

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

UNITED STATES COAST GUARD
Complainant

vs.

BRIAN GRANT PINKSTON

Respondent

Docket Number 2012-0502
Enforcement Activity No. 4484620

DECISION AND ORDER
Issued: September 17, 2013

By Hon. Parlen L. McKenna

Appearances:

Mr. James D. Fayard
Sector Lower Mississippi

For the Coast Guard

Robert Talbot, Esq.
Jessica Fajfar, Esq.
Shauna Madison
Emmett Luty
Carlos Martinez

For the Respondent

DECISION AND ORDER

The United States Coast Guard (Coast Guard) brought these proceedings against Respondent Brian Grant Pinkston's Merchant Mariners License pursuant to 46 U.S.C. § 7704(b) and Coast Guard regulations found at 46 C.F.R. Part 5. The case was conducted under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and the Coast Guard's procedural and evidentiary rules found at 33 C.F.R. Part 20.

The Complaint sought to revoke Respondent's Coast Guard-issued credential for Respondent's alleged conviction for a dangerous drug law. See 46 U.S.C. § 7704(b); 46 C.F.R. § 5.35. For the reasons given in this Decision and Order, the allegations against Respondent are found **PROVED** and Respondent's Coast Guard-issued credential is **SUSPENDED FOR A PERIOD OF ONE YEAR** with additional conditions as outlined below.

I. PROCEDURAL BACKGROUND

On November 15, 2012, the Coast Guard filed its Complaint against Respondent. The Complaint contained the following jurisdictional allegations: "Respondent holds the following Coast Guard-issued credential(s): MML: [number redacted]". The Complaint contained the following factual allegations:

- 1) On 01/24/2011, the Respondent was convicted of Unlawful purchasing/acquiring Pseudoephedrine.
- 2) Unlawful purchasing/acquiring Pseudoephedrine is a violation of 63 O.S. Section 2-212.
- 3) 63 O.S. Section 2-212 is a dangerous drug law of the state of Oklahoma.

The Coast Guard sought revocation as the appropriate sanction for Respondent's alleged violation.

On December 5, 2012, this case was assigned to me for review and disposition. On December 12, 2012, Respondent filed an Answer that denied the Complaint's jurisdictional and factual allegations. Respondent attached an additional statement to the form answer that

admitted he was convicted of Unlawful Pseudoephedrine Purchasing, but claimed he was not under the Coast Guard's jurisdiction and was not employed/acting under the authority of his Coast Guard-issued credentials.

On January 10, 2013, the Coast Guard filed a Motion for Summary Decision pursuant to 33 C.F.R. § 20.901. That Motion argued that there were no genuine issues of material fact to be developed by holding a hearing and attached a court record of Respondent's conviction by the District Court of Muskogee County, Oklahoma dated January 24, 2011.

On December 18, 2013, the University of San Francisco Employment Law Clinic filed a Notice of Appearance as Respondent's legal representative.¹ On January 22, 2013, Respondent filed a Response to the Motion for Summary Decision. The Response argued that genuine issues of material fact exist concerning: 1) whether Respondent's conviction under 63 O.S. § 2-212 represents a violation of a "dangerous drug law" under 46 U.S.C. § 7704(b) and 2) whether the Coast Guard's proposed sanction of revocation was appropriate given Coast Guard precedent under Appeal Decision 2678 (SAVOIE) (2008). The Response attached a signed affidavit from Respondent explaining the circumstances of his conviction.

On February 5, 2013, I issued an Order Denying the Coast Guard's Motion for Summary Decision. On May 16, 2013, the hearing was held in Tulsa, Oklahoma. Respondent appeared in person and was represented telephonically by three law students from the Employment Law Clinic – Ms. Shauna Madison, Mr. Emmett Luty, and Mr. Carlos Martinez – working under the supervision of Prof. Robert Talbot, Esq., the Clinic's Director. Mr. Jim Fayard, CWO Ralph Williams, and the Hon. Bill Davis (ret.) appeared and represented the Coast Guard. At the hearing, the Coast Guard offered five exhibits into evidence and presented the testimony of a

¹ The Court has arranged with the Clinic to refer unrepresented mariners to the Clinic in contested cases. The Clinic is supervised by licensed attorneys and law students act as representatives. The Court's involvement is to make mariners aware of the opportunity for such pro bono representation in an effort to ensure that their due process rights are protected.

single witness. Respondent offered six exhibits into evidence and presented the testimony of a single witness, along with Respondent's own testimony. The list of exhibits entered into evidence and witnesses who testified is contained in **Attachment A**.

On July 3, 2013, the Coast Guard submitted its Post-Hearing Brief that included Proposed Findings of Fact and Conclusions of Law. On July 5, 2013, Respondent submitted his Post-Hearing Brief, including Proposed Findings of Fact and Conclusions of Law. On July 22, 2013, Respondent filed a Reply. Rulings on the parties Proposed Findings of Fact and Conclusions of Law are provided in **Attachment B**. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, applicable statutes, regulations and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully examined and given thoughtful consideration.

II. FINDINGS OF FACT

- 1) On January 24, 2011, Respondent was convicted of Unlawful Purchasing/Acquiring of Pseudoephedrine, a violation of 63 O.S. Section 2-212. CG Exh. 3.
- 2) Respondent is a holder of the Coast Guard-issued MML [# redacted], which was issued on February 3, 2009 and is valid until February 3, 2014. CG Exh. 1.
- 3) Respondent is licensed as an apprentice mate (steersman) of towing vessels upon western rivers. CG Exh. 1.
- 4) On September 2, 2010, Respondent was arrested for a violation of 63 O.S. Section 2-212 at his home and told the arrest was for revocation of probation and unlawful acquiring pseudoephedrine. CG Exh. 2; Tr. at 91:20-92:10.
- 5) Respondent was then transported to the Muskogee police station after he was handcuffed. Tr. at 92:22-25.
- 6) At the Muskogee police station, Respondent was initially questioned by two police officers, who repeatedly asked him what he was doing with pseudoephedrine and for how much he was selling it. Tr. at 93:17-25.
- 7) Respondent claimed that at the time of his arrest and later during police questioning, he was nervous, scared and upset. Tr. at 92:11-13; 93:17-94:22.
- 8) Respondent also claimed he did not understand why he had been arrested. Tr. at 94:20-21.

