Dangerous Drug Law Violation is found proved. Therefore, as an ALJ, I do not have any discretion in this matter; the law states I must revoke. See generally Appeal Decision 2303 (HODGEMAN) (1983) (interpreting 46 U.S.C. 239(b) [the predecessor statute to 46 U.S.C.

7704(b)], which provided the Coast Guard discretion whether to suspend or revoke in narcotic drug law conviction cases), *aff'd sub nom.* Commandant v. Hodgeman, 4 NTSB 1918 (1983).[2]

There are "[o]ffenses for which revocation of licenses, certificates or documents is mandatory." Id. Pursuant to 46 CFR 5.59, "[a]n Administrative Law Judge enters an order revoking a respondent's license, certificate or document when … [t]he respondent has been … convicted for a violation of the dangerous drug laws, whether or not further court action is pending, and such charge is found proved." See also id. at 5.569 (stating that "[t]he only proper order for a charge under 46 U.S.C. 7704 found proved is revocation"). Because it is found that Respondent violated 46 U.S.C. 7704(b) for Conviction for a Dangerous Drug Law Violation, the revocation of Respondent's license is the appropriate order in this matter.

ORDER

IT IS HEREBY ORDERED that the Coast Guard's Motion for Summary Decision is GRANTED; and that Respondent's Motion for Summary Decision is DENIED;

IT IS HEREBY FURTHER ORDERED that the Coast Guard License issued by the U.S. Coast Guard to Respondent Jason Wayne Kovaleski is REVOKED. Respondent J. W. Kovaleski is ordered to deliver his license immediately to the U.S. Coast Guard Marine Safety Detachment Office at 1700 Thomas Drive, P.O. Box 32043, Panama City, Florida 32407 by mail or in person.

[2] However, the Commandant noted that 46 CFR 5.03-10 [the predecessor regulation to 46 CFR 5.59] limited the judge's discretion. Appeal Decision 2303 (HODGEMAN) (1983), *aff'd sub nom.* Commandant v. Hodgeman, 4 NTSB 1918 (1983). The judge could only issue a sanction of revocation under 46 CFR 5.03-10 after proof of conviction for a narcotic drug law violation. Id.

PLEASE TAKE NOTICE that the service of this Decision and Order on the Respondent serves as notice to the Respondent of his right to appeal, the procedures for which are set forth in 33 CFR 20.1001 through 20.1003 and are located below in Attachment B.

SO ORDERED.

Done and dated February 8, 2006.
Houston, Texas

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THOMAS E. P. MCELLIGOTT
ADMINISTRATIVE LAW JUDGE
DEPARTMENT OF HOMELAND SECURITY
U.S. COAST GUARD

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