

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

UNITED STATES COAST GUARD
Complainant

vs.

EARL WAYNE MAXWELL
Respondent

Docket Number 2010-0439
Enforcement Activity No. 3854003

DECISION & ORDER

Date Issued: April 5, 2011

**Issued by: Honorable Bruce Tucker Smith
Administrative Law Judge**

Appearances:

For the Complainant

Gary F. Ball, Esq.
U.S. Coast Guard Suspension & Revocation National Center of Expertise

MSSD4 Carol Cruise
US Coast Guard Sector Mobile

I. PRELIMINARY STATEMENT

The United States Coast Guard Sector Mobile (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Earl Wayne Maxwell's (Respondent) Coast Guard-issued Merchant Mariner's License and Merchant Mariner's Document (hereafter, collectively referred to as "credentials").

On September 23, 2010, the Coast Guard filed an original Complaint alleging that on January 12, 2010, Respondent, a holder of Coast Guard-issued credentials, was arrested for Possession of Cocaine. The Coast Guard further alleged that on July 29, 2010, "Respondent plead [sic] guilty to the lesser charge of Possession of Paraphernalia, was convicted and sentenced to 6 months incarceration that was suspended on 1 year probation and given a \$200.00 fine." The Coast Guard's Complaint avers that Possession of Paraphernalia is a dangerous drug law and violative of 46 U.S.C. §7703(2).

On November 18, 2010, the Chief Administrative Law Judge (CALJ) assigned the instant matter to the undersigned Administrative Law Judge (ALJ) for adjudication. On November 30, 2010, Respondent filed an Answer to the original Complaint wherein he admitted all jurisdictional allegations and denied all factual allegations.¹

On December 20, 2010, the Coast Guard filed an Amended Complaint wherein it changed both the statute Respondent allegedly violated, as well as Respondent's convicted charge. The Amended Complaint again alleged that on January 12, 2010, Respondent, a holder of Coast Guard-issued credentials, was arrested for Possession of Cocaine. The Amended Complaint further alleged that on July 29, 2010, "plead [sic] guilty to the lesser charge of Use/Possession of Drug Paraphernalia, was convicted and sentenced to 6 months of incarceration that was suspended on 1 year probation." The Coast Guard alleged that "Use/Possession of Drug

Paraphernalia is a violation of 46 U.S.C. §7704(b) [and] 46 U.S.C. §7704(b) is a dangerous drug law of the United States.”

On December 21, 2010, the court convened a telephonic pre-hearing conference with the parties, during which time preliminary matters were discussed, including possible hearing dates and locations as well as discovery deadlines.

On January 7, 2011, the Coast Guard filed a second Amended Complaint containing greater specificity than the previous two filings. The factual allegations of the second Amended Complaint alleged that:

1. On 07/29/2010, the Respondent, Earl W. Maxwell . . . was convicted of Use/Possession of Drug Paraphernalia by the District Court of Mobile County, Alabama.
2. Use/Possession of Drug Paraphernalia is a misdemeanor under the Code of the State of Alabama, Title 13A; Criminal Code Section 13A-12-260.
3. Code of the State of Alabama, Title 13A; Criminal Code Section 13A-12-260 is a Dangerous Drug Law of the State of Alabama.
4. The Respondent, Earl W. Maxwell was convicted within the last 10 years of violating a Dangerous Drug Law of a State, as described by Title 46 U. S. Code Section 7704(b).

On March 15, 2011, this matter came on for hearing at the U.S. Federal Courthouse in Mobile, Alabama. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-59 and the Coast Guard procedural regulations set forth at 33 C.F.R. Part 20. Gary F. Ball, Esq., of the Coast Guard Suspension and Revocation National Center of Expertise and Investigating Officer (IO) MSSD4 Carol R. Cruise of Sector Mobile appeared on behalf of the Coast Guard; W.J. LeBlanc, Jr., Esq. appeared on behalf of Respondent, who was also present at the hearing.

¹ On October 19, 2010, the CALJ granted Respondent’s Request for Extension of Time. On November 30, 2010, the court issued an Order denying Respondents second Request for Extension of Time, and directed Respondent to file an Answer not later than December 1, 2010.