- 9) Respondent repeatedly told the officers he bought the pseudoephedrine for his and his wife's allergies. Tr. at 94:1-8.
- 10) After the initial questioning, Respondent was eventually brought in for an interview with Lieutenant Andy Simmons. Tr. at 19:3-8; 95:1-6; CG Exh. 2.
- 11) Lieutenant Simmons has been employed by the Muskogee County Police Department for a little over 17 years and currently works for the special investigations unit. Tr. at 15:3-7; 20:21-24.
- 12) Lieutenant Simmons asked Respondent if he was cooking methamphetamine, which Respondent denied. Tr. at 19:8-9; CG Exh. 2.
- 13) There were about six different police officers in Lieutenant Simmons' office at the time. Tr. at 95:7-12.
- 14) At the time, Respondent was seated with his hands handcuffed behind his back. Tr. at 97:9-13.
- 15) Lieutenant Simmons continued to ask him the same questions as the other two police officers. Tr. at 95:19-24.
- 16) Respondent told Lieutenant Simmons that he bought the pseudoephedrine for his and his wife's allergies. Tr. at 96:1-10.
- 17) As the questioning went on, Mr. Pinkston claimed he began to feel very upset and intimidated. Tr. at 96:20-23.
- 18) Respondent asked Lieutenant Simmons whether Lieutenant Simmons would let him go back to his family if he provided Lieutenant Simmons some information. Tr. at 97:1-8.
- 19) Lieutenant Simmons said he would see and one of the officers standing by the door left the room. Tr. at 97:1-8; 22-25.
- 20) When asked what he was doing with the pseudoephedrine, Respondent told Lieutenant Simmons that he was buying it to give to others who were making methamphetamine. Tr. at 19:9-12; CG Exh. 2.
- 21) Specifically, Respondent told Lieutenant Simmons that he bought the pseudoephedrine for \$5 and sold it to these people making methamphetamine for \$25. Tr. at 19:15-16; CG Exh. 2.
- 22) Respondent claimed that he then began to make up a story about buying pseudoephedrine and on one occasion giving it to an individual named Brandy, whom he drove to where he believed there was a methamphetamine lab. Tr. at 94:14-21.
- 23) Respondent claimed he made up that story because he wanted to get back to his family and he thought if he told the officers what they wanted to hear, they would skip the booking process and let him go back to his family. Tr. at 98:7-11.

- 24) Respondent also claimed he did not believe that telling this story would get him in trouble. Tr. at 98:12-15.
- 25) After Respondent told Lieutenant Simmons about his purchase of pseudoephedrine, he was informed that there would be no bond. Tr. at 97:22-24.
- 26) Respondent then claimed he informed Lieutenant Simmons that he had only been telling Lieutenant Simmons what he thought he wanted to hear. Tr. at 98:16-21.
- 27) Upon hearing that Respondent made up the story, Respondent claimed that Lieutenant Simmons got angry and threw a pen across the desk and told the officers to get Respondent out of there. Tr. at 98:22-99:1.
- 28) Respondent was then taken down the hall to the jail where he was booked. Tr. at 99:1-3.
- 29) Officer Morrison, a patrol officer from the Muskogee Police Department was present during Lieutenant Simmons' interview of Respondent. Tr. at 23:3-5; CG Exh. 2.
- 30) Officer Morrison's report concerning this incident indicates that Respondent told Lieutenant Simmons that he was buying pseudoephedrine and had on one occasion given it to a person named Brandy whom he drove to a location where he suspected there was a methamphetamine lab. Tr. 21:13-17; CG Exh. 2.
- 31) Lieutenant Simmons did not recall that Respondent made any statements about selling or giving the pseudoephedrine to a woman named Brandy. Tr. at 22:4-15.
- 32) Lieutenant Simmons did not follow up investigating anyone named Brandy in connection with Respondent's arrest. Tr. at 25:19-21; 36:11-14.
- 33) Lieutenant Simmons did not get Brandy's last name or her address from Respondent during this interview. Tr. 26:2-7.
- 34) Lieutenant Simmons spoke in general terms about narcotics officers not always documenting names of possible informants for fear of retaliation against the person giving the information and stated that those possible informants are given the opportunity to come back and provide names later. Tr. 24:3-13.
- 35) Lieutenant Simmons explained as a narcotics officer, he would not necessarily follow up an informant's proffered name(s) at the time of arrest but would investigate the matter at a later time. Tr. at 29:20-31:20.
- 36) In particular, Lieutenant Simmons stated that it was common practice not to get into details about names given by informants or cooperating witnesses in front of the patrol officers for the arrestee's safety and that if "Brandy" had been targeted in further investigation, Respondent would have needed to come in and provide additional information. Tr. at 39:19-40:5.
- 37) During this particular roundup operation, Lieutenant Simmons estimated that the Muskogee police submitted about 80-90 cases of people purchasing pseudoephedrine for methamphetamine production over a six-month period. Tr. at 32:15-21.

- 38) Subsequently, the District Attorney (DA) offered Respondent a plea deal. Tr. at 100:2-10.
- 39) This plea deal provided that if Respondent pled guilty to a misdemeanor charge of acquiring pseudoephedrine, the DA would drop the revocation of probation proceeding. Id.
- 40) Respondent claimed he accepted the plea deal because the only punishment was two years of probation and the requirement to complete an outpatient treatment program, which Respondent successfully completed. Tr. at 100:12-14.
- 41) Respondent successfully completed his probation in January of 2013. Tr. at 101:9-102:3.
- 42) Respondent subsequently had the misdemeanor charge of unlawfully acquiring pseudoephedrine expunged from his record. Tr. at 102:10-13.
- 43) Respondent currently resides in Muskogee, Oklahoma with his wife, Whitney Pinkston, and his two children. Tr. at 67:19-24.
- 44) Respondent has been employed by JanTran since October 2011. Tr. at 68:7-69:1.
- 45) Prior to the Coast Guard's filing the Complaint, Respondent served in the wheelhouse for JanTran as a steersman but now currently serves as an engineer. Tr. at 69:2-10; 71:8-20; 71:25-72:7.
- 46) Respondent was previously convicted in 2004 for possession of methamphetamine, the result of which was his placement on supervised probation for 3-4 years and is currently on unsupervised probation until 2015. Tr. at 85:6-8.
- 47) After this 2004 conviction, Respondent entered an in-patient rehabilitation program and continued an outpatient program for an additional six months. Tr. at 85:10-19.
- 48) Respondent claimed to be free from methamphetamine use for over eight years. Tr. at 86:20-87:2
- 49) Respondent's wife testified that there is a clear difference in Respondent's personality and behavior between when he used methamphetamine and now. Tr. at 54:2-55:3.
- 50) Respondent has regularly taken drug tests during his maritime career with all tests negative. Tr. at 74:8-74:25.²
- 51) On July 22, 2010, Respondent reported for a mandated, random drug test, but the collector refused his sample after noting a chemical smell. CG Exh. 4.
- 52) Respondent was thus required to provide a second, observed sample, and Respondent was unable to provide such a sample. Id.

² However, Respondent was subject to Suspension and Revocation proceedings for a refusal to test in connection with a mandated, random drug test.

