UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	VICE COMMANDANT
vs.	:	ON APPEAL
MERCHANT MARINER LICENSE	:	NO. 2683
Issued to: MICHAEL G. DESIMONE	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

By a Decision and Order dated July 8, 2005 (hereinafter "D&O"), Judge Walter J. Brudzinski, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New York, New York, revoked the merchant mariner license of Mr. Michael G. DeSimone (hereinafter "Respondent") upon finding proved a charge of misconduct. The specification alleged that Respondent was convicted of violating a dangerous drug law of the State of New York within 10 years of the initiation of the Coast Guard suspension and revocation proceedings.

PROCEDURAL HISTORY

The Coast Guard filed a complaint against Respondent on April 4, 2005, and Respondent filed his Answer with the ALJ docketing center on April 26, 2005. Included within Respondent's Answer was a motion to dismiss the action. Thereafter, by way of

an "Order Denying Respondent's Motion to Dismiss" dated May 11, 2005, the ALJ denied Respondent's Motion to Dismiss the matter and scheduled the hearing for July 6, 2005.

The hearing convened on July 6, 2005. Respondent was represented by counsel. At the hearing, Respondent admitted the jurisdictional allegations. However, he renewed his motion to dismiss the Complaint, contending that the evidence did not establish that he had been "convicted" of violating a State's "dangerous drug law," as the applicable Federal statute intended those terms to be applied. To support his motion, Respondent introduced three exhibits. After hearing argument, the ALJ denied Respondent's motion. The Coast Guard Investigating Officer (hereinafter "IO") then introduced the testimony of Respondent and three exhibits on the merits.

Two days after the hearing, the ALJ issued his D&O, finding the misconduct charged proved and ordering the revocation of Respondent's merchant mariner license. In a brief letter dated July 11, 2005, Respondent filed a Notice of Appeal *pro se*. Respondent then filed an Appellate Brief on July 26, 2005. The Coast Guard filed a Reply Brief on September 12, 2005. Respondent's appeal is now properly before me.

APPEARANCE: During and immediately following the hearing, Respondent was represented by Frederick W. Meeker, Esq., 7 Dey Street, New York, New York. His subsequent filings have been *pro se*. The Coast Guard spokesperson was LT Richard Gonzalez, USCG, Investigations Department, USCG Activities, Staten Island, New York.

FACTS

At all relevant times, Respondent was the holder of a Coast Guard issued merchant mariner license, authorizing him to serve as a master of steam or motor vessels

of not more than 100 gross tons on domestic or coastal voyages. [Tr. at 6] While conducting a routine review of the criminal records of all U.S.-licensed mariners following the terrorist attacks on the United States on September 11, 2001, the Coast Guard discovered that Respondent had, while holding the merchant mariner license at issue in these proceedings, pled guilty in a New York state court to a charge of simple possession of marijuana. [Reply Brief of Sept. 12, 2005, at 4] Respondent's plea stemmed from an incident that occurred on July 11, 2002. [Tr. at 20] In April 2005, the Coast Guard issued a Complaint against Respondent based on a drug conviction under 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35, alleging that "[w]ithin the last 10 years, the Respondent was convicted of violating a dangerous drug law of the State of New York." [Complaint of Apr. 4, 2005]

In its case on the merits, the Coast Guard introduced three exhibits to establish the nature and circumstances of the conviction under New York law. When the Coast Guard called upon Respondent to testify, he admitted limited involvement in the incident, but contended it was just a matter of being "in the wrong place at the wrong time." [Tr. at 21] Respondent's counsel offered three exhibits to support his contention that the offense of which Respondent had been found guilty was not a "crime," much less a "dangerous drug law…of a State." *See* 46 U.S.C. § 7704(b). His claim was that because the violation that Respondent pled to was not a misdemeanor, felony or violation of an offense listed in the National Driver Registry Act of 1982 (49 U.S.C. 30304), as required by 46 C.F.R. § 10.104, suspension or revocation was inappropriate. After advising the parties that he did not desire to hear argument, the ALJ presented his findings orally from the bench. He concluded that the Coast Guard had proved its case that Respondent had been convicted

of violating a dangerous drug law of New York State, and decided to revoke Respondent's license. [Tr. at 39]

BASES OF APPEAL

This appeal is taken from the ALJ's Order which found proved a charge of misconduct and required the revocation of Respondent's merchant mariner license. After a thorough review of Respondent's filings, I have summarized his assignments of error as follows:

I. *The ALJ erred as a matter of law in denying Respondent's motion to dismiss and his subsequent motion to rescind the revocation Order, because Respondent's "conviction" was not for a "crime," neither a felony nor a misdemeanor, under New York State law;*

II. *The ALJ erred in not granting Respondent's motion to rescind the revocation Order because New York law had expunged the record of the underlying conviction based on passage of time;*

III. *The ALJ improperly considered adverse evidence of an unproved cocaine-possession allegation in finding misconduct and imposing a sanction of revocation;*

IV. *The Coast Guard, and particularly the Investigating Officer, should not have pursued this case to a revocation hearing, but should instead have resolved the matter by issuing Respondent a warning letter; and*

V. *The sanction of revocation is disproportionately severe given the special circumstances of this case.*

Because I resolve this matter by my decision in issue I, I do not reach issues II-V.

OPINION

I.

The ALJ erred as a matter of law in denying Respondent's motion to dismiss and his subsequent motion to rescind the revocation Order, because Respondent's "conviction" was not for a "crime," neither a felony nor a misdemeanor, under New York State law.

Based on the amount of time spent discussing the matter, all of those at the hearing recognized that there was one key issue in this case: whether a "conviction" for violation of a New York law, one that did not rise even to a misdemeanor offense, should result in the legal conclusion that Respondent had been "convicted of violating a dangerous drug law…of a State" under 46 U.S.C. § 7704(b). [Tr. at 7-17, 31-40] The ALJ called this an issue of "first impression" and suggested that, on review, "the Commandant may decide that this [is] yet another unique case." [Tr. at 39]

At the outset of the hearing, Respondent's counsel moved to dismiss the Complaint on the basis that the "violation" in question did not constitute a "conviction" within the meaning of 46 U.S.C. § 7704(b). [Tr. at 7] To support this contention, he introduced Respondent's Exhibit A, a Coast Guard credential application form that defined the term "conviction" as follows:

> *Conviction* means the applicant . . . has been found guilty by judgment or plea by a court of record of the United States, the District of Columbia or any State or territory of the United States of a criminal felony or misdemeanor or of an offense described in section 205 of the National Driver Registry Act of 1982 (49 U.S.C. 30304).

Respondent's Exhibit B is a copy of 49 U.S.C. § 30304, introduced only to show Appellant did not commit any acts that could be construed to constitute a driving-related offense. Respondent's counsel then argued that under New York law, the offense of which Respondent had been found guilty was neither a felony nor a misdemeanor, but merely a "violation" in the nature of a parking ticket. [Tr. at 7]

Under New York law, "[a] person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana." N.Y. Penal Law § 221.05 (McKinney 2004) (spelling in statute). In New York State, "unlawful possession" of a

small amount of marijuana is only a "petty offense." People v. Morgan, 10 A.D.3d 369, 371, 781 N.Y.S.2d 652, 654 (N.Y. App. Div. 2004). Indeed, "[u]nlawful possession of marihuana is a violation punishable only by a fine of not more than one hundred dollars." Penal Law § 221.05 (spelling in statute). Respondent's Exhibit C, a copy of an official New York court document that the ALJ admitted and considered prior to entering his D&O, contains the statement: "UNDER NEW YORK STATE LAW VIOLATIONS AND INFRACTIONS ARE NOT CRIMES." [*See* Tr. at 34] Respondent contends that under New York law, what he did in possessing marijuana on this occasion was not a crime, but was more in the nature of a violation of a traffic or parking regulation, and the court's judgment was therefore not a "conviction" within the meaning of 46 U.S.C. § 7704(b). As a result, Respondent contends that his conviction in New York for possession of marijuana could not form a basis for the suspension or revocation of his mariner credential. I agree that the conviction at issue in this matter, a conviction under N.Y. Penal Law § 221.05, does not constitute a conviction "for a violation of dangerous drug laws" under 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.59(b).

While 46 U.S.C. § 7704(b) mandates that the Coast Guard take adverse action against a mariner's credential when the mariner is found to have been "convicted of violating a dangerous drug law of the United States or a State," the statute does not define the term "conviction." Moreover, the term "conviction" is not defined within 46 C.F.R. § 5.59(b) or anywhere else within 46 C.F.R. Part 5. The Coast Guard has provided illumination on the term in various Decisions on Appeal, but not in the same context of this case. *See e.g.*, Appeal Decisions 2629 (RAPOZA), 2608 (SHEPHERD), 2355 (RHULE), 1786 (NICKELS) and 1105 (HILTON). This is a case of first impression.