Both parties appeared, presented their respective cases and rested. At the outset of the hearing, the parties announced to the court that they had agreed to a stipulation of certain facts and documents. (Tr. at 8). More specifically, the parties stipulated to all facts and documents, with the exception of factual paragraph 6 in the latest Amended Complaint, as set forth in the Coast Guard's Motion for Summary Decision. Those stipulated facts are accepted and incorporated herein to the court's Findings of Fact.

Four witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered one-contested exhibit into evidence, which was admitted over Respondent's objection. Respondent offered the testimony of Steven F. Sciple, Esq., the attorney who represented him in the criminal matter underlying the instant proceeding.²

At the conclusion of the hearing, the court permitted the parties to present their respective closing arguments prior to closing the administrative record.

II. FINDINGS OF FACT

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

1. At all relevant times relevant herein, Respondent Earl Wayne Maxwell (Respondent) was the holder of a Coast Guard-issued Merchant Mariner's License (MML) and Merchant Mariner's Document (MMD). (CG Ex. 4).
2. On or about January 12, 2010, Respondent received an Alabama Uniform Traffic Ticket and Complaint, ticket number 2877908, for violating the Code of Alabama § 32-6-19, to wit: driving on a suspended license. (CG Ex. 1 at p. 22).
3. On or about January 12, 2010, Respondent was arrested by a State of Alabama Alcoholic Beverage Control (ABC) Board law enforcement officer for unlawful possession of a controlled substance in violation of the Code of

² Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

Alabama §13A-12-212, to wit: possession of three rocks of crack cocaine. (CG Ex. 1 at pp. 20-21; CG Ex. 5).

4. On or about July 29, 2010, Respondent entered a guilty plea to an amended charge of unlawful use/possession of drug paraphernalia. (CG Ex. 1 at pp. 3-4). As a result of his guilty plea to unlawful use/possession of drug paraphernalia, Respondent received a six month suspended sentence for one year of formal probation, and ordered to pay restitution in addition to court costs. (CG Ex. 1 at 2-3).
5. Pursuant to the Criminal Code of the State of Alabama §13A-12-260, unlawful use/possession of drug paraphernalia is a Class A misdemeanor. (Stipulated fact; CG Ex. 6).
6. The charge of unlawful use/possession of drug paraphernalia is a dangerous drug law of the State of Alabama. (Stipulated fact).
7. On or about September 21, 2010, Respondent filed a Motion to Withdraw Guilty Plea in accordance with Alabama Rules of Criminal Procedure Rule 14.4 requesting his guilty plea and that the original charge be reinstated. (CG Ex. 1 at pp. 6-7; ALJ I).
8. On or about September 27, 2010, the District Court of Mobile County, Alabama, dismissed the amended charge of unlawful use/possession of drug paraphernalia subject to the following four conditions: that Respondent pay court costs; that Respondent remains current with restitution payments of \$200 per month; the Respondent not be arrest for another crime in the following five months; and that Respondent appear before the court on February 24, 2011, to verify compliance with the foregoing conditions. (Stipulated fact; CG 1 at p. 11).
9. On or about February 17, 2011, the District Court of Mobile County, Alabama, dismissed the charge of unlawful use/possession of drug paraphernalia with prejudice. (stipulated fact; CG Ex. 2).
10. On or about February 17, 2011, the District Court of Mobile County, Alabama, entered an order stating, “that on September 27, 2010, [Respondent’s] guilty plea to unlawful use/possession of drug paraphernalia charge . . . is hereby vacated and withdrawn.” (stipulated fact; CG Ex. 2).
11. On January 17, 2005, the Coast Guard and Respondent entered into a Settlement Agreement, whereby Respondent agreed to attend and complete a drug rehabilitation program, attend a substance abuse monitoring program and participate in random drug tests in lieu of proceeding to an administrative hearing. (CG Ex. 7).
12. No Order emanating from the District Court of Mobile County, Alabama pertaining to Respondent references any legal error or “manifest injustice” in

response to Respondent's Motion for Withdrawal of his guilty plea to the charge of possession of drug paraphernalia.

13. The sole basis for the Order issued by the District Court of Mobile County, Alabama on February 17, 2011 in response to Respondent's Motion to Withdraw his plea of guilty to the charge of possession of drug paraphernalia, was a concern over Respondent's potential loss of his Coast Guard-issued mariners credentials – and not because of any legal error or manifest injustice.

