

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

UNITED STATES COAST GUARD

Complainant

vs.

PAUL SCOTT HUTCHINSON

Respondent.

Docket Number: CG S&R 07-0568
CG Case No. 3080473

DECISION AND ORDER

Issued: July 21, 2008

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

For Complainant

LT Greg Callaghan
LTJG Cahli Carothers
USCG Sector Boston
427 Commercial Street
Boston, MA 02109-1045

For Respondent

Brian P. Flanagan, Esq.
One Wolcott Road
Winchester, MA 01890

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Paul Hutchinson's (Respondent) Merchant Mariner's License Number: 925398. This action was brought pursuant to the authority contained in 46 U.S.C. §§ 7703(2) and 7704 and its underlying regulations codified at 33 CFR Part 20 and 46 CFR Part 5.

The Coast Guard issued its Original Complaint on October 29, 2007, charging Respondent with conviction of a dangerous drug law violation under 46 U.S.C. § 7704(b) and violation of law or regulation citing to 46 U.S.C. § 7703(2) and 46 CFR 3.33. It is noted that 46 CFR 3.33 is a typographical error because 46 CFR 3.33 does not exist in Title 46 CFR. That citation should read, 46 CFR 5.33, "Violation of law or regulation." However, the parties' arguments and analysis directly addressed "conviction of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document" under 46 U.S.C. § 7703(2), not "violation of law or regulation." Therefore, I am amending the title of the charge in the Original Complaint and Amended Complaint to reflect "conviction of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document" to conform to its cited statute and to evidence presented. Furthermore, I am also amending the Original Complaint and Amended Complaint by deleting "46 CFR 3.33" because it is no longer applicable.

Specifically, the Coast Guard alleges Respondent was convicted of possession of a Class B controlled substance in violation of Massachusetts General Laws Ch. 94C § 34. The Coast Guard also alleges Respondent was convicted of two (2) counts of assault and

battery on a law enforcement officer in violation of Massachusetts General Laws Ch. 265 § 13D.

The Coast Guard issued an Amended Complaint on November 20, 2007, amending the proposed hearing dates. Respondent, through counsel, filed his Answer on December 7, 2007 admitting to all jurisdictional allegations and admitting and denying certain factual allegations. Specifically, Respondent denies factual allegation number (3) that he was convicted of a dangerous drug law violation. Respondent also denied factual allegation number six (6) as to the “bearing on his license.” Allegation number six (6) states “Violation of Law or Regulation: You violated 46 USC 7703 (2) for conviction of two (2) counts of Assault and Battery on a law enforcement officer on 26 July 2006.” Furthermore, Respondent intended to introduce extenuating and mitigating factors.

I held the hearing on March 4, 2008 in Boston, Massachusetts. Lieutenant Greg Callaghan and Lieutenant Junior Grade Cahli Carothers appeared on behalf of the Coast Guard. Brian P. Flanagan, Esquire appeared on behalf of Respondent. The Coast Guard introduced six (6) exhibits and Respondent introduced two (2) exhibits. There is also one (1) ALJ exhibit. At the request of the Coast Guard, I took official notice of four (4) Commandant Decisions on Appeal and five (5) sections from the Code of Federal Regulations. The exhibit list and official notice list are contained in **Attachment A**. There was no witness testimony.

Respondent and the Coast Guard submitted post hearing briefs on April 23 and 24, 2008, respectively, including proposed findings of fact and conclusions of law. The Coast Guard and Respondent submitted reply briefs on May 30, 2008 and June 2, 2008

respectively. Proposed findings of fact and conclusions of law, together with their corresponding rulings are listed in **Attachment B**.

After careful review of the entire record, including the applicable statutes, regulations, and case law, I find the Coast Guard **PROVED** that Respondent was convicted of one (1) count of possessing a Class B controlled substance and two (2) counts of assault and battery on a law enforcement officer.

STIPULATED FACTS

At the start of the hearing the Coast Guard submitted a document containing several stipulations. See ALJ Ex. I. Respondent agreed on the record to seven (7) of the nine (9) stipulations and they are contained in there entirety below.

1. The Respondent is the holder of U.S. Coast Guard License No. 925398 issued on or about October 10, 2001.
2. The Respondent was arrested on or about 22 September 2005 by the North Reading Police Department.
3. The Respondent was charged on or about September 22, 2005 with two counts of Assault and Battery on a Law Enforcement Officer, one count of Possession of a Class B [Controlled] Substance, and one count of Resisting Arrest by the North Reading Police Department.
4. The Respondent was convicted on or about July 26, 2006 in Woburn District Court of two counts of Assault and Battery on a Law Enforcement Officer.
5. The Respondent filed a renewal application for Merchant Mariner License No. 925398 on or about October 2, 2007 at Regional Exam Center Boston, MA.
6. The Coast Guard filed a Complaint on or about November 20, 2007 against the Respondent's Merchant Mariner License.
7. The Respondent filed an Answer on or about December 7, 2007 to the Coast Guard's Complaint that admitted all jurisdictional allegations.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence and the entire record taken as a whole, including party stipulations.