- 53) Respondent's initial sample from the July 22, 2010 drug test was sent to the laboratory for analysis and resulted in a negative drug test with no evidence of diluting agents. Id.
- 54) Respondent's most recent drug test from February 6, 2013 was negative. Resp. Exh. A.³
- 55) Respondent has suffered from allergies his whole life. Tr. at 80:21-25.
- 56) Respondent's wife also suffers from allergies. Tr. at 55:8-17.
- 57) Both Respondent and his wife have taken Sudafed products regularly to treat their allergy symptoms. Tr. at 55:18-25; 81:3-19.
- 58) On April 25, 2013, Respondent saw Dr. Maximo Fernan, M.D., at the Pulmonary Clinic in Muskogee, Oklahoma for allergy testing. Resp. Exh. F; Tr. at 88:19-89:7.
- 59) Dr. Fernan's allergy testing revealed that Respondent was allergic to thirty-four out of thirty-eight allergens; five of which, Respondent was severely allergic. Resp. Exh. F; Tr. at 89:10-22.
- 60) Respondent usually purchased Sudafed products from Walgreens or Wal-Mart about three to four times a month to treat his and his wife's allergies. Tr. at 81:24-82:7.
- 61) Respondent was aware that there was a system in place for tracking how much Sudafed he could purchase each month because Sudafed was sold behind the pharmacy counter and he would have to present his ID upon purchase. Tr. at 82:8-15.
- 62) On several occasions, Respondent was told that he could not purchase Sudafed when that purchase would exceed his monthly limit (which Oklahoma state law provides a limit of 9.0 grams of pseudoephedrine during a 30-day period). Tr. at 83:12-21; CG Exh. 2.
- 63) Because of these experiences, Respondent stated the he relied on this system to ensure that he would not exceed his monthly purchasing limit. Tr. at 83:18-21; 93:21-23; 94:21-23.
- 64) Respondent claimed that he did not purchase the Sudafed in question to give or supply to any person other than his wife or himself. Tr. at 84:7-10.

³ This drug test does not appear to be a DOT-approved test.

III. PRINCIPLES OF LAW AND ANALYSIS

A. Jurisdiction

The Coast Guard brought charges against Respondent under the authority of 46 U.S.C. § 7704(b), which provides:

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.

The regulations further provide that “[w]here the proceeding is based exclusively on the provisions of title 46, U.S.C. 7704, the complaint will allege *conviction for a dangerous drug law violation* . . . and will allege jurisdiction by stating the elements as required by title 46, U.S.C. 7704, and the approximate time and place of the offense.” 46 C.F.R. § 5.35.

As stated in the Order Denying the Coast Guard's Motion for Summary Decision (Summary Decision Order), Section 7704(b) provides jurisdiction by the mere fact that Respondent holds a Coast Guard-issued credential at the time of his conviction. Respondent need not be acting under the authority of such a credential for the Coast Guard to obtain jurisdiction. The Coast Guard thus had jurisdiction to bring an action to suspend or revoke Respondent's credential if Respondent had been convicted of violating a dangerous drug law of the United States or of a State within 10 years of bringing the suspension or revocation action.

B. 63 O.S. § 2-212 is a dangerous drug law under the State of Oklahoma

Coast Guard regulations provide that the judge shall enter an order of revocation if the respondent has been convicted for a violation of the dangerous drug laws, whether or not further court action is pending, and such charge is found proved. 46 C.F.R. § 5.59(b). The applicable statutory definition of a “dangerous drug” defines the term as “a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802)).” 46 U.S.C. 2101(8)(a).

The Coast Guard asserts that 63 O.S. § 2-212 is a dangerous drug law under the State of Oklahoma. That section provides, in part, that “[a]ny compound, mixture, or preparation containing any detectable quantity of base pseudoephedrine or ephedrine, its salts or optical isomers, or salts of optical isomers is classified as a Schedule V controlled substance.” 63 O.S. § 2-212. The statute further provides that:

No person shall purchase, receive, or otherwise acquire more than three and six-tenths (3.6) grams of any product, mixture, or preparation per day or more than seven and two-tenths (7.2) grams of any product, mixture, or preparation within any thirty-day period, or sixty (60) grams of any product, mixture, or preparation within a twelve-month period. Once a person has purchased, received or otherwise acquired the daily limit of three and six-tenths (3.6) grams of any product, mixture or preparation, the person shall be prohibited from purchasing, receiving or otherwise acquiring any additional product, mixture or preparation containing any detectable quantity of base pseudoephedrine or ephedrine for a period of not less than seventy-two (72) hours following the last permitted purchase. The requirements of this paragraph shall not apply to any quantity of such product, mixture or preparation dispensed pursuant to a valid prescription.

Id.

Respondent’s representatives argued that their client’s conviction of 63 O.S. § 2-212 does not constitute a violation of a dangerous drug law under 46 U.S.C. § 7704(b). See Respondent’s Opening Brief (April 30, 2013); Respondent’s Post Hearing Brief. Specifically, they argued that such a pseudoephedrine conviction is not a “dangerous drug law” under federal law as reflected in the Controlled Substances Act or the Combat Methamphetamine Act of 2005 as pseudoephedrine is not listed as a “controlled substance”. Opening Brief at 6-7. Furthermore, they argued that there is no independent evidence to support a finding that Respondent engaged in a violation of a dangerous drug law. Id. at 7-8 (citing 33 C.F.R. § 20.1307). Respondent’s representatives stated that Respondent’s conviction “does not conclusively indicate a violation” of a dangerous drug law because Respondent neither “cooked” nor aided in the manufacture of methamphetamine. Id. at 8. They claimed that the Coast Guard relied only upon the police report (CG Exh. 2) to support the contention that Respondent violated a dangerous drug law and

argued that it is the judgment – not an allegedly unreliable police report – that can indicate a clear violation of a dangerous drug law. Id. In sum, Respondent’s representatives argued that he was merely convicted of an “innocent and accidental” over-purchase of pseudoephedrine not connected with illegal production of methamphetamine. Id.

These arguments must be rejected for several reasons. First, I find that 63 O.S. § 2-212 is a dangerous drug law under the State of Oklahoma. The Oklahoma statute clearly makes pseudoephedrine a Schedule V controlled substance under state law and provides a penalty for its violation. As such, 63 O.S. § 2-212 is a “dangerous drug law” meant to regulate a scheduled controlled substance under Oklahoma’s statutes.

Coast Guard precedent supports this conclusion. See Appeal Decision 2675 (KOVALESKI) (2008). In KOVALESKI, a conviction for possession of drug paraphernalia was found encompassed by the term “dangerous drug law” due in no small part to the placement of the law within Florida’s Statutes Annotated chapter 893 entitled “Drug Abuse Prevention and Control”. That law was clearly designed to regulate and control the use of dangerous drugs. Id. (citing Appeal Decision 1839 (PACKARD) (discussing the issue under the prior version of the statute)).

