

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

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Complainant

vs.

BERNARD EUGENE HUTCHING

Respondent.

Docket Number: CG S&R 04-0540
CG Case No. 2210185

ORDER DENYING MOTION TO REOPEN

Issued: March 17, 2006

Issued by: Walter J. Brudzinski, Administrative Law Judge

Background

On October 8, 2004, Coast Guard Activities Baltimore issued a Complaint against Respondent alleging that he wrongfully falsified his renewal application for his Merchant Mariner's Document (MMD). Specifically, the Coast Guard alleged Respondent indicated on the reapplication form that he had not been convicted by any court for an offense other than a minor traffic violation when in fact he had been convicted of Cannabis Possession, Second Degree Assault, and Operating a Motor Boat Under the Influence. In his timely Answer to the Complaint, Respondent admitted all jurisdictional and factual allegations and agreed with the Coast Guard's proposed order of revocation.

On October 13, 2004, the ALJ Docketing Center assigned this case to the undersigned for review and entry of an appropriate Order. There were no factual issues in dispute so the allegations were proved by Respondent's Answer. Since there was no disagreement with the proposed sanction, the matter was ripe for entry of an order revoking Respondent's MMD. Therefore, on October 15, 2004, I issued an Order finding the violation proved by Answer and revoking Respondent's MMD.

Petition to Reopen

On March 6, 2006, the ALJ Docketing Center received a letter from Respondent dated February 15, 2006 seeking to have his MMD "reinstated." Respondent's letter states that he has been in contact with the Coast Guard in Baltimore and is making this request to "reopen" on

their advice. Respondent also claims that he “voluntarily surrendered his MMD to the Coast Guard by mail on May 26, 2004 with the understanding that upon completion of an alcohol and other drug rehabilitation program it would be reinstated.” His letter went on to say that “[u]nfortunately, the Marine Investigating Officer handling my case is no longer in that position. As a result of my time delay, the matter passed to you office.” Respondent closed by stating that he has completed treatment at the Seafarers Addictions Rehabilitation Center and is looking forward to resuming his seagoing career.

On March 8, 2006, the ALJ Docketing Center re-assigned this case to the undersigned for decision. Since the case file contained no documentation that Respondent had “voluntarily surrendered” his MMD, the undersigned contacted the original Investigating Officer on March 16, 2004 to ascertain whether Respondent had voluntarily surrendered his MMD or whether he voluntarily deposited it. The original Investigating Officer stated that Respondent had, in fact, voluntarily surrendered his MMD but not by mail on May 26, 2004. He voluntarily surrendered it in person on October 8, 2004 in the presence of the original Investigating Officer and two other officers at Activities Baltimore. Further, there was no understanding or agreement that the MMD would be returned to him upon completion of rehab. The original Investigating Officer forwarded the Voluntary Surrender document, signed by him and Respondent. Since that document was forwarded to the ALJ Docketing Center on October 8, 2004 but was not in the case file, it is now made part of the record.

Issues

Because Respondent voluntarily surrendered his MMD to the Coast Guard on October 8, 2004, seven days prior to entry of the Order of Revocation, the initial issue is whether the Administrative Law Judge has jurisdiction over an MMD that has been voluntarily surrendered prior to the Order Revoking it. The underlying issue is whether, in any event, good cause exists to reopen the record of this proceeding and take additional evidence.

Decision

Since voluntary surrender of a Merchant Mariner’s Document permanently relinquishes all rights to the document by the holder, the subsequent Order of Revocation is without legal effect. Therefore, an Administrative Law Judge is without authority to reopen. Even if the Order of Revocation was of legal force and effect and Administrative Law Judge had authority over the MMD, Respondent has not shown good cause for reopening and therefore his petition to reopen cannot be granted. As a practical matter, the result is the same. However, this does not mean that Respondent is precluded from applying for a new MMD. As shown below, a mariner who has surrendered his MMD or has had his MMD revoked, may, under certain circumstances, apply for a new MMD pursuant to Title 46 CFR Subpart L, sections 5.901 to 5.905. Respondent may also simply apply outright for a new MMD. In either event, Respondent will be required to prove cure which requires a greater showing than merely completing drug and alcohol rehab.

Voluntary Surrender

While Respondent voluntarily surrendered his MMD, it was not with the understanding that upon completion of an alcohol and other drug rehabilitation program it would be reinstated. “Voluntary surrender” is defined at 46 CFR 5.203 as follows:

(a) Any holder may surrender a license, certificate or document to the Coast Guard in preference to appearing at a hearing.

(b) A holder voluntarily surrendering a license, certificate or document shall sign a written statement containing the stipulations that:

(1) The surrender is made voluntarily in preference to appearing at a hearing;

(2) All rights to the license, certificate or document surrendered are permanently relinquished; and

(3) Any rights with respect to a hearing are waived.

