

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

UNITED STATES COAST GUARD
Complainant

vs.

NICHOLAS JAMES SCHNEIDER
Respondent

Docket Number 2013-0236
Enforcement Activity No. 4631469

DECISION & ORDER

Date Issued: January 8, 2014

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

Appearances:

For the Complainant

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

LT Pedro Mendoza
U.S. Coast Guard Sector Key West

For the Respondent

Nicholas James Schneider, pro se

I. PRELIMINARY STATEMENT

The United States Coast Guard Sector Key West (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Nicholas James Schneider's (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC or credential).

On June 25, 2013, the Coast Guard filed a Complaint alleging that on June 15, 2012, Respondent, a holder of a Coast Guard-issued credential, was convicted of possession with intent to distribute one pound or more of marijuana. Further, the Complaint averred that possession with intent to distribute one pound or more of marijuana was violative of South Dakota Codified Laws §22-42-7, a dangerous drug law. Based upon the foregoing allegations and pursuant to the authority set forth at 46 U.S.C. §7704(b) and 46 C.F.R. §5.35, the Coast Guard requested revocation of Respondent's credential.

On July 10, 2013, Respondent filed an Answer to the Complaint wherein he admitted all jurisdictional allegations and denied paragraphs 2 and 3 of the factual allegations.¹

On July 15, 2013, the Chief Administrative Law Judge (CALJ) assigned the instant matter to the undersigned Administrative Law Judge (ALJ) for adjudication.

On August 1, 2013, 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 October 23, 2013, this matter came on for hearing via telephone.² The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and

¹ Paragraph 2 of the Complaint alleged: "Possession with Intent to Distribute 1 pound or more of marijuana is a violation of [South Dakota] code law 22-42-7." Paragraph 3 of the Complaint alleged: "[South Dakota] [c]ode law 22-42-7 is a dangerous drug law of the State of South Dakota."

² Of note, on October 17, 2013, the court issued a notice to the parties advising that the hearing of this matter would convene telephonically. Prior to the issuance of that order, Respondent assured court staff that he had ready access to a telephone and fax machine. On October 18, 2013, Respondent filed a Motion Requesting Telephonic Conference with the Court expressing concerns about the hearing occurring telephonically and that he did not have access to a telephone or a fax machine. On October 22, 2013, the court convened a telephonic pre-hearing conference with the parties to address Respondent's concerns. As an objection to the matter occurring

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) LT Pedro Mendoza of Sector Key West appeared on behalf of the Coast Guard; Respondent appeared on his own behalf.³

Both parties appeared, presented their respective cases and rested.

The Coast Guard did not offer any witness testimony as part of its case-in-chief and offered three exhibits into evidence, all of which were admitted.⁴ Respondent offered the testimony of four witnesses, as well as his own testimony.

At the conclusion of the hearing, the court heard the parties' 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 was the holder of a Coast Guard-issued Merchant Mariner's Credential. (CG Ex. 1).
2. In December 2011, Respondent agreed to transport marijuana to Chicago. (Tr. at 105).
3. In December 2011, while Respondent was driving in the State of South Dakota, Respondent's vehicle was stopped by a law enforcement officer. The law enforcement officer's search of Respondent's vehicle yielded the

telephonically, Respondent could only articulate that he felt the court should see him physically. The court assured Respondent that although the matter would proceed telephonically, the case would be fully and fairly adjudicated and that there would be no prejudice to Respondent.

³ The court and court reporter were physically located in chambers in New Orleans, Louisiana; Mr. Ball was physically located in his office in Martinsburg, West Virginia; LT Mendoza and Respondent were physically located in a Coast Guard conference room in Key West, Florida. Respondent's parole officer also testified via telephone. The remaining witnesses provided their testimonies from the same conference room that Respondent and LT Mendoza occupied.

⁴ 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.).

discovery of 59 pounds of marijuana.⁵ Respondent was thereupon arrested. (Tr. at 109-111).