III. SUMMARY OF DECISION

The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent was convicted of a dangerous drug law as contemplated by 46 U.S.C. §7704(b) and 46 C.F.R. §5.35, to wit: possession of drug paraphernalia.

For the reasons set forth infra, the Merchant Mariner's License and Merchant Mariner's Document issued by the U.S. Coast Guard to Respondent are hereby **REVOKED**.

IV. DISCUSSION

A. General

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. §7701. Pursuant to 46 C.F.R. §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. §7703 and/or §7704.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003).³ Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

B. Jurisdiction

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). “Where an Administrative forum acts without jurisdiction its orders are void.” Appeal Decision 2025 (Armstrong) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006).

As discussed supra, the Coast Guard has charged Respondent with violating 46 U.S.C. §7704(b). To establish jurisdiction in matters that are based exclusively on the provisions of 46 U.S.C. §7704,⁴ “the complaint will allege conviction for a dangerous drug law violation . . . and the approximate time and place of the offense.” 46 C.F.R. §5.35.⁵

The Coast Guard’s original, first and second Amended Complaint allege jurisdiction is properly situated before this court as Respondent possesses both a Merchant Mariner’s License and a Merchant Mariner’s Document. Moreover, jurisdiction is proper herein as the Coast Guard, and Respondent does not dispute, that in the past ten years he has been convicted of a dangerous drug law.

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7704, and the implementing regulations, 46 C.F.R. Part 5 and Part 10, Subpart B; 33 C.F.R. Part 20. The

³ Pursuant to 46 C.F.R. §5.65, “[t]he decisions of the Commandant in cases of appeal . . . are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges.”

⁴ (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.

⁵ Where the proceeding is based exclusively on the provisions of title 46, U.S.C. section 7704, the complaint will allege conviction for a dangerous drug law violation or use of dangerous drugs or addiction to the use of dangerous

Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. See 5 U.S.C. §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting his affirmative defense by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988) (citing Steadman v. SEC, 450 U.S. 91, 107 (1981)). 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 & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

Therefore, at hearing, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the acts alleged in the Amended Complaint.

D. Dangerous Drug Law Conviction

Pursuant to 46 U.S.C. §7704(b), a mariner’s credentials may be suspended or revoked “[i]f it is shown at a hearing . . . that a holder of a [credential] . . . within 10 years before the

drugs, depending upon the circumstances and will allege jurisdiction by stating the elements as required by title 46, U.S.C. section 7704, and the approximate time and place of the offense.

beginning of the proceedings, has been convicted of violating a dangerous drug law of . . . of a State.” (Id.).

Here, it is undisputed that Respondent is a holder of a both a merchant mariner’s license and document. The Coast Guard’s obligation to establish the remaining elements required of 46 U.S.C. §7704 was obviated by the parties’ stipulation that Respondent was convicted of a dangerous drug law violation of the State of Alabama and that the conviction was within the preceding ten years. (Tr. at 8)(CG Motion for Summary Decision). See also Appeal Decision 2674 KOVALESKI (2008).

In this case, Respondent asserts an affirmative defense; specifically, that the Alabama criminal court expunged his conviction because of either a legal error or “manifest injustice.” 33 CFR §20.1307(d).

Therefore, it is appropriate that the undersigned review the circumstances underlying the Respondent’s criminal conviction and subsequent withdrawal of his plea which gave rise to the instant administrative action.

On January 12, 2010, Respondent was arrested in Mobile, Alabama on charges of unlawful possession of a controlled substance in violation of the Code of Alabama §13A-12-212. (Tr. at 51-52; CG Ex. 1, 5). On July 29, 2010, Respondent, on the advice of counsel, entered a guilty plea to an amended charge of unlawful use/possession of drug paraphernalia. (Tr. at 61; CG Ex. 1). The Alabama criminal court accepted Respondent’s plea and sentenced Respondent to a six-month sentence, suspended on one year of probation. (CG Ex. 1). Respondent was further ordered to pay court costs and restitution in another case then pending before the court. (CG Ex. 1).