Here, the Oklahoma statute explicitly makes pseudoephedrine a controlled substance under state law. See 63 O.S. § 2-101(8). The Summary Decision Order noted the reasons for Oklahoma’s inclusion of pseudoephedrine as a controlled substance was clearly geared toward controlling the production of methamphetamine. See, e.g., Bradly A. Rigdon, “Pharmacists on the Front Lines in the Fight against Meth: A 50-State Comparison of the Laws Regulating the Retail Sale of Pseudoephedrine”, 33 J. LEGAL MED. 253 (2012); E. Reed, “The Prescription for Eradicating Meth Labs: A Call for States to Enact Stricter Chemical Control over Precursors”, 37 CAP. U. L. REV. 787 (2009). Pseudoephedrine is an immediate precursor for the manufacture of methamphetamine. See U.S. v. Jessup, 305 F.3d 300, 304 (5th Cir. 2002). Laws like 63 O.S. §

2-212 are obviously geared toward the control of a “dangerous drug” (i.e., methamphetamine) and must be considered on their face as “dangerous drug laws” for purposes of 46 U.S.C. § 7704(b).

Second, Respondent’s arguments that some nexus is required between Respondent’s conviction and actual methamphetamine production must be rejected. It is irrelevant for the purposes of whether Respondent violated 46 U.S.C. § 7704(b) that Respondent might not have been involved in the actual production or distribution of methamphetamine. The core issue is whether the law in question itself is a dangerous drug law. For the reasons given above, I have found in the affirmative. The Coast Guard is not required to prove that Respondent is a user of dangerous drugs or involved in unlawful drug production or distribution to prevail. Nothing in the plain language of the statute or Coast Guard precedent indicates that any such nexus is required. Indeed, Respondent’s arguments concerning his alleged “accidental and innocent” purchase of pseudoephedrine are better directed toward the issue of the proper sanction than arguments about whether Respondent violated 46 U.S.C. § 7704(b).

Finally, Respondent’s argument concerning the scope of 33 C.F.R. § 1307 misses the mark.⁴ Under Section 1307(c)(1), a judgment of conviction by a Federal or State court for a violation is conclusive in the proceeding if the alleged conviction is for a violation of a dangerous-drug law. Because I find 63 O.S. § 2-212 is a dangerous drug law on its face for 46 U.S.C. § 7704(b) purposes, Respondent’s conviction provides a basis for the Coast Guard to initiate proceedings against Respondent’s credentials. The disputed police report concerning what Respondent claimed he was doing with the pseudoephedrine and his later recanting of those

⁴ The Court also notes that Respondent’s subsequent Expungement of his conviction is irrelevant for purposes of the fact of violation. See Resp. Exh. E. Under 33 C.F.R. § 1307(d), the Coast Guard “does not consider the conviction expunged without proof that the expungement is due to the conviction’s having been in error.” Respondent has made no such claim here. See Appeal Decision 2699 (MAXWELL) (2012).

statements does not alter the fundamental nature of 63 O.S. § 2-212 as a dangerous drug law under Oklahoma state law.

The undisputed facts thus establish that Respondent violated a dangerous drug law under the State of Oklahoma's statutes on January 24, 2011. Respondent thus committed a violation of 46 U.S.C. § 7704(b) and his Coast Guard-issued credential is thereby subject to revocation or suspension.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Under 46 U.S.C. § 7704(b), if a holder of a Coast Guard-issued credential has been convicted of violating a dangerous drug law of the United States or of a State within 10 years before the beginning of the proceedings that credential shall be suspended or revoked.

2. Respondent is a holder of the Coast Guard-issued MML [# redacted], which was issued on February 3, 2009 and is valid until February 3, 2014. CG Exh. 1.

3. On January 24, 2011, Respondent was convicted of Unlawful Purchasing/Acquiring of Pseudoephedrine, a violation of 63 O.S. Section 2-212 in the State of Oklahoma, which is a dangerous drug law under 46 U.S.C. § 7704(b). CG Exh. 3.

4. Respondent thereby violated 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35.

V. SANCTION ISSUES

In Coast Guard suspension and revocation cases, “[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the [administrative law judge]”. Appeal Decision 2693 (LANGLEY) (2011) (internal quotations omitted). See also 46 C.F.R. § 5.569(a) and 33 C.F.R. § 20.902(a)(2). Coast Guard judges have wide discretion to formulate an order adequate to deter a mariner's repetition of the violations found proven. See Appeal Decision 2475 (BOURDO) (1988).

Here, the Coast Guard seeks to revoke Respondent's Coast Guard-issued document. Respondent argues in contrast that under the precedent of Appeal Decision 2678 (SAVOIE) (2008), the judge is authorized under appropriate circumstances to elect a sanction less than

revocation for a violation of Section 7704(b) despite the mandatory revocation language of 46 C.F.R. § 5.59(b).

Respondent is correct because the Commandant explicitly 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.” Appeal Decision 2678 (SAVOIE) (2008); 46 U.S.C. § 7704(b). SAVOIE specifically found that 46 C.F.R. § 5.59(b) was inconsistent with the statute. A judge is thus empowered under SAVOIE and the statute to consider a sanction of less than revocation for a proven drug law violation.⁵

Of particular importance here is Respondent’s claim that he made up the story given to Lieutenant Simmons about his purchasing the pseudoephedrine for others to make methamphetamine. If Respondent really did make an innocent, accidental over-purchase of pseudoephedrine, the sanction for Respondent’s violation clearly should be mitigated by a large degree. However, if Respondent was involved, even peripherally, in the unlawful manufacture of methamphetamine, the sanction should be much more substantial.

During the hearing, Respondent repudiated his statements to Lieutenant Simmons. Notably, Respondent did not deny he made such statements, but rather claimed he made up that story in an effort to go home by providing the police information. Respondent was either not telling the truth to Lieutenant Simmons or failed to tell the truth to the Court. Respondent’s credibility is thus seriously compromised by some engagement in falsehoods.

In an effort to explain his supposedly made up story, Respondent claimed that he was confused, scared, and nervous following his arrest and that he hoped to trade this supposedly false information for some kind of deal not to have his probation revoked or not be held over in

⁵ The legislative history on the 2004 change to Section 7704(b) provides some insight into which such discretion might be based. See H.R. Conf. Rep. 108-617, 2004 WL 1640167, 2004 U.S.C.C.A.N. 936, 948 (July 20, 2004) (noting that the Coast Guard requested this change primarily to provide flexibility in the use of settlement agreements and the timely resolution of cases involving “minor cases”).

jail. One can certainly appreciate that being arrested and interrogated by the police is a stressful and frightening event, but the wisdom of attempting to provide what Respondent would have the Court believe was false information to the police is hard to understand.

Surely, if Respondent was actually making up the “Brandy story”, the police would have found this out very quickly had they investigated it. The police almost certainly would have asked for particular details and followed up on such details if they gave Respondent anything in exchange for such information. Any concessions given Respondent for providing such information therefore likely would have been revoked upon discovering that Respondent fabricated this story. This was not Respondent’s first encounter with the police as he had a prior methamphetamine related conviction. Respondent must have understood that: 1) the police would have investigated his information had he been given some leeway in exchange for providing it and 2) negative consequences surely would have followed had the police later discovered that such information was false.