1. At all relevant times mentioned herein Respondent, Paul Hutchinson, was the holder of Coast Guard Merchant Mariner License Number 925398 issued on or about October 10, 2001. (ALJ Ex. 1; IO Ex. 4)¹.
2. On or about September 22, 2005, Detective Michael P. Murphy, while on duty with Detective Romeo, received a telephone call from a known person reporting that a man named Jim Larkin was going to deal Oxycontin at the rear of the Bose store at 157 Main Street. (IO Ex. 2).
3. As a result of this tip, Detectives Murphy and Romeo went to the Bose store to conduct surveillance. (IO Ex. 2).
4. Detectives Murphy and Romeo observed a man they knew to be Jim Larkin arrive in the parking lot behind the Bose store at approximately 8:50 a.m. on September 22, 2005. (IO Ex. 2).
5. Detective Murphy saw Mr. Larkin exit his vehicle, approach the rear door of the Bose store and knock on the door. (IO Ex. 2). Mr. Larkin waited approximately two (2) minutes and returned to his vehicle. (*Id.*)

¹ Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. at ___). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (IO Ex. ___); Respondent's Exhibits are as follows: Respondent followed by the exhibit number (Resp. Ex. ___); ALJ Exhibits are as follows: ALJ followed by the exhibit number (ALJ Ex. ___).

6. Detectives Murphy and Romeo observed a second vehicle driven by a male, later identified as Paul Hutchinson, arrive at approximately 9:00 a.m. in the parking lot behind the Bose store. (IO Ex. 2).
7. Mr. Larkin and Respondent exited their vehicles, approached the rear door of the Bose store and entered. (IO Ex. 2).
8. After approximately three (3) minutes, Larkin and Respondent exited the Bose store, shook hands and Respondent returned to the store. (IO Ex. 2).
9. Detectives Romeo and Murphy approached the rear of the Bose store at approximately 9:10 a.m., noticed Respondent locking the rear door to the Bose store, and asked to speak with him. (IO Ex. 2).
10. After Detective Murphy informed Respondent that Respondent was suspected of purchasing drugs he read Respondent his Miranda Rights. (IO Ex. 2).
11. When Detective Murphy attempted to frisk Respondent, Respondent slapped Detective Murphy's hand away and struggled with both Detective Murphy and Romeo. (IO Ex. 2). Respondent finally submitted to the detectives and was restrained. (*Id.*)
12. A search of Respondent's person produced a sealed bottle of oxycodone. (IO Ex. 2).
13. Respondent admitted to purchasing the oxycodone from Mr. Larkin. (IO Ex. 2).
14. Respondent was convicted on July 26, 2006 in Woburn District Court of two (2) counts of assault and battery on a law enforcement officer. (Stipulation 4).

15. Respondent's sentence for the two (2) counts of assault and battery on a law enforcement officer was a suspended sentence of 90 days in a correctional facility and payment of \$65.00 a month in probation fees for one (1) year. (IO Ex. 1).
16. On July 26, 2006, the Woburn District Court placed Respondent on one (1) year pretrial probation for possession of a class B controlled substance. (IO Ex. 1).
17. Respondent successfully completed his probation period on July 24, 2007. (IO Ex. 1).

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701. Title 46 CFR 5.19 gives Administrative Law Judges authority to suspend or revoke a merchant mariner's credential for violations arising under 46 U.S.C. §§ 7703 and 7704. If a merchant mariner license holder is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document, his license may be suspended or revoked. 46 U.S.C. § 7703 (2). Further, a merchant mariner license holder shall have his license suspended or revoked if the holder has been convicted of violating a dangerous drug law of the United States or a State within ten (10) years prior to the beginning of the proceeding. 46 U.S.C. § 7704 (b).

In count one, the Coast Guard charged Respondent with conviction of a dangerous drug law violation. In count two, the Coast Guard charged Respondent with having been convicted of two (2) offenses that would prevent the issuance or renewal of a

license, certificate of registry, or merchant mariner's document. Both Coast Guard counts stem from events that occurred on September 22, 2005. The Coast Guard seeks revocation of Respondent's license. For the reasons stated below, I find that the Coast Guard has proved the allegations in both counts.

Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges. 46 U.S.C. § 7702 (a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556 (d). Under Coast Guard procedural regulations, the burden of proof is on the Investigating Officer to prove that the charges are supported by a preponderance of the evidence. 33 CFR 20.701, 20.702 (a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)). Therefore, Investigating Officers (IO) must prove by credible, reliable, probative and substantial evidence that Respondent more likely than not committed the violation charged.

Conviction of a Dangerous Drug Law Violation

Title 46, United States Code section 7704(b) states, “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.” Specifically, the Coast Guard alleges that Respondent was convicted of possessing a Class B controlled substance in violation of Massachusetts General Laws Chapter 94C § 34 on July 26, 2006.

The record shows Respondent was placed on one (1) year pretrial probation for violating Massachusetts General Laws Chapter 94C § 34: Possession of a Class B Controlled Substance. (IO Ex. 1; Resp. Ex. A). At Respondent’s court hearing on July 26, 2006, he pled guilty to the 2 counts of “Assault and Battery on a Police Officer” in violation of Massachusetts General Laws Ch. 265 § 13D but did not enter a plea on the drug charge because there was an agreement that he would be placed on pretrial probation for one year and undergo random drug screens. The record shows that the Respondent’s random drug screens were all negative and on July 24, 2007, the Respondent returned to Court whereby the trial Judge dismissed the drug possession charge. (Id.)

Coast Guard regulations define “conviction” as when a “respondent . . . has to attend classes, contribute time or money . . . submit to any manner of probation or supervision . . . 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). Respondent had to

submit to random drug screens pursuant to the terms of pretrial probation. Further, Detectives Murphy and Romeo observed Respondent's interactions with Mr. Larkin, a known drug dealer. (IO Ex. 1). After the detectives questioned Respondent, he admitted to purchasing the oxycodone from Mr. Larkin. *Id.* Therefore, I find the Coast Guard has proved that Respondent, as a holder of a merchant mariner's license, was convicted of dangerous drug law in violation of 46 U.S.C. § 7704.

Conviction of an Offense that Would Prevent Renewal of Respondent's License

Title 46 United States Code section 7703(2) states that a license or merchant mariner's document may be suspended or revoked if the "holder is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document." The Coast Guard charged Respondent with being convicted of two (2) counts of "assault and battery on a law enforcement officer" in violation of Massachusetts General Laws Ch. 265 § 13D.

Respondent plead guilty to the two (2) counts of "assault and battery on a police officer" in violation of Massachusetts General Laws Ch. 265 § 13D. Therefore, I find the Coast Guard proved Respondent was convicted of two (2) counts of assault and battery on a law enforcement officer. (IO Ex. 1; Resp. Ex. A).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times mentioned herein and specifically on July 26, 2006, Respondent, Paul Hutchinson, was the holder of Coast Guard Merchant Mariner License Number 925398.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703 (2); 46 U.S.C.

§7704 (b); 46 CFR Parts 5 and 16; 33 CFR Part 20; and the APA codified at 5 U.S.C. 551-59.

3. Respondent was convicted on or about July 26, 2006, in Woburn District Court of two counts of Assault and Battery on a Law Enforcement Officer.
4. Respondent was convicted on or about July 26, 2006, of possession of a Class B controlled substance.
5. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence Respondent violated a law or regulation.
6. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence Respondent violated 46 U.S.C. 7704(2).

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 46 CFR 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174.

Conviction of a Danger Drug Law Violation

Respondent was convicted of possessing a Class B controlled substance in violation of Massachusetts General Law Ch. 94C § 34. Title 46 CFR 5.59 and 46 CFR 5.569 require revocation as the only sanction for charges found proved under 46 U.S.C. § 7704.

Prior to August 9, 2004, 46 U.S.C. § 7704 (b) read as follows:

* * *

(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 revoked.

* * *

On August 9, 2004, Congress amended subsection (b) to substitute “shall be suspended or revoked” for “shall be revoked.” § 402, Pub.L. 108-293, Aug. 9, 2004, 118 Stat. 1043. Since the Coast Guard had not taken steps to amend 46 CFR 5.59 or Table 5.569, ALJs are still obligated to follow the regulations and impose “revocation” for any charge under 46 U.S.C. § 7704 found proved, as held in Appeal Decision 2674 (KOVALESKI) (2008), decided on January 28, 2008.