Per the strictures of 33 CFR §20.1307(c) that state conviction was conclusive of a violation of a dangerous drug law – a fact Respondent does not contest.

The relevant question here, however, is what effect, if any, the Alabama court's orders vacating Respondent's guilty plea and his conviction of a dangerous drug law, has on the conviction of a dangerous drug law vis-a-vis Coast Guard licensure regulations.

The analysis begins with a reading of 33 CFR §20.1307(d), which provides:

If the respondent participates in the scheme of a State for the expungement of convictions, and if he or she pleads guilty or no contest or, by order of the trial court, has to attend classes, contribute time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of the finding of the trial court, the Coast Guard regards him or her, for the purposes of 46 USC 7703 or 7704, as having received a conviction. The Coast Guard does not consider the conviction expunged without proof that the expungement is due to the conviction's having been in error.⁶

(emphasis added)

In the instant Suspension and Revocation proceeding, Respondent attempted to prove that his conviction was expunged because his conviction was in error.

The proof adduced at the instant hearing revealed that on September 21, 2010, Respondent filed a Motion to Withdraw the guilty plea he entered on July 29, 2010. Ostensibly, Respondent relied upon Alabama Rule of Criminal Procedure Rule 14.4, which provides that a guilty plea may be withdrawn "when necessary to correct a manifest injustice." (CG Ex. 1 at p. 6).

At the time he filed his Motion to Withdraw his guilty plea, Respondent argued that he entered into the criminal plea agreement under the belief that he would be permitted by the Coast Guard to retain his credentials. (Id.). The record reveals Respondent advised the Alabama criminal court that his conviction would cause the Coast Guard to seek revocation of his mariner's credentials. According to his Motion, Respondent indicated he owed approximately

⁶ The regulation does not define what quantum or quality of "proof" is sufficient to establish an "error" predicate to the state criminal court's expungement of a conviction.

\$10,000 in restitution in two separate matters and that without his credentials, he would be unable to continue to make restitution payments through the Alabama court. (Id. at p.8).

Respondent's Motion to Withdraw did not reference any legal error or "manifest injustice."

Nevertheless, on September 27, 2010, the Alabama criminal court dismissed the conviction of use/unlawful possession of drug paraphernalia, subject to several conditions; including his obligation to pay court costs and restitution and that he not be arrested for another crime during the ensuing five month period. (Id. at 11).

Five months later, on February 17, 2011, the District Court of Mobile County, Alabama, dismissed the charge of unlawful use/possession of drug paraphernalia with prejudice. (CG Ex. 2). Also on February 17, 2011, the District Court of Mobile County, Alabama, entered an Order stating, "that on September 27, 2010, [Respondent's] guilty plea to unlawful use/possession of drug paraphernalia charge . . . is hereby vacated and withdrawn." (stipulated fact; CG Ex. 2).

During the course of the instant proceeding, Respondent emphasized that his criminal plea was, in fact, withdrawn and vacated due to "manifest injustice." Yet neither Respondent's Motion to Withdraw nor the Alabama criminal court's three subsequent orders made any reference to any legal error or "manifest injustice."

In the instant Suspension and Revocation proceeding, Respondent now cites multiple errors supposedly made by the Alabama criminal court in accepting his guilty plea. He argues that his Alabama conviction should be regarded as a nullity and, thus, there are no grounds to suspend or revoke his credentials under 46 U.S.C. §7704. However, a close examination of the Alabama criminal court's Order of February 17, 2011 reveals no finding of error or "manifest injustice." (CG Ex. 2). Likewise, an examination of the Alabama criminal court proceedings on September 27, 2010 reveals no mention of error or "manifest injustice." (CG Ex. 3).

It is noteworthy that at the Suspension and Revocation hearing, Respondent called Steven Sciple, Esq., the criminal defense attorney who represented him during the criminal conviction and subsequent plea withdrawal. Sciple testified although that he “was not at any time provided a copy [of] the police report for [the criminal] case” (Tr. at 71) he, nevertheless, advised Respondent to accept the plea to the paraphernalia charge, since it was a misdemeanor offense and Respondent would avoid a potential felony conviction. (Tr. at 71). Although Sciple was aware of Respondent’s profession, he testified that he (errantly) did not believe Respondent’s credentials would be adversely affected, given that people convicted of drug paraphernalia charges were permitted to retain their state driver’s license. (Tr. at 61-62). There is no evidence or testimony herein that Sciple conducted any research into whether Respondent’s guilty plea could potentially affect his Coast Guard-issued credentials.

