

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

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Complainant

vs.

DONALD ERIC HAGER, Jr.

Respondent.

Docket Number: CG S&R 08-0043
CG Case No. 3106669

ORDER DENYING RESPONDENT'S PETITION TO RE-OPEN

Issued: March 9, 2010

Issued by: Walter J. Brudzinski, Administrative Law Judge

Following a suspension and revocation hearing the undersigned found Respondent, Donald E. Hager, Jr., wrongfully possessed Marijuana; Oxycontin/Oxycodone without a valid prescription; and, a handgun without a permit, all while acting under the authority of his Merchant Mariner's License.¹ In accordance with the regulations, I revoked his License. The State of New Jersey also charged Respondent with those offenses but he was ultimately acquitted after a jury trial. Respondent now asks the ALJ to reopen the record, rescind the Revocation Order, and reinstate his License. Respondent's request is denied.

¹ Oxycontin and Oxycodone were used interchangeably during the hearing but the laboratory report showed the presence of 1.80 grams of Oxycodone.

ARGUMENTS

In his Petition to Re-open and Review Findings, Respondent asks this “Administrative Court to reconsider its findings in the above mentioned case. I believe the Judge prematurely ruled on this issue before all State and Federal charges were dismissed. All charges were acquitted therefore removing the cause for the Revocation Order of my Captains license. I request a hearing to be scheduled at the earliest possible time to correct the Courts error.” Respondent’s Petition at 1.

On February 8, 2010, the undersigned and the parties participated in a teleconference wherein the undersigned ordered the Investigating Officer to file her response to Respondent’s Petition by February 16, 2010 and Respondent to file his reply by February 26, 2010.

On February 22, 2010, the undersigned received the Coast Guard Investigating Officer’s Motion in Opposition to Respondent’s Request to Reopen the Administrative Hearing. Telephonic conversations between Ms. Regina Maye of ALJ NY and Ms. Lauren Meus of the ALJ Docketing Center in Baltimore reveal that the Docketing Center received the Investigating Officer’s Motion in Opposition on February 16, 2010 but the Docketing Center’s facsimile machine did not print all of the pages and no one at the ALJ Docketing Center called the Investigating Officer until February 22, 2010 to advise her to resend it. When Docketing Center personnel advised the Investigating Officer that it had not been received in full, she immediately forwarded an electronic copy. The ALJ Docketing Center considers the Investigating Officer’s brief filed on February 16, 2010, and thus I find the Coast Guard’s brief is timely filed.

The Investigating Officer’s Motion in Opposition states Respondent’s Petition “fails to distinguish the difference between the charge of *misconduct for possession* of marijuana and unprescribed OxyContin, and a charge of *misconduct based on a state court* conviction for

possession of dangerous drugs/controlled dangerous substances . . .” Brief of Investigating Officer at 3. “In this instance, however, the charges brought against the Respondent were based on misconduct *for possession, not misconduct based on a state court conviction . . .*” Id. “The ALJ never based his decision on the outcome of a state court criminal trial.” Id. “In this case, there was no allegation of a conviction, only allegations of misconduct based on possession.” Id. at 4.

The Investigating Officer also argued, among other things, that “[i]n administrative hearings, the party bearing the burden of proof must prove their case by a preponderance of the evidence, which is a much lower standard compared to the criminal burden of proving guilt beyond a reasonable doubt. 33CFR 20.701.” Id. She went on to summarize some of the testimony adduced at hearing as follows: “During the hearing . . . New Jersey State Trooper McGuire . . . testified that he observed the Respondent pull two small plastic bags from his back pocket and drop them on the deck. Trooper McGuire collected the two baggies, entered them into evidence, and ensured that they were maintained through the chain of custody. The contents were later tested and found to be 1.14 grams of marijuana and 1.80 grams of oxycodone . . .” Id. at 5. (citations omitted). “Based on the preponderance of the evidence the ALJ found that the Respondent committed misconduct by possessing marijuana and Oxycontin without a prescription, in violation of New Jersey State law.” Id. “Similarly, evidence was presented . . . [concerning] the misconduct charge of possession of a handgun without the proper permit in violation of New Jersey state law. The ALJ admitted testimony regarding a handgun that was discovered in a gym bag belonging to Respondent. Id. (citations omitted).

The Investigating Officer concluded that Respondent’s acquittal in state court is not binding on the ALJ’s findings in the underlying suspension and revocation proceedings;

therefore, the record should not be reopened. She attached a copy of the Judgment of Acquittal from the Superior Court of New Jersey, Monmouth County, and copies of the relevant New Jersey Statutes. The Judgment of Acquittal lists as “Original Charges” the charges in Indictment #08-03-667-I: Possession of CDS [controlled dangerous substance] (Oxycodone) and Unlawful Possession of a Weapon, together with the statute citation and offense level or degree. The form also lists Possession of CDS (Marijuana) separately. The form’s “Sentencing Statement” reads, “Defendant has been acquitted on the Indictment 08-03-667-I.” No mention is made concerning Possession of Marijuana.

