

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

UNITED STATES COAST GUARD
Complainant

vs.

SEAN PATRICK GOLDEN

Respondent

Docket Number 2010-0174
Enforcement Activity No. 3715810

DECISION AND ORDER
DISMISSING COMPLAINT WITHOUT PREJUDICE

Issued: June 03, 2010

By Administrative Law Judge:
Honorable George J. Jordan

Appearances:

CWO Steven A. Siler
Sector Delaware Bay
For the Coast Guard

SEAN PATRICK GOLDEN, Pro se
For the Respondent

DECISION AND ORDER
DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter comes before me for the review of an Admission and a subsequent Settlement Agreement. The record consists of the Agency's Complaint, the Respondent's Answer and a Settlement Agreement.

I. PROCEDURAL AND FACTUAL HISTORY

The Coast Guard filed a Complaint in this matter on April 15, 2010 alleging that Respondent violated 46 USC 7703(1)(B) and 46 CFR 5.27, Misconduct, by being convicted of an offense listed in the National Driver Register Act.

In its Complaint, the Agency set forth as jurisdictional allegations, that the Respondent was the holder of a merchant mariner credential and that "Respondent acted under the authority of MMD [redacted]- on 09/02/2007 by engaging in official matters regarding that license, certificate or document by other; was convicted of an offense listed in the National Driver Register Act." Agency Complaint pg.1.

The Coast Guard's Complaint further alleged the following factual allegations:

1. On September 2, 2007, Respondent was pulled over by PA State Police in Honesdale, PA and cited for use/possession of drug paraphenalia.
2. On April 17, 2008, Respondent entered a court ordered treatment intervention group . Respondent was assessed by Wayne County Drug and Alcohol Commission and received successfully completed the course on May 6, 2008.
3. On May 21st, 2008, Respondent entered a guilty plea for misdemeanor charge of use/possession of drug paraphenalia. Plea was accepted by Wayne County Magesterial District Judge.
4. On March 10, 2010, Respondent applied for renewal of MMD. Request denied due to conviction of possession of drug paraphenalia.

The Coast Guard proposed as an order:

One (1) month outright suspension followed by twelve (12) months probation. If Respondent does not comply with the following conditions during the probation period, the Respondent's credential(s) or endorsement(s) shall be suspended for an additional twelve (12) months.

Conditions of probation: Respondent shall not be issued Complaint for NDRA Conviction during probationary period.

The Respondent timely filed an Answer dated April 23, 2010 that was received at the ALJ Docketing Center on May 7, 2010. That Answer admits all jurisdictional and factual allegations and agrees with the proposed sanction. Further the Respondent checked the box indicated that he does not request any settlement discussions.

Even though the Respondent indicated that he didn't request settlement discussions in the Answer, nevertheless, a Motion for Approval of Settlement Agreement and Entry of Consent Order was filed on June 2, 2010 to which is attached a Settlement Agreement signed by Respondent on May 19, 2010 and the Coast Guard on May 10, 2010. The Settlement Agreement restates the proposed sanction as follows:

In light of the Respondent's cooperative attitude and good faith efforts to reach compliance, the Coast Guard assesses a mitigated sanction of 1 month outright suspension followed by 12 months probation. If Respondent does not comply with the following conditions during the probation period, the Respondent's credential(s) shall be suspended outright for an additional 12 months . The conditions of probation are: Respondent shall not be issued a complaint during the probationary period for a conviction of NDRA.

II. STANDARD OF REVIEW

Since there has been a Complaint issued and in this case both an Answer of Admission and a Motion for Approval of Settlement Agreement and Entry of Consent Order have been filed, the Administrative Law Judge 's role is to review the pleadings and filings in the matter and determine (1) whether the Agency has jurisdiction in this matter, (2) whether the Complaint

is legally sufficient, and (3) if the sanction agreed to is consistent with agency regulation and policy. See 33 CFR §§ 20.309(f), 20.502(b) and 20.902 and 46 CFR § 5.567.¹

There was no hearing in this matter. Because this case arises from an Admission case in which there has been a later settlement filed, the facts supporting the jurisdictional and factual allegations are found solely within the confines of the Coast Guard's Complaint, the Respondent's Answer and the Settlement Motion and Agreement. My review is therefore limited to the Docket Record. See Appeal Decision 2677 (WALKER).