Sciple testified that he filed the Motion to Withdraw at Respondent’s request “[b]ecause it was manifest injustice, you know. There was no basis for the drug paraphernalia” conviction. (Tr. at 63-70). Sciple testified that he did not believe there was a legally sufficient basis for the original charge of possession of cocaine or that there was any evidence supporting the paraphernalia charge. (Tr. at 60-61). (Query: How did Sciple form such a conclusion if he never read the underlying police report? Moreover, if Sciple indeed believed that there was no legally sufficient basis for either the charge of possession of cocaine or paraphernalia, why did he advise his client to enter an incriminating plea?) At the Suspension and Revocation hearing, Sciple testified that Respondent’s motivation for filing the Motion to Withdraw was based upon his potential loss of his mariner’s credentials not because of a legal error. (Tr. at 70).

Respondent’s argument, buttressed by Sciple’s testimony, was that the Alabama criminal court committed two errors, by: 1) allowing Respondent to enter a guilty plea to a charge that lacked a factual basis and 2) failing to review the entire explanation of rights to Respondent, as opposed to “just the highlights.” (Tr. at 65). Problematically, Sciple did not cite either alleged

error in the Motion for Withdrawal. (Tr. at 66; See CG Ex. 1 at pp. 6-7). According to Sciple's account, he did not want to plead that the court committed an error, or errors, "[b]ecause I have to work in the courtroom, the DA works in the courtroom. . ." (Tr. at 66). In fact, Sciple testified that Respondent's sole basis for seeking plea withdrawal was his concern over the adverse impact his conviction would have on his Coast Guard-issued mariner's credentials. (Tr. at 71).

Sciple testified that it is common practice for Alabama courts to "usually hit the high points" when reviewing a defendant's waiver of rights. (Tr. at 64). Sciple further testified that the court's condensed review violated Rule 14.4 of the Alabama Rules of Criminal Procedure thereby constituting error. (Tr. at 65).

The undersigned agrees with Coast Guard counsel who observed, "[t]he manifest injustice based on . . . the waiver of rights during the guilty plea or the effect of the guilty plea . . . seems beyond belief. . . . [Sciple] sat in court while the judge committed this manifest injustice [and] presumably didn't raise an objection to it then." (Tr. at 104). Sciple's testimony and reasoning strain logic.

Respondent argues a second error was committed by the Alabama criminal court when it accepted his guilty plea on the charge of unlawful use/possession of drug paraphernalia when there is no factual basis for that charge. (Tr. at 65). Sciple's testimony and this line of reason again strain logic and experience, particularly in light of the fact that Sciple admitted he had not reviewed the police report at any time prior to negotiating the charge. (Tr. at 71). It is not this court's function to second-guess the legal advice given by counsel in an Alabama criminal court proceeding, except to note that Respondent voluntarily entered his plea after receiving the advice of his learned attorney.

A thorough review of Respondent's criminal court case file leads the undersigned to the inescapable conclusion that Respondent's Motion to Withdraw was predicated solely upon his concern that he could lose his mariner's credentials. Heretofore, there has simply been no

mention of legal error or “manifest injustice” in any of the Alabama criminal court pleadings or court orders. Respondent’s request that his attorney seek plea withdrawal was predicated solely upon the potential impact a criminal conviction would have on his mariner’s credentials.

Respondent specifically highlighted the impact the loss of his mariner’s credentials in his Motion to the Alabama judge. Respondent impliedly argued before that court that the loss of his credentials would result in his inability to make restitution payments in other pending matters.