Respondent argues that, for the purposes of this action, the term "conviction" should be interpreted as having the same meaning as within the Coast Guard's licensing and credentialing regulations. In the absence of other authority illuminating the meaning of the term, or suggesting that a different meaning should attach to a revocation action than a credentialing action, I agree. The Coast Guard's mariner credentialing regulations[1] qualify the term "conviction" as specifically referring to a conviction for an offense that would rise to the level "of a criminal felony or misdemeanor or of an offense described in section 205 of the National Driver Register Act of 1982, as amended (49 U.S.C. 30304)." *See* 46 C.F.R. § 10.104 (discussing the term "conviction" as it applies to the licensing of merchant mariners) and 46 C.F.R. § 12.01-6 (discussing the term "conviction" as it applies to the documentation of merchant mariners). With this additional qualification of the term "conviction" in mind, it follows that a conviction for a crime, offense, or violation that does not rise to the level of a felony, misdemeanor, or an offense listed in the National Driver Register Act, should not, for the purposes of adverse action against a mariner credential, constitute a conviction "for a violation of the dangerous drug laws" under 46 C.F.R. § 5.59(b).

It is well settled in these proceedings that the decision of the ALJ will only be reversed if it is arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See e.g.*, Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581

[1] The regulations in 46 C.F.R. Part 10 address the process—including the qualifications, skills and abilities that must be shown—through which an individual may apply for, and thus obtain, a merchant mariner license. Similarly, the regulations in 46 C.F.R. Part 12 address the process through which an individual applies for a Merchant Mariner Document.

(DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). A review of the record in this case, including Respondent's Exhibit C (the official New York court document expressly stating that under New York law violations and infractions are not crimes), shows that a conviction under N.Y. Penal Law § 221.05 constitutes neither a felony nor a misdemeanor, but rather, a "violation" under New York State law. As such, in this particular case, the conviction forming the basis of the suspension and revocation action at issue does not rise to a level which would preclude issuance of a mariner credential under the Coast Guard's credentialing regulations, at 46 C.F.R. Parts 10 and 46 C.F.R. Part 12, and it therefore follows that the conviction cannot serve as a basis to support the revocation of Respondent's mariner license. Accordingly, I find that the ALJ erred in failing to grant Respondent's motion to dismiss the Complaint because the particular conviction at issue did not rise to the level of a conviction of a dangerous drug law under applicable Coast Guard regulations.

The Complaint at issue in this proceeding alleged an unsupportable basis for suspension and revocation action against Respondent's mariner credential solely because of the somewhat peculiar nature of the state classification of the offense. It is worth noting that if the Complaint had been amended or brought instead under a charge of misconduct for wrongful possession of a dangerous drug under 46 C.F.R. § 5.59(a), the result of this case might have been different, depending on the evidence presented. Even though the conviction fails to rise to the level of a violation "of a dangerous drug law of the United States or of a State," the facts underlying that conviction, a Respondent's admission, via plea agreement or otherwise, or other evidence might have been used to

substantiate a different charge, such as wrongful possession of a dangerous drug. *See, e.g.* Appeal Decision 2109 (SMITH).

It is incumbent on both the Coast Guard and its ALJs to be fully aware of both the substance and nature of any state conviction used to substantiate a violation of 46 U.S.C. § 7704(b). If such conviction does not appear to meet the criteria described in this opinion, alternative pleading or dismissal should be considered.

Having determined that the ALJ erred in failing to grant Respondent's motion to dismiss the Complaint based on a failure of Respondent's conviction under state law to qualify as a "conviction of a dangerous drug law," discussion of Respondent's remaining bases of appeal is unnecessary.

CONCLUSION

The ALJ erred in failing to grant Respondent's motion to dismiss the Complaint because Respondent's conviction did not rise to the level of a "conviction of a dangerous drug law" under applicable Coast Guard regulations. As such, the ALJ's decision lacked a legally sufficient basis and must be overturned.

ORDER

The Decision and Order of the Administrative Law Judge, at New York, New York, on July 8, 2005, is hereby **REVERSED** and the Complaint supporting suspension and revocation action against Respondent is **DISMISSED,** without prejudice. Respondent's Merchant Mariner License must be immediately returned to him in accordance with the dictates of this decision.

David P. Pekoske

Signed at Washington, D.C. this 6 of November, 2009.

D.P. PEKOSKE
Vice Admiral, U.S. COAST GUARD