

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

UNITED STATES COAST GUARD

Complainant

vs.

LOWELL EUGENE HOLLEY

Respondent.

Docket Number: CG S&R 05-0269
CG Case No. 225518

Order Granting Summary Decision in Part

Issued: February 17, 2006

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

For the U.S. Coast Guard

Investigating Officers
LT Bryan Dunlap
MST1 Barry K. Hollenbeck
MST1 Tanya Huneycutt
U.S. Coast Guard Sector Field Office
1700 Thomas Drive
Panama City, FL 32407

For the Respondent

Appleman, Shepard & Downing Law Offices, P.A.
By Jim Appleman, Esq.
2211 Thomas Drive
Panama City Beach, FL 32408

Preliminary Statement

On May 4, 2005, the Coast Guard initiated an administrative proceeding against Respondent's Coast Guard License number 944851 for Conviction for a Dangerous Drug Violation and Misconduct, as prohibited by 46 U.S.C. 7704(b) and 46 U.S.C. 7703(b) respectively. *Coast Guard Complaint*, May 4, 2005. Respondent filed an Answer on May 12, 2005, admitting the Complaint's jurisdictional allegations but denying all factual allegations. *Respondent's Answer*, May 12, 2005, at 1. Respondent did not allege any affirmative defenses. Id. Respondent noted that he wished to be heard on the Coast Guard's proposed order and requested that a hearing be held in Panama City, Florida. Id. Respondent also requested settlement discussions with the Coast Guard. Id.

The case was assigned to the Honorable Thomas E. McElligott. *Notice of Assignment*, May 17, 2005. Judge McElligott conducted a pre-hearing conference on May 26, 2005. *Pre-Hearing Conference Report and Scheduling Order*, May 26, 2005, at 1. The parties agreed that "if a settlement in this case [was] not reached by or before June 30, 2005, the case [would] proceed to hearing on ... July 27, 2005." Id. at 2. Respondent moved for continuance on June 29, 2005, and the hearing was rescheduled for October 26, 2005. See Respondent's Motion for Continuance, June 29, 2005; *Order of Continuance*, July 20, 2005. The Coast Guard filed its Witness and Exhibits List on October 5, 2005. On October 17, 2005, Judge McElligott rescheduled the hearing for January 11, 2006, "due to the potential landfall predicted of TS/Hurricane Wilma along the Gulf Coast of the United States." *Order of Continuance*, Oct. 17, 2005. Days later, Respondent's counsel filed another motion for continuance, noting that Respondent's counsel's obligations in another matter conflicted with the new hearing date Judge McElligott set. *Respondent's Motion for Continuance*, Oct. 20, 2005. The ALJ granted

Respondent's motion for continuance and rescheduled the hearing for February 23, 2006. *Order Granting Motion for Continuance*, Oct. 25, 2005.

On December 13, 2005, the Coast Guard moved for summary decision, "on the grounds that there [were] no genuine issues of material fact" to be resolved at hearing. *Coast Guard Motion for Summary Decision*, Dec. 13, 2005, at 1. The Coast Guard proposed a sanction of revocation in accordance with 46 CFR 5.59. *Id.* Respondent filed a response on December 21, 2005 and requested that the Coast Guard's motion be denied, as Respondent maintained that "there [was] a genuine issue of material fact in this cause." *Respondent's Response to Complainant's Motion for Summary Decision*, Dec. 21, 2005, at 1-2. Respondent also alleged that the "Coast Guard[] has entered into previous stipulations suspending the licenses of other Respondents who have had the same violations [as Respondent is alleged to have] or even more severe violations" but that the Coast Guard "refuse[d] to accept or negotiate with Respondent for suspension of his license." *Id.* According to Respondent, the Coast Guard's actions "are arbitrary and capricious and a violation of the Respondents [sic] Right to Due Process and Equal Protection of the Law." *Id.* at 2.

Subsequently, the Coast Guard amended its Complaint and Motion for Summary Decision seeking revocation of Respondent's Merchant Mariner's Document, in addition to the Coast Guard License for which revocation was originally sought. *Coast Guard Amended Complaint*, February 9, 2006; *Coast Guard Amended Motion for Summary Decision*, February 9, 2006.

Discussion

Amendment of the Complaint

With respect to amendment of the complaint, under 33 CFR 20.305(a), each party may amend or supplement previously filed pleading or documents so long as the amendment or supplement does not broaden the issues without providing the opposing party an opportunity to reply to it and to prepare for the broaden issue. The ALJ has discretion whether to permit an amendment. See 33 CFR 20.305(b). In these proceedings, the regulations make clear that an “order is to be directed against all licenses, certificates, and documents, except in cases of negligence or professional incompetence.” See 46 CFR 5.567(b). As such, I find that the amendment does not broaden the issues, and the amendment is permissible.

Motion 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 admits the Coast Guard’s jurisdictional allegations but denies all factual allegations. *Respondent’s Answer*, May 12, 2005, at 1. As Respondent has not filed an answer to the Coast Guard’s Amended Complaint, he has neither admitted or denied the additional jurisdictional allegations contained therein. See *Coast Guard Amended Complaint*, February 9, 2006. To determine whether there exist any issues of material fact so as to make summary decision inappropriate, we will examine each charge separately.