Thus, it is clear to the undersigned that the Alabama criminal court granted Respondent’s Motion to Withdraw solely to help Respondent keep his mariner’s credentials and to ensure prompt restitution payments were made.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times relevant herein, Respondent Earl Wayne Maxwell (Respondent) was the holder of a Coast Guard-issued Merchant Mariner’s License (MML) and Merchant Mariner’s Document (MMD). (CG Ex. 4).
2. On or about January 12, 2010, Respondent was arrested by a State of Alabama Alcoholic Beverage Control (ABC) Board law enforcement officer for unlawful possession of a controlled substance in violation of the Code of Alabama §13A-12-212, to wit: possession of three rocks of crack cocaine. (CG Ex. 1 at pp. 20-21; CG Ex. 5).
3. On or about July 29, 2010, Respondent entered a guilty plea to an amended charge of unlawful use/possession of drug paraphernalia. (CG Ex. 1 at pp. 3-4). As a result of his guilty plea to unlawful use/possession of drug paraphernalia, Respondent received a six month suspended sentence for one year of formal probation, and ordered to pay restitution in addition to court costs. (CG Ex. 1 at 2-3).
4. Pursuant to the Criminal Code of the State of Alabama §13A-12-260, unlawful use/possession of drug paraphernalia is a Class A misdemeanor. (Stipulated fact; CG Ex. 6).
5. The charge of unlawful use/possession of drug paraphernalia is a dangerous drug law of the State of Alabama. (Stipulated fact).
6. On or about September 27, 2010, the District Court of Mobile County, Alabama, dismissed the amended charge of unlawful use/possession of drug paraphernalia subject to the following four conditions: that Respondent pay

- court costs; that Respondent remains current with restitution payments of \$200 per month; the Respondent not be arrest for another crime in the following five months; and that Respondent appear before the court on February 24, 2011, to verify compliance with the foregoing conditions. (stipulated fact; CG 1 at p. 11).
7. On or about February 17, 2011, the District Court of Mobile County, Alabama, dismissed the charge of unlawful use/possession of drug paraphernalia with prejudice. (stipulated fact; CG Ex. 2).
 8. On or about February 17, 2011, the District Court of Mobile County, Alabama, entered an order stating, “that on September 27, 2010, [Respondent’s] guilty plea to unlawful use/possession of drug paraphernalia charge . . . is hereby vacated and withdrawn.” (stipulated fact; CG Ex. 2).
 9. No Order emanating from the District Court of Mobile County, Alabama pertaining to Respondent references any legal error or “manifest injustice” in response to Respondent’s Motion for Withdrawal of his guilty plea to the charge of possession of drug paraphernalia.
 10. The sole basis for the Order issued by the District Court of Mobile County, Alabama on February 17, 2011 in response to Respondent’s Motion to Withdraw his plea of guilty to the charge of possession of drug paraphernalia was a concern over Respondent’s potential loss of his Coast Guard-issued mariners credentials – and not because of any legal error or manifest injustice.
 11. Respondent’s Alabama criminal court conviction was not expunged, vacated, withdrawn, rendered a nullity or set aside because of either a legal error or “manifest injustice.”

IV. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 C.F.R. §§5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to “promote, foster, and maintain the safety of life and property at sea.” 46 U.S.C. §7701; 46 C.F.R. §5.5; Appeal Decision 1106 (LABELLE) (1959).

The governing statute, 46 U.S.C. § 7704(b), expressly permits either suspension or revocation of a merchant mariner’s credential when a mariner is found to have been convicted

for a dangerous drug law violation.⁷ However, the governing regulation, 46 C.F.R. § 5.59, requires revocation of a merchant mariner's credential for conviction of a dangerous drug law. Despite the mandatory language contained within the applicable regulation, the precatory language within the statute controls as it is a basic rule of law that statutes supersede regulations.

In the instant matter, it has been established that Respondent was convicted of a dangerous drug law in violation of 46 U.S.C. §7704(b). The Coast Guard seeks revocation of Respondent's credentials. In determining an appropriate sanction for offenses for which revocation is not mandatory, an Administrative Law Judge should consider: any remedial actions undertaken by a respondent; respondent's prior records; and evidence of mitigation or aggravation. See 46 C.F.R. §5.569(b)(1)-(3).⁸

Remedial Action: Respondent did not provide any evidence of any independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 C.F.R. §5.569(b)(1).

Respondent's Prior Records: Respondent's credentials have been subject to at least one prior disciplinary action. See infra. In that matter, Respondent and Coast Guard negotiated a settlement agreement whereby Respondent participated in the "cure" process. (CG Ex. 7). See also 33 C.F.R. §5.569(b)(2).