III. DISCUSSION

These proceedings are governed by the Administrative Procedure Act which requires in 5 U.S.C. § 554(b) that persons "entitled to notice of an agency hearing shall be timely informed of ... the legal authority and jurisdiction under which the hearing is to be held; ... and the matters of fact and law asserted." The Coast Guard has established rules of Practice, Procedure and Evidence in Part 20 of Title 33 of the Code of Federal Regulations. Section 20.307(a) of those rules pertains to the requirements for Complaints:

- (a) The complaint must set forth—
 - (1) The type of case;
 - (2) The statute or rule allegedly violated;
 - (3) The pertinent facts alleged; and
 - (4)... (ii) The order of suspension or revocation proposed.

¹ See Interim Final Rule *Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard*, 64 FR 28054-28058-59 (1999) which states:

Under §20.502(b) any motion for proposed settlement must include the reasons why the ALJ should accept it. The ALJ will review such a settlement for the following information:

- (1) Did the appropriate parties sign the agreement?
- (2) Does the complaint allege sufficient facts?
- (3) Does the government have jurisdiction over the respondent?
- (4) Does the law permit the order? ...
- (5) Is the settlement fair under the circumstances?
- (6) Is the settlement clear?

If the ALJ rejects the proposed settlement the ALJ must state the reason(s) in writing and will return the motion to the parties.

The purpose of the Complaint is to provide the Respondent notice of the allegations and must be sufficiently adequate to enable the Respondent to identify the offense so that the Respondent is in a position to prepare a defense or to make an appropriate answer.

See e.g. Appeal Decisions 2386 (LOUVIERE), Appeal Decision 2277 (BANASHAK) and Appeal Decision. 2521 (FRYER). The Complaint is to provide the “legal and factual bases under which the Coast Guard is proceeding.” Appeal Decision 2655 (KILGORE) and Appeal Decision 2676 (PARKER). See also Appeal Decision 2326 (MCDERMOTT) (The thrust of modern pleading, especially in administrative proceedings, is toward fulfillment of a notice requirement).

The principal issue before me is whether this Complaint gives adequate notice of the basis for suspension or revocation. The charge was set forth as Misconduct and the Complaint cites the statutory and regulatory citations for Misconduct. While the Complaint alleges Misconduct, it then describes the Misconduct as a Conviction for a National Drivers Registry Act Violation. NDRA Convictions provide a separate basis for suspension or revocation with a different jurisdictional basis than Misconduct. Moreover, reading the allegations reveal that the actual conviction was for a dangerous drug law violation which is yet another basis for suspension or revocation and based on a separate section of the statute.

A. Subject Matter Jurisdiction

A recent Decision on Appeal establishes that even in non-contested cases such as Admissions and Defaults that the Complaint must allege sufficient facts to demonstrate jurisdiction. See Appeal Decisions 2677 (WALKER) and Appeal Decision 2656 (JORDAN)

46 U.S.C. § 7703 makes clear that to establish jurisdiction in a misconduct case, the action of misconduct alleged must be proven to have occurred while the mariner was “acting under the authority” of his merchant mariner credential. Appeal Decision 2677 (WALKER) (2008)

Here the Complaint states that Respondent is a holder of a credential and further describes that the Respondent acted under the authority by ‘engaging in official matters regarding that license, certificate or document by other:[sic] Was convicted of an offense listed in the National Driver Register Act.’ Coast Guard regulations provide a definition of the term “acting under the authority” at 46 C.F.R. § 5.57. 46 C.F.R. § 5.57(b) states, in relevant part that, “[a] person is considered to be acting under the authority of the credential or endorsement while engaged in official matters regarding the credential or endorsement. This includes, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a hearing under this part.” The act of being convicted of a misdemeanor by a State court is not within this definition. Also the date stated in the jurisdictional allegation is the date of citation (9/2/2007) and not the actual date of conviction (5/21/2008).

Conclusions as to Jurisdiction.

Accordingly, this Complaint does not provide a sufficient jurisdictional basis for Misconduct. However, the inartfullness of the wording of the Complaint does not necessarily mandate dismissal of this action. Appeal Decision 2578 (CALLAHAN) As long as the Complaint actually states the elements of an offense including jurisdiction, I may find the pleadingsto be sufficient if the Respondent had adequate notice of the legal and factual bases under which the Coast Guard was proceeding. NDRA Convictions have been a basis for suspension and revocation since 1990, however, Coast Guard regulations still do not provide for them. The only law available is the statute itself and policy guidance in the Marine Safety Manual. As a result, there has been significant confusion in charging such offenses. When Congress added National Driver Register Act Convictions as a basis for suspension or revocation, it specifically made the basis for jurisdiction being the “holder” of a credential.