Conviction for a Dangerous Drug Law Violation

The Coast Guard has charged Respondent with Conviction for a Dangerous Drug Law Violation. *Coast Guard Complaint*, May 4, 2005; see also *Coast Guard Amended Complaint*, February 9, 2006. 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 properly made all required jurisdictional and factual allegations to prove a violation of 46 U.S.C. 7704(b) by asserting that: (1) Respondent is a holder of License No. 944851 and a Merchant Mariner's Document, and (2) “Respondent was convicted of violating a dangerous drug law of the United States, on 16 January 2003.” *Coast Guard Complaint*, May 5, 2005, at 1-2; *Coast Guard Amended Complaint*, February 9, 2006, at 1-2. In support of its allegations, the Coast Guard referred to documents evidencing Respondent's conviction in the County Court in and for Bay County, State of Florida, and attached these documents to the Coast Guard Witness and Exhibit List dated October 5, 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. While denying all factual allegations contained in the Coast Guard Complaint, Respondent's Answer 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.

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. In accordance with Coast Guard regulations, the Florida state 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"). The fact that Respondent pled no contest to Driving Under the Influence and Possession of Marijuana Under 20 Grams does not mean that the state court did not enter a judgment of conviction. See Respondent's Plea of No Contest in Absentia, County Court in and for Bay County, State of Florida, January 15, 2003, submitted as an intended Coast Guard exhibit. 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." 33 CFR 20.1307(d).

Further, the fact that the Coast Guard has entered into previous stipulations suspending the licenses of other mariners charged with similar violations as Respondent does not evidence that the Coast Guard's actions are arbitrary and capricious or a violation of Respondents Right to Due Process and Equal Protection. The decision to settle certain cases and litigate others is a matter of prosecutorial discretion.

Misconduct

The Coast Guard has also charged Respondent with Misconduct. *Coast Guard Complaint*, May 4, 2005; see also *Coast Guard Amended Complaint*, February 9, 2006. Pursuant to 46 U.S.C. 7703(1)(b), "[a] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder ... **when acting under the authority of that license, certificate, or document** ... has committed an act of misconduct or

negligence.” (Emphasis added). As such, in order to prevail on the misconduct allegation, the Coast Guard must establish that Respondent was acting under the authority of his license and/or MMD when he was convicted of D.U.I. There are two instances in which a person is considered to be “acting under the authority” of his license or MMD. First, a person is considered to be “acting under the authority” of his license or MMD when employed in the service of a vessel for which the license or MMD is required by law or by the employer as a condition of employment. See 46 CFR 5.57(a). Second, a person is also considered to be “acting under the authority” of his license or MMD while engaged in official matters regarding the license or MMD; such official matters includes, but is not limited, such acts as applying for renewal of a license, taking examinations for upgrades or endorsements, and appearing at a hearing conducted under 46 CFR Part 5. Id. at 5.57(b).

The Coast Guard has not alleged and has not proved Respondent was acting under the authority of his license or MMD when he “was adjudicated guilty of a D.U.I. by the Bay County Court,” which is a requisite element of the Misconduct allegation. *Coast Guard Complaint*, May 4, 2005, at 2; see also *Coast Guard Amended Complaint*, February 9, 2006, at 2. As such, the Coast Guard’s Complaint is defective with respect to the charge of Misconduct, and the Coast Guard’s Motion for Summary Decision for this charge must be denied.

Conclusion

Motion for Summary Decision

The Coast Guard has properly made all required jurisdictional and factual allegations to prove Respondent’s Conviction for a Dangerous Drug Law Violation, as prohibited by 46 U.S.C. 7704(b), by asserting that: (1) Respondent is a holder of License No. 944851 and a Merchant Mariner’s Document, and (2) “Respondent was convicted of violating a dangerous drug law of

the United States, on 16 January 2003.” *Coast Guard Amended Complaint*, February 9, 2006, at 1-2; see also *Coast Guard Complaint*, May 5, 2005, at 1-2. In his Answer to the Coast Guard Complaint, Respondent denied the Coast Guard’s factual allegations. *Respondent Answer*, May 12, 2005, at 1.¹ Respondent did not, however, raise any arguments which call into question the elements required to prove a Conviction for a Dangerous Drug Law Violation. *Id.*; see also 46 U.S.C. 7704(b); 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, I find the charge of Conviction for a Dangerous Drug Law Violation, in violation of 46 U.S.C. 7704(b), to be proved. I will grant the Motion for Summary Decision with respect to the charge of Conviction for a Dangerous Drug Law Violation. I find that the Coast Guard is entitled to summary decision as a matter of law.

The Coast Guard’s motion for summary decision is denied, however, with respect to the charge of Misconduct. The Coast Guard failed to allege that Respondent was “acting under the authority of [his] license, certificate, or document,” see 46 U.S.C. 7703(b) (setting forth the required elements of a charge of Misconduct), when he “was adjudicated guilty of a D.U.I. by the Bay County Court.” *Coast Guard Complaint*, May 4, 2005, at 2; see also *Coast Guard Amended Complaint*, February 9, 2006, at 2. As such, the Coast Guard’s Complaint is defective with respect to the charge of Misconduct, because it fails to allege all required elements of the offense.

Sanction

The Coast Guard seeks revocation of Respondents license and MMD. *Coast Guard Complaint*, May 4, 2005, at 2; *Coast Guard Amended Complaint*, February 9, 2006, at 2. I agree

¹ To date, Respondent has not filed an answer to the Coast Guard’s Amended Complaint.

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; 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 I have found

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.

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 in part and DENIED in part;

IT IS HEREBY FURTHER ORDERED that the Coast Guard License and Merchant Mariner's Document issued to Respondent Lowell Eugene Holley is REVOKED. Respondent is ordered to surrender his license and MMD immediately to the U.S. Coast Guard Sector Field Office in Panama City, FL 32407.

PLEASE TAKE NOTICE that the service of this Decision and Order on the Respondent's counsel 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 17, 2006.
Houston, Texas

**THOMAS E. P. MCELLIGOTT
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD**

[REDACTED]