The KOVALESKI involved a conviction for possession of drug paraphernalia. In upholding the ALJ’s decision to revoke Kovalski’s license, the Vice Commandant stated, “. . . the ALJ noted that when Congress amended 46 U.S.C. § 7704(b) to allow ‘suspension or revocation’ when *conviction of a dangerous drug law violation* is found proved, Congress did not mandate that the Coast Guard change 46 C.F.R. § 5.59, which continues to mandate revocation. [*Id.*] In Coast Guard suspension and revocation cases, an ALJ must follow properly proscribed regulations, and in this case, the ALJ had no other option but to revoke Respondent’s license once the conviction for a dangerous drug law violation charge was found proved. 46 C.F.R. § 5.59.”

In accordance with the regulations and the guidelines in KOVALESKI, the Coast Guard in this case also seeks to revoke Respondent’s license. Having found proved the charge that Respondent Hutchinson was convicted of a dangerous drug law violation, I

would have no choice but to revoke his license. However, Appeal Decision 2678 (SAVOIE) (2008), issued on March 20, 2008, holds that 46 U.S.C. § 7704(b) can be relied upon to “suspend” rather than “revoke” a mariner’s license even though the applicable regulations mandate revocation.

Respondent Savoie was convicted of possession of cocaine in 2001 and had his merchant mariner’s credentials revoked by the Coast Guard. He took the necessary steps to establish cure and eventually had his credentials restored in 2002 through administrative clemency. In 2004, Savoie was again arrested for possession of cocaine and subsequently pled “no contest.” Pursuant to his plea, he was convicted of possession of cocaine.

At Savoie’s Suspension and Revocation hearing, the ALJ found section 7704(b) expressly permits either suspension or revocation. Upon finding insufficient evidence to support a conclusion that Savoie was either a user of dangerous drugs or a threat to marine safety, the ALJ issued an Order suspending Savoie’s credentials outright for a period of four (4) months.

On appeal, the Vice Commandant affirmed the ALJ’s decision finding that “[u]nder the current Coast Guard regulation, there is no circumstance in which an ALJ could suspend a merchant mariner credential for conviction of a dangerous drug law even though such a sanction is authorized by statute.” The Vice Commandant further found that “[i]n order for the regulation [46 CFR 5.59] to be in ‘harmony’ with the authorizing statute [46 U.S.C. § 7704 (b)] and ‘[bear]’ a fair relationship to the language of the statute, it must provide some circumstance in which an ALJ could order suspension of a merchant mariner credential, even if rare.” Citations omitted. [Emphasis added].

“Congress has authorized suspension as an alternative to revocation of a merchant mariner’s credential when there is a conviction for possession of a dangerous drug . . . [t]herefore, in accordance with the applicable statutory authority, the ALJ was authorized to consider a sanction less than revocation, and having considered several factors, she subsequently issued an order of suspension. Although Coast Guard regulations preclude such an order, the statute in this case is controlling.” In support of her decision to suspend rather than revoke, the ALJ in SAVOIE found that there was “insufficient evidence in the record to support a conclusion that Savoie was either a user of dangerous drugs or a threat to marine safety.”

In the instant case, there is no evidence of a prior conviction of a dangerous drug law violation; nor is there evidence of current or prior drug use. The bottle of oxycodone was unopened and sealed. Respondent admitted to police officers that he purchased a bottle of oxycodone from Mr. Larkin. Oxycodone, like cocaine, is a Schedule II controlled substance. 21 CFR 1308.12. He did not pose an immediate threat to safety at sea as there is no evidence to show he was employed under his license at the time. In fact, Respondent was working at the Bose electronic store which has no connection to maritime employment. (IO Ex. 2). Further, the State Judge ordered Respondent to undergo random drug testing for one year as a condition of his pretrial probation. Those drug screens were negative. Moreover, Respondent admitted to this offense on his reapplication for license. (IO Ex. 3, 5). The factors in this case would likewise support a rare decision to suspend, as did the factors that the ALJ considered in SAVOIE.

The nature of this administrative proceeding is to “promote, foster, and maintain the safety of life and property at sea.” Appeal Decision 1106 (LABELLE) (1959); 46

U.S.C. § 7701. These proceedings are remedial, not penal in nature, and “are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 CFR 5.5. In consideration of the foregoing factors in mitigation, I find that an appropriate sanction in this case is suspension outright for a period of twelve (12) months.

Conviction of an Offense that Would Prevent Renewal of Respondent’s License

The police report in IO Exhibit 1 reflects the following exchange as the police officers confronted Respondent, identified themselves as police officers, asked if they could speak to him, to which he agreed, and advised him of his Miranda rights:

Hutchinson became obviously nervous at our presence and began to move around. At that point I looked down at his hands and noticed a bulge in his left front pocket, I asked Hutchinson if he had any weapons on him and he stated “do you have a search warrant.[?]” Hutchinson became defensive and got in what I believe to be a fighting stance. I reached toward his front pocket in order to conduct a pat frisk for weapons. As I was reaching, Hutchinson struck my hand away by swinging his right arm down on my forearm. Det. Romeo grabbed Hutchinson by the left arm and was struck by Hutchinson on his right arm causing a wrist chain to break and fall off. Myself [sic] and Det. Romeo tried to control Hutchinson during a violent struggle. There were several times when we had controlled Hutchinson and he continued to fight. We continued to struggle with Hutchinson, giving verbal commands as he overcame restraints on several occasions. Det. Romeo struck Hutchinson on the right side of his face. Hutchinson finally stopped fighting and I was able to put him restraints.