On February 24, 2010, Respondent filed a “Motion for Default Finding” claiming the Investigating Officer did not file her response until after the due date, thus creating a default condition. Respondent asserts that under 33 C.F.R. § 20.904 the Coast Guard waived any objection it might have. Respondent also argues that pursuant to 33 C.F.R. § 20.1205 he requests his credentials be returned to him claiming the Coast Guard lacked probable cause once the state court dismissed his criminal charges after a jury trial. He went on to say that because of the dismissal, the Coast Guard’s allegations did not occur. Respondent’s Motion for Default Finding at 1.

Following his Motion for Default Finding, Respondent submitted his brief on February 27, 2010. That brief was due February 26, 2010. Although he dated his brief February 16, 2010, the facsimile transmission stamp at the top of the pages shows “02/27/2010 16:41 17327900527.” Respondent’s brief also contained a Motion for Extension dated February 16, 2010 requesting an extension to reply claiming, “[t]he defendant needs extra time to confer and obtain legal counsel which has an earliest possible date of February 26, 2010 for an intake interview.” That Motion also reflects the same facsimile date stamp as Respondent’s brief.

Professional counsel represented Respondent during the suspension and revocation hearing. In this Petition to Re-Open, Respondent represents himself and asks that it be taken into consideration. The undersigned will take into consideration that Respondent is self-represented to the extent permitted by law. Therefore, the undersigned finds Respondent's brief is timely filed.

Respondent argues the same points made and rejected during the suspension and revocation proceeding. His most relevant point is that he was not the Captain, implying that he was not acting under the authority of his license at the time of the misconduct. He also argues "[t]he decision to revoke Captains license was determined before the civil Courts [*sic*] verdict was rendered. All Charges were acquitted and vacate the allegations [*sic*] made by the state and federal agencies which were used to make the decision to revoke Captains license." Brief of Respondent at 1. He argues further that "[a]s per standard operational procedures, a urinalysis was performed for the presence of controlled substances, all results were negative." Respondent concludes by arguing that "[t]o hold Donald [Responsible] for things beyond his control would be guilt by association . . . I respectfully submit that all charges by the USCG be removed and that my license be reinstated at the earliest possible date. I also reserve the right to appeal this matter to the Commandant of the Coast Guard and the right to introduce new evidence as it is collected." *Id.* at 2.

LAW

Under 33 C.F.R. § 20.904(a) ". . . the ALJ may, for good cause shown in accordance with paragraph (c) of this section, reopen the record of a proceeding to take added evidence." Subsection (c) provides "[t]he ALJ may reopen the record of a proceeding if he or she believes that any change of fact or law, or that the public interest, warrants reopening it."

Section 904(e)(1) states, in pertinent part, as follows:

At any time, a party may file a petition to reopen with the Docketing Center for the ALJ to **rescind** [emphasis added] any order suspending or revoking a merchant mariner's license . . . **if** [emphasis added] –

(i) **The order rests on a conviction** [emphasis added] –

(A) For violation of a dangerous – drug law;

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

* * *

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

* * *

(f)(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 . . . 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.

ISSUES

- 1) Whether Respondent is entitled to a default finding;
- 2) Whether the order of revocation rests on a conviction; and,
- 3) Whether the acquittal is a change of fact or law that warrants reopening.

DECISION

For the reasons discussed below, the Respondent is not entitled to a default finding automatically reinstating his Merchant Mariner's License; further, the order of revocation did not rest on convictions in state court; finally, Respondent's acquittals do not constitute any change in fact or law triggering reopening in the public interest.

DISCUSSION

Respondent's Motion for Default Finding

Respondent claims that if the Coast Guard does not file an objection to the Petition, then it creates a default condition which requires the Coast Guard to return his license. Respondent cites no authority for this proposition and the procedural regulations as well as appeal decisions do not provide for default in petitions to re-open. Title 33 C.F.R. § 20.904(b)(2) provides “[a]ny party who does not respond to any petition to reopen the record waives any objection to the motion.” Title 33 C.F.R. § 20.310(a) entitled “Default by respondent” provides “[t]he ALJ may find a respondent in default upon failure to file a timely answer to the complaint or, after motion, upon failure to appear at a conference or hearing without good cause shown.” See also, 33 C.F.R. § 20.308.

Waiving an objection does not equal default. Under 33 C.F.R. § 20.904(b)(2), the remedy for a party's failure to respond to a petition to reopen is waiver of that party's right to object to the petition. Although the undersigned found the Coast Guard's filing timely, the decision to re-open is still left to the ALJ's discretion under the guidelines in 33 C.F.R. § 20.904. These guidelines apply with or without the Coast Guard's objection. Therefore, Respondent is not entitled to a default finding automatically reinstating his Merchant Mariner's License.