Respondent attempted to demonstrate that the police themselves did not believe Respondent’s story. Respondent pointed out that Lieutenant Simmons failed to recall Respondent’s story about a woman named “Brandy” as the person to whom he provided the pseudoephedrine and did not follow up on this lead. Officer Morrison’s report explicitly mentions that Respondent told Lieutenant Simmons the “Brandy story” in his presence. See CG Exh. 2. Nevertheless, Lieutenant Simmons explained at the hearing both why he might not have noted the name Respondent provided and why the police might not have further investigated Brandy without more information. I find these explanations plausible and will not question ex post facto the reasons the police did not investigate the Brandy lead or speculate that such inaction was because they did not believe Respondent.

Indeed, in Respondent’s own version of events, he claimed that he told Lieutenant Simmons about Brandy and his purchasing activities in hopes of getting some kind of concession

and only provided the information after Lieutenant Simmons said they would look into his probation issues. Only after a police officer returned and told Lieutenant Simmons that no such concessions would be given, did Respondent then say that everything he told them was false. The question arises whether Respondent decided to cease providing such information once he was told no concessions would be given and so saw no benefit from further informing on his associates or he realized his falsehoods would get him nowhere.

My primary concern is that Respondent has a prior methamphetamine conviction and seemingly has maintained connections and/or contacts with whom he could engage in the unlawful provision of pseudoephedrine for them to use in the production of methamphetamine. See, e.g., CG Exh. 2 (Officer Morrison's report indicating that before he took Respondent into Lieutenant Simmons' office, Respondent admitted that "he still had contact with his friends from his past and he sometimes bought the pseudoephedrine and gave the pills to them . . . [and] assumed they were using the pills to manufacture methamphetamine."). Officer Morrison's indicates that Respondent admitted to Officer Morrison that he had made such purchases within the last thirty days of his arrest. Id.

These details in Officer Morrison's report call into question Respondent's claim that he only began making up the story about providing the pills to methamphetamine cookers in Lieutenant Simmons' office. Id.; see also Tr. at 93:10-94:8 (Respondent claiming that the two police officers repeatedly questioned him about his pseudoephedrine purchases but he said that he bought them for his wife's and his own personal use). Respondent did not say at the hearing that he began telling the police about his connections and purchases prior to being interviewed by Lieutenant Simmons. Yet, Officer Morrison's written report clearly indicates that such statements were provided both in front of him prior to going into Lieutenant Simmons' office and during Lieutenant Simmons' interview. See CG Exh. 2.

Respondent offered some evidence that he and his wife suffer from allergies and that they used pseudoephedrine products regularly to control their symptoms. However, such legitimate use of pseudoephedrine products does not necessarily mean that all these purchases were used for such purposes. Indeed, there is no allegation that all of Respondent's purchases were to supply his contacts with material to make methamphetamine. According to Officer Morrison's report, Respondent admitted that he "sometimes" made such purchases for this purpose. See CG Exh. 2.

I thus have serious questions about what Respondent was doing with the pseudoephedrine he purchased in violation of 63 O.S. § 2-212. Given 1) Respondent's drug use history; 2) inconsistencies between Respondent's testimony and Officer Morrison's written report; and 3) the statements made to Lieutenant Simmons, I find it more likely than not that Respondent's admissions to both Officer Morrison and Lieutenant Simmons were accurate and not stories he simply made up to receive some concessions.

However, there is no proof or allegation that Respondent is currently addicted to or a user of a dangerous drug. There is also no allegation that Respondent is currently selling pseudoephedrine to others for the manufacture of methamphetamine. Nevertheless, I have grave concerns that his continued association with those involved in the production and/or use of such drugs could very well result in a relapse and endanger the public if he continues to hold and act under his Coast Guard-issued credentials. I also am concerned that Respondent was not completely forthright with the Court concerning his purchases of pseudoephedrine.

While these proceedings are remedial, not penal in nature, they "are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. Indeed, "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) (2003). However, the welfare of individual seamen must also be considered. See Appeal Decision 2570 (HARRIS) (1995).

As mentioned above, Respondent has presented evidence that he is currently not a drug user or addicted to the use of dangerous drugs and has gone through rehabilitation for his prior drug use. The risk of Respondent thus engaging in unlawful drug use and/or engaging in the direct sale of unlawful drugs is somewhat minimized despite the violation found proved here. Outright revocation would be a disproportionately severe sanction for Respondent's violation. However, the public interest must be protected by taking steps to ensure that Respondent is really drug free and does not engage in any further unlawful drug related activities before working under his Coast Guard-issued credentials again.

Taking into account all the facts and circumstances, I therefore find that a sanction less than revocation is appropriate for Respondent's violation of 46 U.S.C. § 7704(b) and that a **SUSPENSION** of 1 year is sufficient. However, such a sanction is appropriate only under strict conditions that demonstrate that Respondent is currently drug-free and minimizes the chance that Respondent will use or sell drugs in the future or associate with known drug dealers or users. To ensure that Respondent remains free from dangerous drugs additional conditions are imposed as outlined in the **ORDER** below for a 1 year **PROBATION** period following Respondent's **SUSPENSION**.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED THAT the allegations in the Complaint are found **PROVED** and Respondent thereby violated 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35 by his January 24, 2011 conviction under 63 O.S. 2-212.

IT IS HEREBY FURTHER ORDERED THAT all of Respondent Brian Grant Pinkston's Coast Guard-issued credentials are **SUSPENDED OUTRIGHT FOR ONE YEAR**.

IT IS HEREBY FURTHER ORDERED THAT following the **ONE YEAR SUSPENSION**, Respondent is placed on **PROBATION** for an additional period of **ONE YEAR**. If, during the

SUSPENSION or **PROBATION PERIOD**, Respondent commits any drug related offense under federal or state law or fails any mandated drug test, Respondent's Coast Guard-issued credentials shall be subject to immediate **REVOCATION** upon proof that Respondent committed such offense and/or failed such a drug test following the granting of a motion requesting the same by the Coast Guard. Respondent shall be provided an opportunity to respond to any such motion filed by the Coast Guard.

IT IS HEREBY FURTHER ORDERED THAT as a condition of **SUSPENSION**, Respondent must consult with a licensed Substance Abuse Professional (SAP), follow the SAP's recommendations for any drug treatment regimen, and arrange for **SIX (6)** DOT-approved, random chemical drug tests (conducted in accordance with 49 C.F.R. Part 40) to be given over the course of the one year suspension period at the direction of the SAP. Respondent must bear the cost of all such consultation with the SAP and the drug tests. The Coast Guard Investigating Officer shall be provided copies of each of the random DOT-approved drug test results by the Medical Review Officer (MRO) as they are given.

IT IS HEREBY FURTHER ORDERED THAT Respondent must obtain a return to work letter from a designated MRO at the end of the one year suspension period that states Respondent is a low risk for the use of dangerous drugs and is fit to resume safety-sensitive duties under his credentials. Should Respondent fail to obtain such a letter and/or fail any of the six random drug tests, Respondent's Coast Guard-issued credential shall be subject to immediate **REVOCATION** following the granting of a motion requesting the same by the Coast Guard. Respondent shall be provided an opportunity to respond to any such motion filed by the Coast Guard.