4. On or about December 28, 2011, Respondent was indicted in the Meade County Circuit Court Fourth Judicial Circuit, with the crimes of “Count I: Possession with Intent to Distribute more than 1LB of Marijuana (S.D. Codified Laws §22-42-7), Count II: Possession of More than 10LBS of Marijuana, and Count III: Unauthorized Possession of Controlled Substance (S.D. Codified Laws 22-42-5).” (CG Ex. 2).
5. On January 27, 2012, Respondent was arraigned and entered a not guilty plea to all charges. (CG Ex. 2)
6. Following his arraignment, Respondent pled guilty to the charge of “Count I: Possession with Intent to Distribute more than 1LB of Marijuana (S.D. Codified Laws §22-42-7) and the State of South Dakota dismissed the remaining charges. (CG Ex. 2).
7. On or about June 15, 2012, the Meade County Circuit Court Fourth Judicial Circuit, State of South Dakota, accepted Respondent’s guilty plea to the charge of Possession with Intent to Distribute more than 1LB of Marijuana (S.D. Codified Laws §22-42-7). Respondent was thereupon sentenced to a term of 4 years in the South Dakota State Penitentiary with 1 year suspended. (CG Ex. 2).
8. Pursuant to S.D. Codified Laws §22-42-7, “distribution, or possession with intent to distribute, of one pound or more of marijuana is a Class 3 felony.” (CG Ex. 3).
9. The crime of “distribution, or possession with intent to distribute, of one pound or more of marijuana” as set forth at S.D. Codified Laws §22-42-7 is a dangerous drug law of the State of South Dakota.

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 with intent to distribute marijuana.

For the reasons set forth infra, Respondent’s Coast Guard-issued Merchant Mariner’s Credential is hereby **REVOKED**.

⁵ Respondent clarified that he believed the actual weight of the marijuana alone was 50 pounds and that packaging

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).⁶ 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 charged Respondent with violating 46 U.S.C. §7704(b). To establish jurisdiction in matters that are based exclusively on the provisions of 46

materials weighed 9 pounds. (Tr. at 111).

⁶ 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.”

U.S.C. §7704,⁷ “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.

The Coast Guard’s Complaint alleges jurisdiction is properly situated before this court as Respondent possesses a Coast Guard-issued credential. Moreover, jurisdiction is proper herein as the Coast Guard properly alleged a conviction for a dangerous drug law violation . . . and the approximate time and place of the offense.” 46 C.F.R. §5.35.

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 33 C.F.R. Part 20. The APA, 5 U.S.C. §§551-59, 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

⁷ As per 46 U.S.C. §7704(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.” Id.

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 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 beginning of the proceedings has been convicted of violating a dangerous drug law of ... a state, the [credential] shall be suspended or revoked.” Id.

It is undisputed herein that Respondent is a holder of a Coast Guard-issued credential. (CG Ex. 1, Respondent's Answer).

Coast Guard Exhibit 2 is a properly certified judgment of conviction by the Circuit Court, Fourth Judicial Circuit, State of South Dakota, reflecting that on June 15, 2012, Respondent, as a result of a guilty plea to the charge of “possession with intent to distribute more than 1lb of marijuana,” was sentenced to a term of four years in the South Dakota State Penitentiary, one year suspended. In accordance with 33 C.F.R. §20.1307(c)(1), “[a] judgment of conviction by a . . . State court for a violation is conclusive in the proceeding if an S&R proceeding alleges conviction for . . . [a] violation of a dangerous-drug law.” Id.

Although 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35 do not define what constitutes a “dangerous drug law” violation; Appeal Decision 2674 (KOVALESKI) (2008) held that a dangerous drug is a “narcotic drug, controlled substance or a controlled substance analog.” Id. Respondent was convicted under South Dakota Codified Law 22-42-7. A careful examination reveals that particular statute is situated within the “Crimes” title (Title 22) and the “Controlled

Substances and Marijuana” chapter (Chapter 22-42). Moreover, the term “marijuana” is statutorily defined under the “drugs and substances control” chapter. S.D. Codified Laws §34-20B-1(12). It is clear to the court that Respondent’s conviction of “Possession with Intent to Distribute 1 pound or More of Marijuana” is a conviction for a dangerous drug law of the State of South Dakota. See Appeal Decision 2674 (KOVALESKI) (2008).

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times relevant herein, Respondent was the holder of a Coast Guard-issued Merchant Credential. (CG Ex. 1).
2. On or about June 15, 2012, Respondent was convicted by the Meade County Circuit Court, Fourth Judicial Circuit, State of South Dakota for Possession with Intent to Distribute More than 1LB of Marijuana, S.D. Codified Laws §22-42-7.
3. The crime of “distribution, or possession with intent to distribute, of one pound or more of marijuana” as set forth at S.D. Codified Laws §22-42-7 is a dangerous drug law of the State of South Dakota.
4. “A judgment of conviction by a . . . State court for a violation is conclusive in the proceeding if an S&R proceeding alleges conviction for . . . [a] violation of a dangerous-drug law.” 33 C.F.R. §20.1307(c)(1).