Order of Revocation Does Not Rest on a Conviction

Respondent argues “the Coast Guard rested its case on Criminal Proceedings that were all dropped, and meet [*sic*] the tests under 20.904 sections I paragraph to allow for appeals.” Respondent's Motion for Default Finding at 1. Respondent appears to be referring to 33 C.F.R. § 20.904(e)(1) above. If the order of revocation in the underlying suspension and revocation proceedings rested only on convictions and Respondent submits a specific order of court to the

effect that the convictions have been unconditionally set aside for all purposes, it would be good cause to re-open the proceedings and take additional evidence. However, in this case, the Coast Guard did not initiate the underlying suspension and revocation proceedings based on Respondent's convictions. Had that been the case, the Coast Guard would have offered the convictions into evidence.

Instead, the Coast Guard proceeded with allegations of misconduct under 46 U.S.C. § 7703 which reads in pertinent part, "a license . . . issued by the Secretary may be suspended or revoked if the holder – (1) when acting under the authority of that license . . . (B) has committed an act of incompetence, misconduct, or negligence" The Coast Guard defines Misconduct in 46 C.F.R. § 5.27 as ". . . human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law . . . It is an act which is forbidden or a failure to do that which is required." The misconduct that I found proved in the underlying suspension and Revocation proceedings are acts which are forbidden by statute. Therefore, the order of revocation does not rest on a conviction.

Reopening under change of fact or law, or in the public interest

Respondent's final argument appears to be based on two claims: 1) that even if the revocation order is not based on convictions, the Superior Court of New Jersey acquitted him of the same conduct and because of the dismissal, the Coast Guard's allegations did not occur; and, 2) the Coast Guard lacked probable cause once the state court dismissed his criminal charges after a jury trial. Respondent's Motion for Default Finding at 1.

Concerning Respondent's first claim, the standard of proof in criminal proceedings to determine a criminal defendant's guilt is "beyond a reasonable doubt." In Coast Guard administrative proceedings it is the "preponderance of the evidence." Reasonable doubt is a

much higher standard than preponderance of the evidence. Reasonable doubt is “[t]he doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that a defendant is not guilty. BLACK’S LAW DICTIONARY (8th ed. 2004).

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)).

A finding of not guilty by a jury does not necessarily mean that the allegations did not occur. It simply means that the State did not prove each and every element of the offense to “firmly convince” all 12 members of the jury that the defendant was guilty. Because of these differences in the standards of proof, it does not necessarily follow that a jury’s finding of not guilty beyond a reasonable doubt means that the same result would occur when applying the preponderance of the evidence standard.

Concerning Respondent’s second claim, he cites 33 C.F.R. § 20.1205 as authority to have his credentials returned arguing that the Coast Guard lacked probable cause once the state court dismissed his criminal charges. Section 20.1205 pertains to Expedited Proceedings and provides, in pertinent part, “at any time during the expedited hearing, the respondent may move that his or her license . . . be returned on the grounds that the agency lacked probable cause for temporary suspension.” Section 20.1205 is based on 46 U.S.C. § 7702(d) which provides, in summary, that the Coast Guard may take possession of and temporarily suspend a merchant mariner’s credential for not more than 45 days if the mariner was acting under the authority of that

credential and there is probable cause to believe the mariner performed a safety sensitive function on a vessel in violation of law or Federal regulations regarding use of alcohol or a dangerous drugs.

Under the Expedited Proceedings regulations in subpart L of Title 33 C.F.R., once the Coast Guard takes possession of and temporarily suspends a merchant mariner's credential, the mariner is entitled to a hearing before an Administrative Law Judge within 30 days after the temporary suspension. In this case, the Coast Guard did not take possession of and temporarily suspend Respondent's License. Therefore, 33 C.F.R. § 20.1205 does not apply.

During the underlying suspension and revocation proceedings, the Coast Guard presented evidence that Respondent had previously tested positive for marijuana during a random drug test. As a result of that positive drug test, Respondent entered into a settlement agreement. Ultimately, Respondent failed to comply with the settlement agreement and the Coast Guard revoked his credentials. Respondent subsequently applied for administrative clemency. The Coast Guard denied his request because he tested positive for drugs during the administrative clemency process. The Coast Guard ultimately granted Respondent administrative clemency on his second request. Decision and Order at 17.

Also during the underlying hearing, Trooper McGuire also testified that Respondent admitted to him that the two vials found in his gym bag contained synthetic urine that he purchased online so that he could pass a urine test. The undersigned found that such action shows intent and capability to falsify future drug screens. Id. In view of the foregoing, Respondent's acquittals do not constitute any change in fact or law triggering reopening in the public interest.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent's Petition to Re-open and Review Findings is **DENIED**.

Done and dated March 9, 2010
New York, New York

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