(c) A voluntary surrender of a license, certificate or document to an investigating officer in preference to appearing at a hearing is not to be accepted by an investigating officer unless the investigating officer is convinced that the holder fully realizes the effect of such surrender.

Voluntary Deposit

If there had been an “understanding” that upon completion of rehab Respondent’s MMD would be returned to him, that “understanding” would have been a written agreement specifying the conditions upon which the Coast Guard will return the license. Had that been the case, Respondent would have voluntarily deposited his MMD. “Voluntary deposit” is defined at 46 CFR 5.201 as follows:

(a) A holder may deposit a license, certificate, or document with the Coast Guard in any case where there is evidence of mental or physical incompetence. A voluntary deposit is accepted on the basis of a written agreement, the original of which will be given to the holder, which specifies the conditions upon which the Coast Guard will return the license, certificate, or document to the holder.

(b) Where the mental or physical incompetence of a holder of a license, certificate, or document is caused by use of or addiction to dangerous drugs, a voluntary deposit will only be accepted contingent on the following circumstances:

(1) The holder is enrolled in a bona fide drug abuse rehabilitation program;

(2) The holder's incompetence did not cause or contribute to a marine casualty,

(3) The incompetence was reported to the Coast Guard by the individual or any other person and was not discovered as a result of a Federal, State or local government investigation; and

(4) The holder has not voluntarily deposited or surrendered a license, certificate, or document, or had a license, certificate, or document revoked for a drug related offense on a prior occasion.

(c) Where the mental or physical incompetence of a holder of a license, certificate, or document is caused by use of addiction to alcohol, a voluntary deposit will only be accepted contingent on the following circumstances:

(1) The holder is enrolled in a bona fide alcohol abuse rehabilitation program;

(2) and (3) read exactly the same as (b) (2) and (3) above.

(d) Where the conditions of paragraphs (b) and (c) of this section are not met, the holder may only surrender such license, certificate, or document in accordance with § 5.203.

Had Respondent not voluntarily surrendered his MMD, then the Order of Revocation would have legal effect. Had that been the case, Respondent would still have to show good cause to reopen.

Requirements for Reopening

Matters concerning reopening are covered at 33 CFR 20.904. The applicable subsections in 33 CFR 20.904 read as follows:

(a) To the extent permitted by law, the ALJ may, for good cause shown (emphasis added) in accordance with paragraph (c) of this section, reopen the record of a proceeding to take added evidence.

(b) Any party may move to reopen the record of a proceeding 30 days or less after closing the record.

(c) The ALJ may reopen the record of a proceeding if he or she believes that any change in fact or law, or that the public interest, warrants reopening it.

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(e)(1) At any time, a party may file a petition to reopen with the docketing Center for the ALJ to rescind any order suspending or revoking a merchant mariner's license . . . or document if –

(i) The order rests on a conviction -

(A) For violation of a dangerous drug law;

(B) Of an offense that would prevent the issuance or renewal of the license . . . or document; or

(C) Of an offense described in subparagraph 205 (a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401, note); and

(ii) The respondent submits a specific order of court to the effect that the conviction has been unconditionally set aside for all purposes.

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(f) Three years or less after an S&R proceeding has resulted in revocation of a license, certificate, or document, the respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center.

(1) Any motion to reopen the record must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea.

(2) Any party who does not respond to any petition to reopen the record waives any objection to the motion.

Discussion

Applying the facts to the law, there is nothing in the record to justify reopening the record to take additional evidence. There has been no change in fact or law, and there is nothing in the public interest that warrants reopening. Respondent's petition to reopen states only that he has completed treatment at the Seafarers Addictions Rehabilitation Center and is looking forward to resuming his seagoing career. Evidence of cure requires much more than mere completion of treatment.

Any motion to reopen the record must clearly state reasons why the basis for the Order of Revocation is no longer valid and how the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea. The Order of Revocation was entered based upon Respondent admitting all allegations in the Complaint. Respondent's petition to reopen does not dispute those allegations or admissions. Therefore, I find no basis to disturb the findings and sanction.

Respondent's Remedy

Respondent's petition states that he is "looking forward to resuming his seagoing career. . . [and has]. . . come to realize . . . that membership in the United States Merchant Marine mandates responsible behavior both onboard merchant vessels and while ashore." Since Respondent's case cannot be "reopened" for the reasons set forth above, the only remedy is applying for a new MMD pursuant to Subpart L of Title 46 CFR entitled "Issuance of New Licenses, Certificates or Documents After Revocation or Surrender." That subpart is appended as Attachment 1.

Wherefore,

ORDER

IT IS HEREBY ORDERED that Respondent's Petition to Reopen is **DENIED**.

Done and dated March 17, 2006
New York, NY

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

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded this Order to the following parties and entities by the methods indicated below:

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Done and dated March 17, 2006
New York, NY

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