Mitigation or Aggravation: Respondent offered no affirmative proof in mitigation of any potential sanction.

⁷ Suspension or revocation was authorized in a 2004 amendment to 46 U.S.C. §7704(b). Prior to 2004, revocation was the sole sanction authorized for conviction of a dangerous drug law.

⁸ Cf. 46 C.F.R. §5.569(d) provides that "[t]he only proper order for a charge under 46 U.S.C. 7704 found proved is revocation."

It is incumbent upon the Coast Guard to substantiate the basis for its proposed sanction. Here, the Coast Guard's proof of Respondent's conviction demonstrates that he poses a threat to safety at sea or on the waterways.

The Coast Guard has proved that Respondent was convicted of a dangerous drug law, in violation of 46 U.S.C. §7704. Respondent's prior disciplinary record reflects his knowledge of the maritime drug safety program and his failure to adhere to its requirements. Specifically, in 2005, Respondent entered into a Settlement Agreement with the Coast Guard after the Coast Guard filed a Complaint against him for drug use or addiction. The terms of that Settlement Agreement specifically required Respondent to attend a substance abuse program (such as Alcoholics Anonymous or Narcotics Anonymous) for one year. (CG Ex. 7). In sum: Respondent has been afforded previous opportunities to eliminate drugs from his life and his service on the waterways. His apparent failure to learn the lesson afforded him by the prior settlement agreement aggravates the impact of his recent conviction of a dangerous drug law.

“Congress has determined as a matter of public policy that involvement with illegal drugs is inconsistent with employment in the merchant marine.” Appeal Decision 2629 RAPOZA (2002).

Therefore, based upon the record as a whole, the appropriate sanction is **REVOCAION** of Respondent's Merchant Mariner's License.

VI. CONCLUSION

For the foregoing reasons, I find the Coast Guard has **PROVED** its allegation that Respondent was convicted of a dangerous drug law as contemplated by 46 U.S.C. §7704(b).

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the Merchant Mariner's Document and Merchant Mariner's License issued by the U.S. Coast Guard to Respondent Earl Wayne Maxwell are **REVOKED**.

IT IS FURTHER ORDERED, that Respondent Earl Wayne Maxwell shall immediately tender his Coast Guard-issued Merchant Mariner's Document and Merchant Mariner's License to the nearest United States Coast Guard office or to the United States Coast Guard, Sector Mobile, Investigations Division, 1500 15th Street, Brookley Complex, Mobile, Alabama 36615-1390.

IT IS FURTHER ORDERED, that Respondent Earl Wayne Maxwell is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Document or Merchant Mariner's License issued by the U.S. Coast Guard.

PLEASE TAKE NOTE, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.



Bruce Tucker Smith
Administrative Law Judge
US Coast Guard

Date:

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Certified copy of Alabama Judicial Enforcement Case Action Summary, Case No. DC 2010 000391 (27 pages)
2. Certified copy of Order issued on February 17, 2011, by the District Court of Mobile County, Alabama (2 pages)
3. Certified copy of Alabama Judicial Enforcement Case Action Summary Continuation, Case No. DC 2010 000391(1 page)
4. Certified copies of Merchant Mariner's License and Merchant Mariner's Document issued by the Coast Guard to Respondent Earl Wayne Maxwell
5. Certified copy of Alabama Alcohol Beverage Control Board Enforcement-Drug Investigation Report dated January 12, 2010 (7 pages)
6. Alabama Criminal Code §13A-13-260. Drug paraphernalia; use or possession; delivery or sale; forfeiture.
7. United States Coast Guard v. Earl Wayne Maxwell, Docket No. 05-0034: Motion for Approval of Settlement Agreement and Entry of Consent Order (4 pages).

COAST GUARD WITNESSES

1. Kimberly A. Earl
2. Sergeant James H. Rigby
3. Deputy Aaron Swayze

RESPONDENT EXHIBITS

None

RESPONDENT WITNESSES

1. Steven F. Sciple, Esq.

ALJ EXHIBITS

- I. Alabama Rules of Criminal Procedure Rule 14.4

ALJ WITNESS LIST

None

ATTACHMENT B – NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.