

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

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Complainant

vs.

DAVID G. WRIGHT

Respondent.

Docket Number: CG S&R 08-0157
CG Case No. 3150610

ORDER PARTIALLY GRANTING WRITTEN MOTION FOR SUMMARY DECISION

Issued: May 28, 2008

Issued by: Michael J. Devine, Administrative Law Judge

Appearances:

J. D. Butwid, LT
U.S. Coast Guard
Marine Safety Detachment Sturgeon Bay
57 N. 12th Avenue, Suite 108
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For the Coast Guard

Robert Wells, Esq.
For the Respondent

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 Document (“MMD”) issued to David G. Wright, 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 April 1, 2008 when the Coast Guard issued and served a complaint against Respondent seeking revocation of his MMD. The jurisdictional allegations of that complaint state that Respondent is the holder of a MMD. The factual allegations of that complaint state:

1. On or about February 24, 2006 the Respondent was convicted of operating a motor vehicle while under the influence (2nd offense) in Dodge County, WI Circuit Court.
2. On or about February 1, 2006 the Respondent was convicted for a dangerous drug law violation in Milwaukee, WI Circuit Court.
3. On or about September 20, 2006 the Respondent was convicted for a dangerous drug law violation in Ozaukee County, WI Circuit Court.

The complaint was filed with the ALJ Docketing Center in Baltimore, MD on April 1, 2008. On April 21, 2008 Respondent’s attorney filed an answer responding to the factual allegations as follows:

1. Admits but avers this was previously handled and has been resolved and therefore should not be grounds to suspend his license at this time.
2. Admits.
3. Admits.

The Answer also asserts various matters for consideration and requests that the court use a punishment short of revocation.

On April 23, 2008, the Coast Guard filed a Motion for Summary Decision asserting that there were no genuine issues of material fact and seeking revocation of the Respondent’s MMD in accordance with 46 USC 7704(b) as sought in the Complaint.

The Certificate of Service indicates that the Motion for Summary Decision was served on opposing counsel on April 23, 2008. To date no response to the Motion has been submitted. 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 IN PART**.

FINDINGS OF FACT

1. In a written Answer dated April 21, 2008, Respondent's counsel did not directly address the assertion of the jurisdictional allegations of the complaint. In keeping with 33 CFR 20.308(c) since the Answer did not deny the jurisdictional allegation the Answer is deemed to admit the jurisdictional allegations that he holds a United States Coast Guard issued Merchant Mariner Credential as alleged in the Complaint.
2. In that same Answer, Respondent admitted all the factual allegations of the complaint that states that he was convicted of three offenses in 2006 as follows:
On or about February 24, 2006 the Respondent was convicted of operating a motor vehicle while under the influence (2nd offense) in Dodge County, WI Circuit Court.
On or about February 1, 2006 the Respondent was convicted for a dangerous drug law violation in Milwaukee, WI Circuit Court.
On or about September 20, 2006 the Respondent was convicted for a dangerous drug law violation in Ozaukee County, WI Circuit Court.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent David G. Wright and the subject matter of this proceeding fall within the jurisdiction vested in the U.S. Coast Guard under 46 U.S.C. 7703(3) and 46 U.S.C. 7704(c).
2. The Coast Guard's allegation of conviction of a violation of driving a vehicle under the influence an offense covered by the National Drivers registration Act is proved based on Respondent's admission of the factual allegation. The Coast Guard also provided documentation of the conviction attached to the Motion for Summary Decision.
3. The Coast Guard's allegation of conviction for dangerous drugs allegation on February 1, 2006 is proved based on Respondent's admission of the allegations and that the Coast Guard provided proof of the conviction attached to the Motion for Summary Decision See Appeal Decision 2559 (NEILSEN) (1995).
4. The Coast Guard's allegation of conviction for dangerous drugs allegation on September 20, 2006 is proved based on Respondent's admission of the allegations and that the Coast Guard provided proof of the conviction attached to the Motion for Summary Decision. See Appeal Decision 2559 (NEILSEN) (1995).
5. Under 46 CFR 5.59(b), the only appropriate sanction is revocation of Respondent's U.S. Coast Guard issued Merchant Mariner's Credentials. However, under 46 U.S.C. 7704(c) and Appeal Decision 2678 (SAVOIE) (2008) suspension may be considered.

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

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).

In the instant case, the Coast Guard argues that Respondent's admissions in Respondent's Answer to the Complaint along with the documentation of convictions provided with the Coast Guard's Motion eliminates all genuine issues of material fact. With regard to proof of the charges, 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 with regard to finding all three of the charged violations proven 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 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(b), suspension or revocation is required of a merchant mariner's license and/or credentials when it is shown that the mariner was convicted of a dangerous drug² law within ten years before the beginning of the proceedings.

Likewise a merchant mariner's document may be suspended or revoked upon proof of a conviction under 46 U.S.C. 7703(3). See also 46 CFR 5.59(b).

However, in view of recent case law the question of what sanction may be imposed is not fixed as a matter of law. In Appeal Decision 2678 (SAVOIE) (2008), the Commandant held that although the applicable regulation 46 CFR 5.59 mandated revocation as a sanction when conviction of an offense involving a dangerous drug is proven, the 2004 amendment to the statute allows suspension as an alternative to revocation. Since an ALJ is statutorily authorized to consider suspension (in lieu of revocation) at this point in the proceedings the Coast Guard is not entitled to a determination that revocation is required as a matter of law. Accordingly, the portion of the Motion asserting that the sanction of revocation be imposed without further proceedings is **DENIED**. While the charges are proven the Respondent is entitled to further due process to determine an appropriate sanction.

Following this Order a pre-hearing conference will be scheduled with the parties to set a schedule for further action in this matter

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).

ORDER

IT IS HEREBY ORDERED that the Coast Guard's Motion for Summary Decision is **PARTIALLY GRANTED** by finding that the charges are **PROVEN**.

IT IS HEREBY FURTHER ORDERED that a prehearing conference will be scheduled to set a schedule for conducting the remaining proceedings to determine a sanction regarding the U.S. Merchant Mariner's Document issued to Respondent David G. Wright.

Done and dated May 28, 2008
Norfolk, Virginia

MICHAEL J. DEVINE
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that the attached ORDER PARTIALLY GRANTING WRITTEN MOTION FOR SUMMARY DECISION has been served on the following party or its designated representative by facsimile as follows:

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Done and dated May 28, 2008
Norfolk, Virginia

Janice Parker
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