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.⁸ 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 ALJ 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).⁹

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 not been subject any prior disciplinary action.

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

Testimony of Respondent and Respondent's Witnesses:

Respondent offered the testimonies of his current marine employers, Christopher Garcia and Damon Santelli. Mr. Garcia and Mr. Santelli co-own L&S Fish, Incorporated, a charter fishing company in Key West, Florida. (Tr. at 52). L&S Fish, Incorporated operates four vessel

⁸ 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.

⁹ 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."

and runs approximately 1,000 charters per year. (Tr. at 53). Mr. Garcia's and Mr. Santelli's testimonies cause the court concern for it is apparent that both Mr. Garcia and Mr. Santelli displayed an intentional disregard concerning Respondent's criminal background. For instance, neither made any attempt to apprise themselves of the details concerning Respondent's criminal background until one of their vessels operated by Respondent was boarded for a safety inspection by the Coast Guard on June 21, 2013, and again on June 22, 2013. (Tr. 54, 59-60; 92-100). Even more disturbing to the court was Mr. Santelli's testimony that he had no concerns, as a charter boat company owner in Key West, Florida, about hiring a man who had been convicted for possession of intent to distribute marijuana. Mr. Santelli testified he "know[s] that [Respondent] is not a drug user" and he "know[s] that you can't use drugs and operate a vessel." (Tr. at 98-99). He further testified that his "main concern" was whether someone was operating one of his vessels under the influence of any type of drug. (Tr. at 99). Mr. Santelli expressed to the court that he knew that "[Respondent] wasn't going to take my boat and try to go make drug runs." Mr. Santelli then countered that testimony by stating, "Well, I guess you don't know anything for sure, but I know he wanted to . . . operate [] a safe vessel." (Tr. at 99-100). Clearly, Mr. Garcia and Mr. Santelli fail to appreciate, or concern themselves, with the severity of Respondent's conviction vis a vis his employment in the Florida Keys.

It was also apparent from the testimonies of Mr. Garcia and Mr. Santelli that they were more concerned with Coast Guard safety boardings occurring on June 21, 2013, and June 22, 2013. Respondent's employers attempted to use this forum as an opportunity to air their grievances toward the Coast Guard relating to those boardings. (Tr. at 56-59; 82-94). However, their testimonies actually exposed their, as well as Respondent's, disrespect for Coast Guard regulations and directives. Respondent's failure to abide by the Coast Guard directive to replace life jackets aboard the COOLWATER on June 21, 2013, demonstrates a lack of respect for a

mariner's paramount duty: ensuring safety at sea. Thus the court discounts the testimonies of Mr. Garcia and Mr. Santelli.

The Coast Guard has proved that Respondent was convicted of a dangerous drug law, in violation of 46 U.S.C. §7704. "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). Based upon the record as a whole, the appropriate sanction is **REVOCAION** of Respondent's Merchant Mariner's Credential.

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 Credential issued by the U.S. Coast Guard to Respondent Nicholas James Schneider is **REVOKED**. Respondent Nicholas James Schneider is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Credential issued by the U.S. Coast Guard.

IT IS FURTHER ORDERED, that Respondent Nicholas James Schneider shall immediately tender his Coast Guard-issued Merchant Mariner's Credential to the nearest United States Coast Guard office or to the United States Coast Guard, Sector Key West, Investigations Division, ATTN: LT MENDOZA, 100 Trumbo Point Road, Key West, FL 33040-0005.

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.

Done and dated this the 8th day of January, 2014,
at New Orleans, Louisiana.



Hon. Bruce Tucker Smith
US Coast Guard Administrative Law Judge

Date:

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. MISLE Screenshot of Respondent's credential information (1 page)
2. Judgment of Conviction, State of South Dakota, filed June 18, 2012 (3 pages)
3. South Dakota Codified Laws §22-42-7 (1 page)

COAST GUARD WITNESSES

None

RESPONDENT EXHIBITS

None

RESPONDENT WITNESSES

1. Cheryl Blyth
2. Christopher B. Garcia
3. Nathalia Abondano
4. Damon Santelli
5. Nicholas James Schneider

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.