Section 7703 provides that:

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder—(3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49

The complaint does set out an adequate jurisdictional allegation for such an offense in that the Respondent is a “holder” of a Coast Guard-issued credential. Other than for Misconduct, Negligence or Violation of Marine Safety Law or Regulation, an allegation of the Respondent being a “holder” of a Coast Guard issued mariner’s credential creates an adequate basis for jurisdiction in these proceedings.

B. Sufficiency of Complaint.

1. National Driver Register Act Conviction

However, a review of the factual allegations in the pleadings reveals that the conviction in this matter is not a National Driver Register Act Conviction. 46 USC § 7703(3) sets forth as a basis for suspension or revocation whenever a mariner “within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49.” Those sections relate to the “ following motor vehicle-related offenses or comparable offenses:

(A) operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance.

(B) a traffic violation arising in connection with a fatal traffic accident, reckless driving, or racing on the highways.”

The factual allegations which have been admitted by the answers include the allegation that “On May 21st, 2008, Respondent entered [a] guilty plea for [the] misdemeanor charge of use/possession of drug paraphenalia. Plea was accepted by Wayne County Magesterial [sic]

District Judge.” The use/possession of drug paraphernalia is not a listed or comparable offense. The fact that this conviction began as a traffic stop does not convert this to a NDRA offense. Therefore, these allegations are legally insufficient to establish an NDRA conviction as a basis for suspension or revocation.

2. Conviction of violating a dangerous drug law

Rather than establishing a NDRA offense, the allegation in paragraph 3 of the Factual Allegations is sufficient to establish a violation of 46 USC § 7704(b) which states -

(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 suspended or revoked.

A recent appeal decision clearly establishes that a conviction for “Possession of Drug Paraphernalia” is a conviction for a dangerous drug law violation under 46 USC § 7704(b). Appeal Decision 2674 (KOVALESKI). See also Appeal Decision 1830 (PACKARD). The jurisdictional nexus for a drug violation conviction is the same as for NDRA convictions, which is being the holder of a Coast Guard-issued credential.

In this case, the allegations set out facts alleging a drug law conviction, but the Complaint is for Misconduct, cites the Misconduct statute and regulation, attempts to allege facts establishing “acting under the authority” jurisdiction and mentions the NDRA several times. Unlike NDRA convictions, drug law convictions have been the subject of suspension and revocation proceedings for over fifty (50) years. There is a separate statutory source and different rules and policy concerning drug use and conviction. The differences are far too great to allow me to amend the allegations to conform to the proof without substantially changing the allegations.

3. Conclusions as to Legal Sufficiency.

Even though, the Respondent admitted to these allegations including the allegation concerning the misdemeanor drug law conviction and he has also signed a settlement agreement agreeing to the sanction, the multiple defects in this Complaint are too great for me to conclude that the Respondent was given meaningful notice of the legal and factual bases under which the Coast Guard was attempting to proceed. Therefore I find that this Complaint is defective and it must be dismissed. See Appeal Decision 2326 (McDERMOTT) supra and Appeal Decision 2407 (GONSALVES). In Appeal Decision 2568 (SANCHEZ et al) (1995), the Commandant places a duty on the ALJ to have defective charges withdrawn. That decision was based on an interpretation of 46 CFR 5.525 that was repealed in May 1999. However, I still regard this decision as having at least persuasive weight in that it stated that dismissal of allegations was appropriate where “the records suggest that the original inapposite charge and specification led to a complete misunderstanding between the [parties] as to what had to be shown to find the charge proved” That is precisely the circumstance in this matter. There is little doubt that the Respondent was convicted of a dangerous drug law violation but that is not what the agency alleged or to what the Respondent has admitted or entered into a settlement concerning.

C. Consistency of Order with Agency Policy.

Finally I note that even if I had found that the Respondent had sufficient notice, I would have had to order further hearing in this matter. The proposed order in this matter, while possibly appropriate for some NDRA conviction cases, does not appear consistent with long-standing agency policy in drug conviction cases.

Prior to 1984, the statute concerning Drug Use and Drug Convictions (46 USC 239a) stated that the Coast Guard may revoke merchant mariner credentials in such cases. Coast Guard policy and pertinent regulations mandated revocation. The NTSB found that revocation was discretionary on the part of the Commandant and that the regulations only mandated revocation on the part of the ALJ. As

a result, the statute was amended in 1984.

46 USC 7704 mandated revocation in all drug use and conviction cases except in drug use cases where cure was established. Subsequently, Appeal Decision 2335 (SWEENEY) and its progeny established a regime for establishing cure. A disconnect was seen because cure was not available in cases where a mariner was convicted of possession of personal use amounts of drugs.