IT IS HEREBY FURTHER ORDERED THAT Respondent immediately surrender any and all of his Coast Guard-issued credentials to the Coast Guard's Investigating Officer.

PLEASE TAKE NOTICE that service of this Decision and Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001 – 20.1004, a copy of which can be found in **Attachment C**.

SO ORDERED.

/s/ Parlen L. McKenna

Hon. Parlen L McKenna

US Coast Guard Administrative Law Judge

Date:

Attachment A – List of Witnesses and Exhibits

Coast Guard Witnesses

1. Lieutenant Andy Simmons

Respondent Witnesses

1. Whitney Pinkston

Coast Guard Exhibits

1. Marine Safety Network – Screenshot showing Respondent’s Record
2. Muskogee Police Department Offense Report
3. District Court of Muskogee County, Oklahoma Judgment
4. Decision and Order by the Hon. Michael J. Devine (March 8, 2011)
5. Order by the Hon. Michael J. Devine (April 15, 2011)

Respondent Exhibits

- A. Drug test results
- B. Letters from Substance Abuse Services
- C. Letters from supervisors and colleagues
- D. Certificates of Completion – Radar Observer & Residential Program
- E. Record of Expungement (March 13, 2013)
- F. Medical records from visit to Muskogee Pulmonary Clinic on April 24, 2013

Attachment B – Rulings on Proposed Findings of Fact and Conclusions of Law

Coast Guard Proposed Findings of Fact

1. On January 24, 2011 Brian Grant Pinkston was convicted of Unlawful Purchasing/Acquiring of Pseudoephedrine. IO Exhibit 003.

Ruling: ACCEPTED AND INCORPORATED.

2. Unlawful Purchasing/Acquiring of Pseudoephedrine is a violation of 63 O.S. Section 2-212.

Ruling: ACCEPTED AND INCORPORATED.

3. 63 O.S. Section 2-212 is a Dangerous Drug Law of the State of Oklahoma.

Ruling: ACCEPTED AND INCORPORATED.

4. Brian Grant Pinkston is the holder of MML [redacted]. IO Exhibit 001.

Ruling: ACCEPTED AND INCORPORATED.

Coast Guard Proposed Conclusions of Law

1. The subject matter of this Administrative Hearing and the Respondent are properly within the Jurisdiction vested in the United States Coast Guard by 46 USC 7704.

Ruling: ACCEPTED AND INCORPORATED.

2. The Jurisdictional and Factual Allegations of Conviction of a Dangerous Drug Law Violation against Respondent are found PROVED.

Ruling: ACCEPTED AND INCORPORATED.

Respondent's Proposed Findings of Fact

1. . Brian Pinkston (hereinafter "Mr. Pinkston") holds Merchant Mariner License [redacted], which was issued on February 3, 2009 and is valid until February 3, 2014. (IO-001)

Ruling: ACCEPTED AND INCORPORATED.

2. Mr. Pinkston is licensed as an apprentice mate (steersman) of towing vessels upon western rivers. (IO-001)

Ruling: ACCEPTED AND INCORPORATED.

3. Mr. Pinkston currently lives at [redacted], Muskogee, Oklahoma with his wife, Whitney Pinkston, and his two children, Kennedy Pinkston and Brynlee Pinkston. (Transcript 67)

Ruling: ACCEPTED AND INCORPORATED.

4. Mr. Pinkston has been employed by JanTran since October 24, 2011. (Transcript 68-69)

Ruling: ACCEPTED AND INCORPORATED.

5. Prior to the Coast Guard bringing charges, Mr. Pinkston was in the wheelhouse acting as a steersman at JanTran; currently Mr. Pinkston acts as an engineer. (Transcript 71-72)

Ruling: ACCEPTED AND INCORPORATED.

6. Mr. Pinkston has a prior 2004 conviction for possession of methamphetamine, and as a result Mr. Pinkston was put on reporting probation for three to four years and is currently on unsupervised probation until 2015. (Transcript 85)

Ruling: ACCEPTED AND INCORPORATED.

7. After the 2004 conviction, Mr. Pinkston entered an inpatient rehabilitation center and then continued an outpatient program for six months. (Transcript 86)

Ruling: ACCEPTED AND INCORPORATED.

8. Mr. Pinkston has been clean from methamphetamine for over eight years. (Transcript 86)

Ruling: ACCEPTED AND INCORPORATED as to Respondent's claim.

9. Mr. Pinkston has regularly taken drug tests during his maritime career, and all results have been negative. (Transcript 74)

Ruling: ACCEPTED AND INCORPORATED IN PART; REJECTED IN PART. The Court notes that Respondent failed to produce an adequate sample for an observed collection and even though the first sample was later tested and found to be negative with no evidence of diluting agents, the fact remains that under 49 C.F.R. Part 40, Respondent failed that drug test as described in Hon. Michael Devine's Order on that subject.

10. One drug test instance occurred on July 22, 2010, when Mr. Pinkston reported for drug testing. The collector noted a chemical smell, which required Mr. Pinkston to provide a second observed specimen. Mr. Pinkston was unable to provide a second specimen because of a shy bladder. (IO-004)

Ruling: ACCEPTED AND INCORPORATED.

11. Although Mr. Pinkston's original specimen collected on July 22, 2010 should have been discarded, it was forwarded for testing and resulted in a negative test with no indication of it being a diluted specimen. (IO-004)

Ruling: ACCEPTED AND INCORPORATED.

12. Mr. Pinkston's most recent drug test was taken on February 6, 2013, and the result was negative. (Pinkston-A)

Ruling: ACCEPTED AND INCORPORATED. But the Court notes that this test does not appear to be a DOT-approved test conducted according to 49 C.F.R. Part 40.

13. Mr. Pinkston has suffered from allergies his whole life. (Transcript 81)

Ruling: ACCEPTED AND INCORPORATED.

14. Mr. Pinkston's wife also suffers from allergies (Tr. At 55)

Ruling: ACCEPTED AND INCORPORATED.

15. Both Mr. Pinkston and his wife have taken Sudafed products regularly to relieve allergy symptoms. (Transcript 81)

Ruling: ACCEPTED AND INCORPORATED.

16. Mr. Pinkston saw Dr. Maximo Fernan, M.D., on April 25, 2013 at the Pulmonary Clinic in Muskogee, Oklahoma for allergy testing. (Pinkston F; Transcript 88-89)

Ruling: ACCEPTED AND INCORPORATED.

17. Dr. Fernan's allergy testing revealed that Mr. Pinkston was allergic to thirty-four out of thirty-eight allergens; five to which Mr. Pinkston was severely allergic. (Pinkston F; Transcript 88-89)

Ruling: ACCEPTED AND INCORPORATED.

