

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

UNITED STATES COAST GUARD

Complainant

vs.

MARK EDWIN EGERTON

Respondent.

Docket Number: CG S&R 06-0268
CG Case No. 2664660

ORDER GRANTING WRITTEN MOTION FOR SUMMARY DECISION

Issued: April 9, 2007

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

Appearances:

PO Chris J. Champeau
U.S. Coast Guard
Sector Houston-Galveston
9640 Clinton Drive
PO Box 446
Houston, TX 77029
For the Coast Guard

Mark Edwin Egerton, pro se
For the Respondent

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PRELIMINARY STATEMENT

In discharge of its duty to promote the safety of life and property at sea, the United States Coast Guard ("Coast Guard" or "Agency") initiated this administrative action seeking revocation of the Merchant Mariner's Credential ("MMC") issued to Mark Edwin Egerton, the respondent in this case. This action was brought pursuant to the legal authority contained in 46 United States Code ("U.S.C.") 7703, and was conducted in accordance with the procedural requirements of 5 U.S.C. 551-559, 33 Code of Federal Regulations ("CFR") Part 20, and 46 CFR Part 5.

This case began on June 6, 2006 when the Coast Guard issued and served a complaint against Respondent seeking revocation of his MMC. The jurisdictional allegations of that complaint state that Respondent is the holder of an MMC. The factual allegations of that complaint state:

1. On April 13, 2006 the Respondent took a post-accident drug test.
2. A urine specimen was collected by C. Barbosa of Concentra Medical Centers, Corpus Christi, TX.
3. The respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was received and analyzed by Advanced Toxicology Network, Memphis, TN using procedures approved by the Department of Transportation.
5. The specimen subsequently tested positive for the marijuana (THC) metabolite.

The complaint was filed with the ALJ Docketing Center in Baltimore, MD on June 7, 2006.

On July 5, 2006, the Coast Guard filed two motions. The first was a Motion for Certification of Non-Answer to the complaint. The second was a Motion for Default Order based on Respondents failure to file an answer to the complaint. That same day, on July 5, 2006, the ALJ Docketing Center certified that an answer to the complaint had not been received from Respondent.

The ALJ Docketing Center did not receive Respondent's answer to the complaint until July 18, 2006. The Respondent's answer was dated June 28, 2006. This case was subsequently assigned to Judge Thomas E. P. McElligott for adjudication. Based on Respondent's filing of the written answer to the complaint, the Investigating Officer's Motion for Default is hereby **DENIED**.

An evidentiary trial-type hearing was scheduled in Houston, Texas on March 22, 2007. That hearing was subsequently postponed based on the Coast Guard's pending written motion for summary decision. On March 8, 2007, the Coast Guard filed a Motion for Summary Decision arguing that there is no genuine issue of material fact because Respondent admitted "all jurisdictional and all factual allegations," and that the Coast Guard is entitled to a decision as a matter of law. Respondent has not filed a signed, written reply to the Coast Guard's Motion for Summary Decision. After careful review of the facts and circumstances of this case, including the applicable law, the Coast Guard's Motion for Summary Decision is **GRANTED**.

FINDINGS OF FACT

1. In a written Answer dated June 28, 2006, Respondent Mark Edwin Egerton admitted all the jurisdictional allegations of the complaint that states he holds a United States Coast Guard issued Merchant Mariner Credential.
2. In that same Answer, Respondent admitted all the factual allegations of the complaint that states that he took a post-accident drug test on April 13, 2006 in which he subsequently tested positive for marijuana.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Mark Edwin Egerton and the subject matter of this proceeding fall within the jurisdiction vested in the U.S. Coast Guard under 46 U.S.C. 7704(c).
2. The Coast Guard's use of dangerous drugs allegation is proved based on Respondent's admission of all allegations and that Respondent tested positive for marijuana (THC) metabolite. See Appeal Decision 2559 (NEILSEN) (1995).
3. Under 46 U.S.C. 7704(c) and 46 CFR 5.59(b), the only appropriate sanction is revocation of Respondent's U.S. Coast Guard issued Merchant Mariner's Credentials.

DISCUSSION

Summary decision is a well accepted and commonly used procedural device in administrative agencies, whereby the government disposes of a controversy on the pleadings without an evidentiary hearing. See Reese, ADMINISTRATIVE LAW DESK REFERENCE FOR LAWYERS 168. The standard of review of a summary decision motion is set forth in 33 CFR 20.901, which provides in pertinent part:

(a) Any 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. The party must file the motion no later than 15 days before the date fixed for the hearing and may include supporting affidavits with the motion. Any other party, 10 days or less after service of a motion for summary decision, may serve opposing affidavits or countermove for summary decision. . . .

(b) The ALJ may grant the motion 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.

The motion may be made as to some or all of the claims in order to find that "as a matter of law" the moving party should prevail. See Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE § 8.22[5], at 483 (2d ed. 1997).