Pursuant to his pleas of guilty, the above facts supported findings of guilty on two (2) counts of violation of Massachusetts General Laws Ch. 265 § 13 D, “Assault and Battery upon Public Employees.” That section reads as follows: “Whoever commits an assault and battery upon any public employee when such person is engaged in the

performance of his duties at the time of such assault and battery, shall be punished by imprisonment for not less than ninety days nor more than two and one-half years in a house of correction or by a fine of not less than five hundred nor more than five thousand dollars.” A review of the applicable Massachusetts assault and battery statutes reveals that no distinction is made between law enforcement officers and other public employees.

Title 46 CFR 10.201(h) states the assessment period for simple assault is one (1) year minimum to five (5) years maximum and five (5) minimum to ten (10) years maximum for aggravated assault. An assessment period is an amount of time that must pass from a respondent’s conviction to the date of application. Although it may be considered, the assessment period is not used to determine a sanction in suspension and revocation cases. It is used to determine whether to grant or renew a person’s license. Under 46 CFR 10.201(h)(2), the assessment period commences when an applicant is no longer incarcerated, and may include supervised and unsupervised probation. That period began July 26, 2006, the day Respondent was convicted and began his probation.

BLACK’S LAW DICTIONARY (8th ed. 2004) defines simple assault and aggravated assault as follows: “Simple Assault. A person is guilty of assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury. . .Aggravated Assault. Criminal assault accompanied by circumstances that make it more severe, such as the intent to commit another crime or the intent to cause serious bodily injury, esp. by using a deadly weapon. See Model Penal Code § 211.1(2).” Applying those definitions to the terms found in 46 CFR 10.201(h), Respondent’s actions are more appropriately

characterized as simple assault because there was no evidence of intent to commit another crime or to cause serious bodily injury.

Pursuant to his guilty pleas, the Court sentenced Respondent to ninety (90) days on the two (2) assault and battery charges on July 26, 2006. The Court suspended that sentence and placed Respondent on probation for one year. It did not impose a fine but ordered Respondent to pay \$65.00 per month in probation fees for one year and a \$90.00 victim right assessment. (IO Ex. 1; Resp. Ex A). Under 46 U.S.C § 10.201 (h)(2), the minimum assessment period would begin on July 26, 2006 and end on July 24, 2007, the same date that Respondent's probation ended.

While there is no specific sanction prescribed for "conviction of assault and battery on a law enforcement officer," in the Table of Suggested Range of Appropriate Orders (Table), the Table can provide a framework for selecting an appropriate sanction if the offenses are similar. 46 CFR 5.569. For example, the Table provides a suspension range from 2 to 6 months for "Violent acts against other persons (without injury)" and 4 months to Revocation for "Violent acts against other persons (injury)." In consideration of the foregoing, Respondent's convictions of assault and battery on the two law enforcement officers would warrant a framework sanction from 2 to 6 months.

Aggravating Factors. The assault and battery was not merely against "other persons" or but against two (2) police officers engaged in restraining him after observing what they believed to be a purchase of a controlled substance. This shows poor judgment as well as a blatant and overt disrespect for authority. Such actions run counter to the 46 U.S.C. § 7701(c)(1) "requirement of good discipline and safety at sea" and would bear on his fitness to hold a merchant mariner's license.

Mitigating Factors. During his probation period from July 26, 2006 to July 24, 2007 and at least up to the time of the hearing on March 4, 2008, Respondent had a clean record. His drug screens were negative and he has had no further arrests.² Respondent also completed the terms of the probation successfully. (IO Ex. 6). The final mitigating factor I considered was Respondent disclosed his convictions on his license renewal application. (IO Ex. 3, 5). Therefore, in consideration of the foregoing aggravating and mitigating factors, a sanction of 12 months outright suspension is appropriate on the 46 U.S.C. § 7703(2) offenses.

Since the purpose of suspension and revocation proceedings is remedial and not punitive in nature, this subsequent period of “good behavior” shows that Respondent is capable of remediation. See generally, 46 CFR 5.5.