18. Mr. Pinkston purchased Sudafed products from Walgreens about three to four times a month to treat his and Mrs. Pinkston's allergies. (Transcript 82)

Ruling: ACCEPTED AND INCORPORATED.

19. Pursuant to Oklahoma statute CM-2010-582, it is unlawful for any individual to buy more than 9 grams in a thirty day period. (IO-002)

Ruling: ACCEPTED AND INCORPORATED.

20. Mr. Pinkston was aware that there was a system in place for tracking how much Sudafed he could purchase per month because the Sudafed was behind the pharmacy counter and he would have to present his ID upon purchase. (Transcript 82-83)

Ruling: ACCEPTED AND INCORPORATED.

21. On several occasions, Mr. Pinkston was told that he could not purchase Sudafed when that purchase would exceed his monthly limit. (Transcript 82-83)

Ruling: ACCEPTED AND INCORPORATED.

22. Because of these experiences, Mr. Pinkston relied on this system to ensure that he would not go over his monthly limit for the purchase of Sudafed. (Transcript at 83; 94-95)

Ruling: ACCEPTED AND INCORPORATED IN PART; REJECTED to the extent this proposed finding of fact states or implies that Respondent's conviction should be excused or the circumstances surrounding his over-purchase of pseudoephedrine was accidental or unintentional.

23. Mr. Pinkston did not purchase the Sudafed in question to give or supply to any person other than his wife or himself. (Transcript 84)

Ruling: REJECTED for the reasons given in this Decision and Order.

24. On September 2, 2010, Mr. Pinkston was arrested at his home and told the arrest was for revocation of probation and acquiring pseudoephedrine. (IO-002; Transcript 92)

Ruling: ACCEPTED AND INCORPORATED.

25. Mr. Pinkston at the time was scared, nervous and really confused. (Transcript 92)

Ruling: ACCEPTED AND INCORPORATED as to Respondent's claiming this was the case.

26. Mr. Pinkston was transported to the Muskogee police station immediately after he was handcuffed. (Transcript 92)

Ruling: ACCEPTED AND INCORPORATED.

27. After he was transported to the Muskogee police station and repeatedly questioned about the Sudafed, Mr. Pinkston was nervous, scared and upset. (Transcript at 94)

Ruling: ACCEPTED AND INCORPORATED.

28. Mr. Pinkston didn't understand why he had been arrested. (Transcript at 94)

Ruling: ACCEPTED AND INCORPORATED.

29. Mr. Pinkston believes that the warning system for acquiring pseudoephedrine products which he had counted on had failed him. (Transcript 92; 94)

Ruling: ACCEPTED AND INCORPORATED as to Respondent claiming this to be the case. REJECTED to the extent this proposed finding of fact states or implies that Respondent's conviction should be excused or the circumstances surrounding his over-purchase of pseudoephedrine was accidental or unintentional.

30. At the Muskogee police station, Mr. Pinkston was initially questioned by two police officers, who repeatedly asked him what he was doing with pseudoephedrine and for how much he was selling it. (Transcript 93)

Ruling: ACCEPTED AND INCORPORATED.

31. Mr. Pinkston repeatedly told the officers he bought the pseudoephedrine for his and his wife's allergies. (Transcript 94)

Ruling: ACCEPTED AND INCORPORATED.

32. Mr. Pinkston was then taken to Lieutenant Simmons' office. (Transcript 95)

Ruling: ACCEPTED AND INCORPORATED.

33. There were about six different police officers in Lieutenant Simmons' office at the time. (Transcript 95)

Ruling: ACCEPTED AND INCORPORATED.

34. At the time, Mr. Pinkston was seated ... with his hands handcuffed behind his back. (Transcript at 97)

Ruling: ACCEPTED AND INCORPORATED.

35. Lieutenant Simmons continued to ask him the same questions as the other two police officers had previously asked him. (Transcript 95)

Ruling: ACCEPTED AND INCORPORATED.

36. Mr. Pinkston also repeatedly told Lieutenant Simmons that he bought the pseudoephedrine for his and his wife's allergies. (Transcript 96)

Ruling: ACCEPTED AND INCORPORATED.

37. But Lieutenant Simmons made it obvious to Mr. Pinkston that he did not want to hear Mr. Pinkston's truthful answer. (Transcript 96)

Ruling: REJECTED for the reasons given in this Decision and Order.

38. As the questioning went on, Mr. Pinkston began to feel very upset and intimidated. (Transcript 96)

Ruling: REJECTED to the extent this proposed finding of fact seeks to repudiate later statements made by Respondent concerning his sale of pseudoephedrine as stated to Lt. Simmons and Officer Morrison earlier.

39. Mr. Pinkston finally asked Lieutenant Simmons whether Lieutenant Simmons would let Mr. Pinkston go back to his family if Mr. Pinkston gave Lieutenant Simmons the information he wanted to hear. (Transcript 97)

Ruling: ACCEPTED IN PART AND INCORPORATED; REJECTED to the extent this proposed finding of fact seeks to repudiate later statements made by Respondent

concerning his sale of pseudoephedrine as stated to Lt. Simmons and Officer Morrison earlier.

40. Lieutenant Simmons said he would see. At that time one of the officers standing by the door left the room (Transcript 96-97)

Ruling: ACCEPTED AND INCORPORATED.

41. Mr. Pinkston began to make up a story about buying pseudoephedrine and giving it to a girl named Brandy, who drove the pseudoephedrine to somewhere where there was a meth lab. (Transcript 97)

Ruling: REJECTED for the reasons given in this Decision and Order.

42. Mr. Pinkston made up that story because he wanted to get back to his family and he thought if he told the officers what they wanted to hear, they would skip the booking process and let him go back to his family. (Transcript 98; 115)

Ruling: REJECTED for the reasons given in this Decision and Order.

43. Mr. Pinkston, upset and scared, did not believe that telling this obviously false story would get him in trouble (Tr. at 98)

Ruling: REJECTED for the reasons given in this Decision and Order.

44. After Mr. Pinkston made up the story, he was informed him that there would be no bond. (Transcript 97-98)

Ruling: ACCEPTED AND INCORPORATED as to the fact that the Muskogee Police let Respondent know that there would be no relief for providing the information. REJECTED as to Respondent's claim of making up the story concerning his sale of pseudoephedrine.

45. After hearing that, Mr. Pinkston then informed Lieutenant Simmons that he had only been telling Lieutenant Simmons what he thought Lieutenant Simmons wanted to hear. (Transcript 98)

Ruling: ACCEPTED AND INCORPORATED IN PART; REJECTED to the extent this proposed finding of fact states or implies that Respondent actually did fabricate the story about his sale of pseudoephedrine.

46. Upon hearing that Mr. Pinkston made up the story, Lieutenant Simmons got angry and threw a pen across the desk and told his guys to get out of there. (Transcript 98-99)

Ruling: ACCEPTED AND INCORPORATED.