A legislative fix was proposed and the result was the Coast Guard and Maritime Transportation Act of 2004 (“Coast Guard Authorization Act”). The new law now provides for suspension or revocation if a holder of a license, certificate of registry, or merchant mariner’s document was convicted of violating a dangerous drug law of the United States or of a State. A review of the Conference Report accompanying the Coast Guard Authorization Act illustrates that the Congressional intent 46 USC 7704 (b) was specifically amended in order to provide the ALJ to approve settlement agreements when drug convictions cases involve minor drug offenses. See H.R. CONF. REP. NO. 108-617, at 78

A recent Appeal Decision and several ALJ Decisions have authorized suspension only orders for some drug conviction cases (See Appeal Decision 2678 (SAVOIE) (2008); but see Appeal Decision 2674 (KOVALESKI)). However, other ALJ Decisions since SAVOIE have ordered revocation or allowed settlements. The Commandant stated that “Congress has not dictated a desired or preferred sanction for conviction of a dangerous drug law; rather Congress has merely authorized either sanction.” SAVOIE, supra. 46 U.S.C. § 7704(b).

Conclusions regarding Consistency of Order with Agency policy.

While recognizing that a suspension-only order in a drug conviction case is allowed, I find that a one (1) month suspension with an additional potential twelve (12) month suspension that would be triggered only by a subsequent NDRA conviction within a twelve (12) month probationary period would not appear to meet the remedial purposes of these proceedings.

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 C.F.R. § 5.5

“Congress enacted 46 U.S.C. § 7704 with the express purpose of removing those individuals possessing or using drugs from service in the United States merchant marine. House Report No. 338, 98th Cong., 1st Sess. 177 (1983).” Appeal Decision 2638 (PASQUARELLA) .

In order to find the mitigated sanction agreed to in the Settlement Agreement acceptable, there would have to be significant evidence of rehabilitation or evidence explaining why Respondent possessed drug paraphernalia even though the Respondent was not a user of dangerous drugs. I note that the ALJ Decision in the SAVIOE case specifically found that there was no evidence that the mariner was a user or had a substance abuse problem in weighing the factors that led to a four (4) month suspension. See USCG v. Savoie, SR-2005-15 (USCG ALJ Dec.). See also USCG v. Rich, SR-2009-13 (USCG ALJ Dec.) (Revocation appropriate where Respondent did not provide any evidence of any remedial action undertaken by him which might mitigate the imposed sanction in a case involving NDRA and Drug Convictions)

While USCG regulations concerning the appropriate order in conviction cases in 46 CFR 5.59(b) were invalidated by SAVIOE and the Agency has not yet published new rules, the Marine Safety Manual has set out policy for such cases. In cases where an amended or new complaint is filed alleging Drug Law Conviction, I must remind the parties of that Coast Guard policy concerning the need to establish rehabilitation following such a conviction (*See e.g.* Section B.9.b. Proposed Order for Drug Conviction Cases, Commandant Instruction M16000.10A Marine Safety Manual, Volume V, Investigations and Enforcement) . This Marine Safety Manual policy is guidance only and I am not bound by that policy and I remind the parties that I still have broad discretion in these cases and that am “statutorily authorized to consider suspension (in lieu of revocation) as an appropriate sanction in this proceeding” under SAVIOE if there is evidence in mitigation.

The Coast Guard has encouraged settlement of cases for many years. One of the goals of the procedural rules was the establishment of new procedures for settlement agreements. The preamble to the Procedural Rules states that “this rule will help to promote settlement in cases that are undisputed. This will further help to eliminate unnecessary hearings.” See 64 FR 28055 (1999). In keeping with the intentions of this rule and the principles of judicial economy, I will keep this docket open to permit the parties to amend the pleadings and settlement agreement to submit an amended Complaint and an acceptable agreement.

IV. ORDER

Accordingly, for the reasons noted above, I am making the following orders:

1. The Complaint is found to be legally insufficient and must be **DISMISSED** or **AMENDED**.
2. The Motion for Approval of Settlement Agreement and Entry of Consent Order is **DENIED** and the Settlement Agreement is rejected.
3. The parties have until June 30, 2010 to file an amended Complaint and Settlement Agreement consistent with this decision with the Docket Center.
4. If no amended filing is received by that date, the Complaint will be **DISMISSED** without prejudice.

IT IS SO ORDERED.

IT IS ORDERED that service of this Decision and Order upon Respondent will serve as notice to Respondent of appeal rights as set forth in 33 CFR Subpart J, Section 20.1001. (Attachment A)

George J. Jordan
US Coast Guard Administrative Law Judge

Date: June 03, 2010