In an administrative context, the standard of review of a summary decision motion is inextricably linked to Rule 56(c) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") (governing review of a summary judgment motion). See Puerto Rico Aqueduct, 35 F.3d at 607. A judge "will generally grant summary [decision] if the pleadings and papers filed by the parties establish, without substantial dispute, facts that entitle the movant to judgment as a matter of law." See Ernest Gelhorn & William F. Robinson, Jr., Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612, 613 (Jan. 1971). All competing inferences or reasonable doubts as to whether a genuine issue of material fact exists are viewed in a light most favorable to the non-moving party (i.e., the Respondent) in this case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The moving party (i.e., the Coast Guard) bears the initial burden of identifying those portions of the pleadings, the material obtained by discovery or otherwise, or other material contained in the record that show an absence of a genuine issue of material fact. See generally 33 CFR 20.901(b); see also Fed. R. Civ. P. 56(c); Anderson, 477 U.S. at 251-55; Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1985).¹

In the instant case, the Coast Guard argues that Respondent's admissions in Respondent's written and signed Answer to the Complaint of all the jurisdictional and all factual allegations eliminate all genuine issues of material fact. I agree. In these proceedings, a respondent's admissions are sufficient to support a finding that an allegation is proved. See Appeal Decision 2559 (NEILSEN) (1995). Respondent's admissions also obviates the need for the Coast Guard to otherwise prove or establish a prima facie case, and constitutes a waiver of all non-jurisdictional defects and defenses. See generally Appeal Decision 2376 (FRANK) (1985) (holding that a guilty plea obviates the requirement for otherwise establishing a prima facie case); Appeal Decision 2385 (CAIN) (1985). Accordingly, the Coast Guard's Motion for Summary Decision is **GRANTED** in this case.

SANCTION

One of the major purposes of suspension and revocation proceedings and trial-type hearings is to protect lives and properties against actual and potential dangers. 46 U.S.C. 7701(a). Congress enacted 46 U.S.C. 7704(c) and related statutes with the express intent of removing those individuals using a dangerous drug from service on board United States merchant marine vessels. See House Rep. 338, 98th Cong., 1st Sess. 177 (1983); see also Appeal Decision 2634 (BARRETTA) (2002). Under 46 U.S.C. 7704(c), revocation of a merchant mariner's license and/or credentials is required when it is shown on a motion or proceeding such

¹ See Fed. R. Civ. P. 56(c), which states in pertinent part:

... [Summary] [J]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.** . . .

(Emphasis added).

as this before a U.S. Administrative Law Judge that the merchant mariner is a user of, or addicted to, a dangerous drug unless the mariner provides satisfactory evidence of cure of all dangerous drug use. See also 46 CFR 5.59(b).²

In Appeal Decision 2535 (SWEENEY) (1992), the Commandant held that a merchant mariner could establish proof of cure by showing that he had successfully completed a drug abuse rehabilitation program and that he had not had any associations with drugs for at least one year after completing the drug rehabilitation program as evidenced by successful participation in an active drug abuse monitoring or testing program which incorporates random, unannounced drug testing during that year. In later cases, the Commandant has also held where a Respondent demonstrates "substantial involvement in the cure process by proof of enrollment in an accepted [drug] rehabilitation program," a judge may stay the revocation and continue the hearing. Appeal Decision 2634 (BARRETTA) (2002); see also Commandant Review Decision 18 (CLAY). Where as in this case, the respondent has not provided any evidence of cure or substantial involvement in the cure process, revocation is mandated or dictated by the applicable laws. See 46 CFR 5.59(a).

While revocation is a severe order, it is not necessarily permanent. Respondent's attention is directed to 33 CFR 20.904(f), which allows a respondent, within three (3) years or less after his Coast Guard issued license or document is revoked, to file a written motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety of lives and property at sea. In cases such as this one, the revocation order may be modified upon a showing by Respondent that the Respondent:

- (1) Has successfully completed a bona fide, acceptable drug abuse rehabilitation program;
- (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of a drug rehabilitation program and;
- (3) Is actively participating in a bona fide drug abuse monitoring or testing program.

See generally 46 CFR 5.901. The drug abuse monitoring program must include random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY).³

Wherefore,

² A "dangerous drug" is "a narcotic drug, a controlled substance, or a controlled-substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802))." See 46 CFR 16.105. By definition, marijuana (also known as "tetrahydrocannabinol" or "THC") is recognized as a "dangerous drug". See Id.; 21 U.S.C. 802(6), (16); 21 U.S.C. 812(c)(17) (listing marijuana as a Schedule I controlled substance).

³ After three years, Respondent is required to apply directly with the Commandant of the U.S. Coast Guard in Washington, D.C. for issuance of a new license. See 46 CFR 5.901 to 5.905, and it must be written, signed and delivered in person to the nearest Officer in Charge, Marine Inspection, U.S. Coast Guard.

ORDER

IT IS HEREBY ORDERED that the Coast Guard's Motion for Summary Decision is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that all the U.S. Merchant Mariner's Credentials issued to Respondent Mark Edwin Egerton are **REVOKED**. Respondent shall immediately deliver by mail or in person his merchant mariner's credentials and all other Coast Guard issued licenses, certificates or documents to the Coast Guard at Sector Houston-Galveston, attention of the Senior Investigating Officer, LCDR Joseph Cost, at 9640 Clinton Drive, Houston, Texas 77029, telephone number 713-671-5193.

PLEASE TAKE NOTICE that the service of this Order 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. See Attachment A.

Done and dated April 9, 2007
Houston, Texas



THOMAS E. P. MCELLIGOTT
ADMINISTRATIVE LAW JUDGE

Attachment A

NOTICE OF 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.