47. Mr. Pinkston was then taken down the hall to the jail where he was booked. (Transcript 99)

Ruling: ACCEPTED AND INCORPORATED.

48. Subsequently, the DA offered Mr. Pinkston a plea deal concerning Mr. Pinkston's purchase of pseudoephedrine.

Ruling: ACCEPTED AND INCORPORATED.

49. This plea deal was that if Mr. Pinkston pled guilty to a misdemeanor charge of acquiring pseudoephedrine, the DA would drop the revocation of probation proceeding against Mr. Pinkston. (Transcript 100)

Ruling: ACCEPTED AND INCORPORATED.

50. In this plea deal, the only charge to which Mr. Pinkston pled guilty was for the purchase of pseudoephedrine. (Tr. at 100)

Ruling: ACCEPTED AND INCORPORATED.

51. Mr. Pinkston accepted the plea deal because the only punishment was two years of probation and the requirement to complete an outpatient treatment program, which Mr. Pinkston successfully completed. (Transcript 100)

Ruling: ACCEPTED AND INCORPORATED.

52. Mr. Pinkston never was found guilty of anything other than that minor misdemeanor of possession of pseudoephedrine. The Muskogee police department never charged Mr. Pinkston with intent to resell pseudoephedrine for the purposes of manufacturing methamphetamine, nor does the Muskogee police department offer any credible evidence that Mr. Pinkston did intend to resell the pseudoephedrine for the manufacturing of methamphetamine. (Transcript 25; 100)

Ruling: REJECTED for the reasons given in this Decision and Order.. The Court will not speculate about the charging decisions of the Muskogee County District Attorney and the DA's subsequent plea deal and/or the police department's amount of evidence for any other charges.

53. Mr. Pinkston successfully completed his probation in January of 2013. (Transcript 101)

Ruling: ACCEPTED AND INCORPORATED.

54. Mr. Pinkston subsequently had the misdemeanor charge of acquiring pseudoephedrine expunged from his record. (Transcript 102)

Ruling: ACCEPTED AND INCORPORATED.

55. The Muskogee police department, by all of their actions/non-actions, indicated that there was no credibility to the charge Mr. Pinkston with intent to resell or provide pseudoephedrine for the manufacture of methamphetamine, nor credibility to Mr. Pinkston's false confession. (Transcript 25)

Ruling: REJECTED for the reasons given in this Decision and Order.

56. Mr. Pinkston was never questioned about Brandy after he told Lieutenant Simmons that he was only telling Lieutenant Simmons what Mr. Pinkston thought Lieutenant Simmons wanted to hear. (Transcript 25; 100)

Ruling: ACCEPTED AND INCORPORATED as to the fact that Lieutenant Simmons did not follow up with Respondent concerning this incident. REJECTED to the extent this proposed finding of fact states or implies that the police did not believe Respondent's story about providing pseudoephedrine to others.

57. There was never a follow up on Brandy by the Muskogee police department, although Lieutenant Simmons admits that Brandy would have been a serious criminal and important to the police's investigation of the manufacturing of methamphetamine. (Transcript 25-26)

Ruling: ACCEPTED AND INCORPORATED as to the fact that the Muskogee Police Department did not follow up on "Brandy" information provided by Respondent. REJECTED to the extent that this proposed finding of fact mischaracterizes Lt. Simmons' testimony.

58. There is no reliable evidence showing that Mr. Pinkston bought pseudoephedrine for anything other than treating the symptoms caused by his and his wife's allergies. (Entire Record)

Ruling: REJECTED for the reasons given in this Decision and Order..

59. Mr. Pinkston has taken responsibility for his actions and is trying to better his life by stay drug-free, including participating in in-patient and out-patient drug treatment, refraining from buying any pseudoephedrine, and focusing on his job and beautiful family. (Transcript 72)

Ruling: ACCEPTED AND INCORPORATED IN PART as to Respondent's claims to be drug-free and participating in in-patient and out-patient drug treatment. REJECTED to the extent this proposed finding of fact fails to account for Respondent's mischaracterization of his pseudoephedrine purchases and/or state or implies that no further sanction is necessary to ensure public safety.

60. There is no evidence showing that Mr. Pinkston is in any way involved with methamphetamine or persons who do or manufacture methamphetamine. (Transcript 74; Entire Record).

Ruling: REJECTED for the reasons given in this Decision and Order.

61. Mr. Pinkston's wife, Morgan Whitney Pinkston, testified that there is a clear difference in Mr. Pinkston's personality between when he used methamphetamine and now. (Transcript 54)

Ruling: ACCEPTED AND INCORPORATED.

62. Mr. Pinkston can be trusted, has a great employment record, is wonderful with his two daughters, and has led a drug-free life since his rehabilitation from methamphetamine addiction in 2004. (Transcript 54; 86)

Ruling: ACCEPTED IN PART AND INCORPORATED. REJECTED to the extent this proposed finding of fact state or implies that Respondent should be allowed to continue in a safety-sensitive position following his violation of 46 USC 7704(b).

63. Mr. Pinkston did not purchase pseudoephedrine to sell or give to methamphetamine manufacturers. (Transcript at 104)

Ruling: REJECTED for the reasons given in this Decision and Order.

64. Mr. Pinkston's current steersman license expires in January 2014, by which time he has to be upgraded to a mate's pilot license in order to continue to work and make a living for his family. (Transcript 73-74)

Ruling: REJECTED to the extent this proposed finding of fact states or implies that no further sanction is necessary to ensure public safety.. The fact that Respondent might be unable to work under his license and/or upgrade his endorsements does not necessarily mean that he cannot find other employment.

65. Ever since Complainant filed this complaint against Mr. Pinkston, Mr. Pinkston has not been able to work in the wheelhouse—a substantial punishment in and of itself. (Transcript 72-74)

Ruling: REJECTED to the extent this proposed finding of fact states or implies that Respondent's has already suffered a sanction enough for his violation of 46 USC 7704(b) and no further sanction is warranted for Respondent's proven violation.

Respondent's Proposed Conclusions of Law

1. Complainant failed to prove that Mr. Pinkston has been convicted of a Dangerous Drug Law violation, as Complaint failed to offer any credible evidence showing a nexus between Mr. Pinkston's purchase of pseudoephedrine and the intent to manufacture or aid in the manufacture of methamphetamine.

Ruling: REJECTED for the reasons given in this Decision and Order.

2. The sanction of revocation is too harsh a penalty for the minor misdemeanor at issue, as Mr. Pinkston is not involved in any nature or way with the manufacture or use of methamphetamine, has been drug-free for over eight years, and has had a solid safety record during his maritime career.

Ruling: ACCEPTED AND INCORPORATED as to the sanction of revocation; REJECTED to the extent this proposed conclusions of law seeks to distance Respondent's admitted involvement with selling pseudoephedrine to others for unlawful purposes.

Attachment C – Appeal Rights

33 C.F.R. Part 20, Subpart J

§ 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.

(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.