Therefore, the 12 month outright suspensions for dangerous drug law violation and conviction of an offense for which his license will not be renewed shall run concurrently. Accordingly, Respondent’s license shall be suspended for a total of 12 months.

² If Respondent has received any further arrests or failed any subsequent drug screens since the hearing date, the undersigned has not been made aware of it.

ORDER

IT IS HEREBY ORDERED that Respondent, Paul Scott Hutchinson's license and all other documents held by Respondent are **SUSPENDED** outright for a period of twelve (12) months. Respondent is to surrender his license to the Investigations Department, USCG Sector Boston, 427 Commercial Street, Boston, Massachusetts 02109-1045, telephone (617) 223-3000.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (**Attachment C**).

Done and dated July 21, 2008
New York, New York

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

ATTACHMENT A – EXHIBIT LIST

COAST GUARD EXHIBITS

1. Woburn District Court Records and Summary for Paul Hutchinson.
2. North Reading Police Department Report concerning Paul Hutchinson and an incident occurring on September 22, 2005.
3. Respondent's Statement accompanying reapplication dated October 2, 2007.
4. Copy of Respondent's License Number 925398.
5. Respondent's Application for Renewal of License dated October 2, 2007.
6. Respondent's Probation Terms and Conditions dated July 26, 2006.

RESPONDENT EXHIBITS

- A. Transcript – *Commonwealth v. Hutchinson*, Woburn (Massachusetts) District Court, Docket No. 0553 CR 2405, together with motion to suppress and Court's Denial
- B. Respondent's random drug tests and results for tests on December 5 and 26, 2006; January 10 and 31, 2007, February 1, 2007, March 16, 2007, and April 5 2007.

ALJ EXHIBITS

1. List of Stipulations Proposed by Coast Guard, numbers 1-4, 6-7, and 9 were stipulated to by Respondent, numbers 5 and 8 were not stipulated to by Respondent.

OFFICIAL NOTICE AT THE REQUEST OF THE COAST GUARD

1. Appeal Decision 1381 (CLINTON) (1963).
2. Appeal Decision 2611 (GIBULKA) (1999).
3. Appeal Decision 2656 (JORDAN) (2006).
4. Appeal Decision 2674 (KOVALESKI) (2008).
5. 33 CFR 20.1307 Use of judgments of conviction.
6. 46 CFR 5.59 Offenses for which revocation . . . is mandatory.
7. 46 CFR 10.201 (h) Guidelines for Evaluating Applicants for Licenses and Certificates of Registry who have Criminal Convictions.
8. 46 CFR 10.209 (e) Special circumstances [for license renewal].
9. 46 CFR 10.210 (i) Criminal records check.

ATTACHMENT B

COAST GUARD

Proposed Findings of Fact

Jurisdictional Facts

1. The Respondent, Paul S. Hutchinson, was issued U.S. Coast Guard License No. 925398 on or about October 10, 2001; which expired by its terms on October 10, 2006. CG Ex. 4; Tr. at 8.

ACCEPTED AND INCORPORATED IN PART – See Decision and order

2. Respondent filed a renewal application for Merchant Mariner License No. 925398 on or about October 2, 2007, with the Coast Guard’s Regional Exam Center Boston, MA. CG Ex. 5.

ACCEPTED

3. Respondent’s Renewal Application was filed within the 12-month so-called “grace period” provide by 46 C.F.R. § 10.209(e). CG Ex. 4, 5.

ACCEPTED

4. As part of his renewal application Respondent provided a signed, hand-written note stating: “I [was] arrested in 2005 for possession of Class B and A/B on police officer. I received probation for one year and dismissed July 2006. I have had prior arrest 20-25 years ago. And have not had problems since until issue 2006. I feel I was set up and did not deserve what happened. North Reading, MA. Paul Hutchinson 10/2/07”. CG Ex. 3.

ACCEPTED

5. The Coast Guard filed the pending Complaint against Respondent’s Merchant Mariner License on or about November 20, 2007 after Respondent filed his renewal application, which is pending.

ACCEPTED AND INCORPORATED IN PART – See Decision and Order

6. Respondent filed an Answer on or about December 7, 2007 admitting all jurisdictional and factual allegations.

ACCEPTED

Substantive Facts

7. Respondent was arrested on or about September 22, 2005 by the North Reading Police Department in North Reading, Massachusetts. CG Ex 2.

ACCEPTED AND INCORPORATED

8. Respondent was charged on or about September 22, 2005 with two counts of Assault and Battery on a Law Enforcement Officer, in violation of Massachusetts General Law (M.G.L.) c265 §13D;³ one count of Possession of a (Class B) Controlled Substance, in violation of M.G.L. c94C § 34;⁴ and with one count of Resisting Arrest (by the North Reading Police Department), in violation of M.G.L. c268 § 32B. CG Ex. 1, 2.

ACCEPTED AND INCORPORATED

9. Massachusetts General Law c94C § 34 is a provision of the Commonwealth's "Controlled Substances Act." M.G.L. c94 § 34.

ACCEPTED

10. On or about July 26, 2006, Respondent was convicted, pursuant to his pleas, in Woburn District Court of two counts of Assault and Battery on a Law Enforcement Officer. For these offenses he was sentenced to 90 days incarceration and placed on one year of probation with risk/need or OUI supervision, and required probation fee and witness assessment. CG Ex. 1, 6; *see also* Resp. Ex. A.

ACCEPTED AND INCORPORATED IN PART – See Decision and Order. The Judge suspended Respondent's 90 day sentence on one year good behavior and probation.

³ "Whoever commits an assault and battery upon any public employee when such person is engaged in the performance of his duties at the time of such assault and battery, shall be punished by imprisonment for not less than ninety days nor more than two and one-half years in a house of correction or by a fine of not less than five hundred nor more than five thousand dollars." M.G.L. c265 §13D.

⁴ "No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment..." M.G.L. c94C § 34.

11. With respect to the charged violation of M.G.L. c94C § 34 (Possession of a Class B Substance), as part of a negotiated plea agreement, on or about July 26, 2006, Respondent was placed on pre-trial probation for a period of one year, in accordance with the provisions of M.G.L. c276 § 87. CG Ex. 1, 6; *see also* Resp. Ex. A.

ACCEPTED AND INCORPORATED IN PART – See Decision and Order

12. As conditions of the aforementioned probation, Respondent was required to submit to random drug and alcohol testing, and to pay \$65.00 per month during the 12 month probation period. CG Ex. 1, 6; *see also* Resp. Ex. A, B.

ACCEPTED AND INCORPORATED IN PART – The Court disposition sheet reflects that the Judge ordered Respondent to pay \$65.00 per month as part of the sentence on Count 2, Assault and Battery on a Police Officer. The Judge did order Respondent to undergo random drug testing.

Proposed Conclusions of Law

1. At all times relevant, Respondent was, and remains, a holder of the Coast Guard-issued U.S. Merchant Marine Officer license, No. 925398.

ACCEPTED AND INCORPORATED

2. The Coast Guard retains jurisdiction over Respondent's now-expired license, while his renewal application is pending, for these 46 C.F.R. Part 5 proceedings.

ACCEPTED

3. Respondent was convicted of a dangerous drug law of the United States, as contemplated in 46 U.S.C. § 7704, when he was placed on pre-trial probation for a period of one year, in accordance with the provisions of M.G.L. c276 §87, for a charge of Possessing a (Class B) controlled substance, in violation of M.G.L. c94C §34.

ACCEPTED AND INCORPORATED

4. Respondent was convicted of an offense which would prevent issuance or renewal of a license, as contemplated in 46 U.S.C. § 7703(2) when he was convicted of two counts of Assault and Battery on a Law Enforcement Officer, in violation of M.G.L. c265 §13D, and sentenced to 90 days incarceration and one year of probation.

ACCEPTED AND INCORPORATED IN PART – See Decision and Order.

RESPONDENT

Proposed Findings of Fact

1. Respondent was the holder of license # 925398, a 100 ton master's license issued on or about 10 Oct 2001. Stip.

ACCEPTED AND INCORPORATED

2. On or about 22 September 2005, Respondent was arrested by the North Reading police. Stip.

ACCEPTED AND INCORPORATED

3. Respondent was charged with the following offenses:
 - a. Possession of a class B controlled substance pursuant to MGL Ch. 94C Sec. 34. (Stip).
 - b. Two counts of assault and battery on a police officer pursuant to MGL Ch. 265 Sec. 13 D.⁵
 - c. One count of resisting arrest pursuant to MGL Ch 268 Sec. 32B.

CG Exhibit 1.

ACCEPTED AND INCORPORATED IN PART – See Decision and Order.

4. On or about 26 July 2006 respondent appeared in Woburn District [Court] and pled guilty [to] the assault and battery charges pursuant MGL Ch. 265 Sec. 13 D. He was convicted of the same. CG Exhibit 1 and Respondent Exhibit A.

ACCEPTED AND INCORPORATED

5. The charge of resisting arrest against Respondent was dismissed without discussion by the Commonwealth of Massachusetts. CG Exhibit 1 and Respondent Exhibit A (p.10).

ACCEPTED

6. The charge of possession of a class B substance pursuant to was never adjudicated. Respondent made no plea, admission or confession on the charge possession of a class B substance. Ibid.

⁵ MGL Ch 265 Sec. 13 D is titled "Assault and Battery upon Public Employees." No distinction is made between law enforcement officers and other public employee of the state of a political subdivision of the state.

REJECTED - See Decision and Order.

7. Respondent was sentenced to 90 Days in the Massachusetts House of Corrections [emphasis added] on the two assault and battery charges that he plead guilty to pursuant to MGL Ch. 265 Sec. 13 D. The sentence was suspended and respondent was placed on probation for one year. No fine was imposed on Respondent but he was ordered to pay \$65.00 per month in probation fees for one year. CG Exhibit 1.

ACCEPTED AND INCORPORATED

8. On the charge of possession of a class B substance pursuant to MGL Ch. 94C Sec. 34, respondent was placed on probation prior to any trial, hearing, or adjudication of the matter and required to undergo random drug testing for a period of one year. Respondent successfully completed the probationary period and the drug testing and on motion of the probation officer the charge was dismissed. CG Exhibit 1.⁶

ACCEPTED AND INCORPORATED IN PART – See Decision and Order.

9. There is no evidence of an outright conviction of respondent on the charge of possession of a class B controlled substance pursuant to MGL Ch. 94C Sec. 34 in the record before this court. Indeed, that charge was dismissed without a trial, findings, or other involvement of the trial court.

REJECTED – See Decision and Order.

10. Respondent filed an application for renewal of his Merchant Mariner License on or about 2 Oct. 2006 and within the statutory grace period for renewal. (Stip).

ACCEPTED

⁶ The court itself raised a question during the hearing that was not responded to due to the fact that the response would not have been germane to the issue of a conviction on the possession charge. Had a conviction been proved under existing law at the time of the hearing, testimony in mitigation would not have changed the result. Revocation was the only option for the court. In light of the recent Savoie case discussed below, other matters not entered into evidence at the time of trial may now become important. Toward the conclusion of the hearing, the court, in dicta questioned why Respondent would submit to random testing for the one year probation period instead of making the state prove its case. While there is no evidence in the record to answer this question, respondent states or otherwise makes an offer of proof that that he has been subject to random drug testing as a condition of employment since he obtained a merchant mariner's license and has had a clean record.

11. The Government filed a complaint against Respondent on or about 20 November 2007 seeking revocation of Respondent's license (though expired and only subject to renewal) for convictions on the assault and battery and conviction of the possession mentioned above. Respondent duly filed an answer to the complaint on 7 December 2007 and amended the same in accordance with the rules of this court.

ACCEPTED AND INCORPORATED

12. Respondent fully disclosed the events surrounding the arrest and its aftermath on his application. CG Exhibits 3 and 5.

ACCEPTED

Proposed Conclusions of Law

1. The Court has jurisdiction over this matter pursuant to 46 USC 7704.

ACCEPTED – the Coast Guard also has jurisdiction over this matter pursuant to 46 USC 7701 and 7703 to the extent that Respondent is a “holder” of a merchant mariner’s license.

2. Respondent's conviction for the charge of assault and battery pursuant to MGL 265 Sec. 13D constituted a conviction for a misdemeanor.

NEITHER ACCEPTED NOR REJECTED – no determination was made as to whether Respondent's convictions of assault and battery were misdemeanors.

3. Respondent was never convicted of the charge of possession of a class B substance under Massachusetts law. CG Exhibit 1 and Respondent Exhibit A.

REJECTED under the Coast Guard definition of “conviction”– See Decision and Order.

4. The government may not revoke or otherwise refuse to renew respondent's license based upon a finding of conviction pursuant to MGL 94C Sec. 32A. There is no evidence of any outright conviction that was submitted into evidence in this case. Further, the government may not rely upon the events that transpired in the matter in Woburn District Court to claim the respondent was convicted of possession of dangerous drugs under existing statutes and regulations.

REJECTED – See Decision and Order.

ATTACHMENT C

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS

CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

§ 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.

§ 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.

§ 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.

§ 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.

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.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing *DECISION AND ORDER* via Express Mail Courier (Federal Express) to the following parties and limited participants (or designated representatives) in this proceeding at the addresses indicated:

Commanding Officer
U.S. Coast Guard Sector Boston
Attn: Investigations Department
427 Commercial Street
Boston, MA 02109
Telephone: (617) 557-9081
Facsimile: (617) 223-3032

Brian P. Flanagan, Esquire
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ALJ Docketing Center
U.S. Coast Guard
40 S. Gay Street, Rm. 412
Baltimore, MD 21202
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Done and dated July 21, 2008
New York, New York

Regina V. Maye
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Administrative Law Judge
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