UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
Merchant Mariner License and	:	NO.: 2678
Merchant Mariner Document	:	
Issued to: WAYNE SAVOIE	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq*., 46 CFR Part 5, and the procedures in 33 CFR Part 20.

By a Decision and Order (hereinafter "D&O") dated June 10, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, suspended the merchant mariner credentials of Mr. Wayne Savoie (hereinafter "Respondent") for a period of four months upon finding proved a charge of *conviction for a dangerous drug law violation*. The Complaint alleged that on August 30, 2004, Respondent pleaded guilty to, and was convicted of, "Possession of Cocaine" in a Louisiana court.

PROCEDURAL HISTORY

On January 7, 2005, the Coast Guard issued a Complaint against, and sought revocation of, Respondent's merchant mariner credentials upon alleging that Respondent was convicted of a dangerous drug law violation. [Complaint at 2; D&O at 2] Respondent filed an Answer to the Complaint on January 10, 2005, wherein he admitted

all jurisdictional allegations but denied that he pleaded guilty to a charge of "Possession of Cocaine," even though at the subsequent hearing he did not dispute that he pleaded guilty. [Answer at 1; D&O at 2; Transcript (hereinafter "Tr.") at 20]

The hearing in the matter was held at the United States Courthouse in Houma, Louisiana, on April 14, 2005. At the hearing, Respondent admitted all jurisdictional and certain factual allegations. [D&O at 2] Although the Coast Guard Investigating Officer (hereinafter "IO") did not call any witnesses, he introduced one exhibit into the record, a judgment of conviction, showing that Respondent pleaded guilty to, and was convicted of, "Possession of Cocaine" on August 30, 2004. [IO Exhibit 1] Respondent did not call any witnesses at the hearing but testified on his own behalf and introduced seven exhibits into the record.

The ALJ issued a D&O suspending Respondent's merchant mariner credentials on June 10, 2005. The Coast Guard filed a notice appealing the sanction imposed by the ALJ on June 14, 2005, and perfected its appeal by filing an Appellate Brief on July 7, 2005. Therefore, this appeal is properly before me.

APPEARANCES: Respondent was represented by Kevin Broussard, Esq., Pittman and Broussard, 209 West Main Street, Suite 300, New Iberia, Louisiana 70562. The Coast Guard was represented by LCDR Ron Patrick and ENS Timothy Tilghman of U.S. Coast Guard Marine Safety Office, Morgan City, Louisiana.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner credentials at issue in this proceeding. [D&O at 3] Respondent previously had his merchant mariner credentials revoked by the Coast Guard in 2001 due

to a prior conviction for possession of cocaine. [D&O at 5] Respondent took the necessary steps to establish cure pursuant to Coast Guard regulations. [*Id*.] Thereafter, as a result of an Administrative Clemency proceeding, respondent had his credentials restored in 2002. [*Id*.]

Respondent was arrested in May 2004 for "Possession of Cocaine." [D&O at 5-6; Tr. at 20; IO Exhibit 1] Thereafter, Respondent entered a plea of no contest to, and was subsequently convicted of, "Possession of Cocaine" in the Parish of St. Mary, Louisiana, on August 30, 2004. [*Id*.] Respondent was sentenced to three years imprisonment which was suspended for three years of probation. [D&O at 6-7; IO Exhibit 1] At the hearing, Respondent presented evidence and exhibits in mitigation, but at no time disputed the conviction for "Possession of Cocaine." [Respondent's Exhibits 1-7]

BASIS OF APPEAL

This appeal is taken from the ALJ's D&O finding proved the charge of conviction for a dangerous drug law violation and ordering the suspension, rather than revocation, of Respondent's merchant mariner credentials. On appeal, the Coast Guard sets forth only one basis of appeal:

> *The ALJ erred as a matter of law when she substituted her judgment concerning the appropriate sanction for the Commandant's judgment concerning the appropriate sanction.*

OPINION

The facts in this case are not in dispute. The ALJ determined that the Coast Guard proved, by a preponderance of the evidence, that Respondent was convicted for "Possession of Cocaine" in 2004 (D&O at 7). Respondent did not dispute the fact that he

pleaded guilty to the charge of "Possession of Cocaine" in St Mary Parish, Louisiana, on August 30, 2004. [Tr. at 20]

In her D&O, the ALJ held that a 2004 amendment to the governing statute, 46 U.S.C. § 7704(b), expressly permits either suspension or revocation of a merchant mariner credential when a mariner is found to have been convicted for a dangerous drug law violation. [D&O at 4-5, 8] Upon finding insufficient evidence in the record to support a conclusion that Respondent was either a user of dangerous drugs or a threat to marine safety, the ALJ issued an Order suspending Respondent's merchant mariner credentials. The Coast Guard asserts that the ALJ is required, under current Coast Guard regulations, to order the revocation of Respondent's merchant mariner credentials. [Coast Guard Appellate Brief at 1-2]

Prior to the 2004 amendment of 46 U.S.C. § 7704(b), revocation was the sole sanction authorized for conviction of a dangerous drug law. Irrespective of the statutory amendment, Coast Guard regulations, codified at 46 C.F.R. § 5.59, continue to mandate revocation of a merchant mariner's credentials for conviction of a dangerous drug law. As such, the key issue presented in the instant appeal is whether the ALJ erred, as a matter of law, in following the authorizing statute, rather than agency regulations, when she issued a sanction less than revocation in this case. For the reasons set forth below, I find no such error and affirm the ALJ's D&O.

There is clearly a difference between the applicable regulations, at 46 C.F.R. § 5.59, which require revocation of a merchant mariner's license for conviction of a dangerous drug law, and the authorizing statute at 46 U.S.C. § 7704(b), as amended in 2004, which authorizes suspension or revocation for conviction of a dangerous drug law.

Prior Commandant Decisions on Appeal do not fully address this issue and do not provide firm guidance to ALJ's when confronted with this type of difference between a statute and a regulation. In Appeal Decision 2035 (KROHN), it was noted that ALJ's are bound by the agency regulations to which they are subject and must follow proscribed procedures. In KROHN, however, the issue was whether the ALJ applied a particular regulation correctly when admitting certain evidentiary documents into the record and was not faced, as in the instant case, with a regulation which completely prohibits a sanction that is authorized by statute.

Therefore, in order to solve this dilemma, I look to how federal courts have addressed the resolution of issues when there is tension or conflict between an authorizing statute and a regulation. First, the Supreme Court has stated that agency regulations must "carry into effect the will of Congress as expressed by the statute" and "[a] regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Manhattan General E. Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936)(citing Lynch v. Tilden Produce Co., 265 U.S. 315, 320-322 (1924)); *See* also Miller v. United States, 294 U.S. 435, 439, 440 (1935). Additionally, the Court has noted that when a reviewing court considers an agency's construction of a statute which it administers, the court is confronted with two questions: (1) whether "Congress has directly spoken to the precise question at issue;" and (2) if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's interpretation is based on a permissible reading of the statute." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). In the instant case, although Congress has not spoken on the precise question of

whether an ALJ is bound to follow the existing regulation in light of the underlying statutory change, it remains doubtful that the regulation at issue is a permissible construction of the statute.

Other courts have provided more detail to this general rule, such as in Soriano v. U.S., 494 F.2d 681 (9th Cir. 1974), where the court observed "[t]he weight given to an interpretive regulation, such as the one at issue here, 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Moreover, in Zheng v. Gonzales, 422 F.3d 98 (9th Cir. 2005), the court noted "[t]he conflict between regulation and statute is clear and unmistakable. Under the second step of the *Chevron* test, "we must determine 'whether the regulation harmonizes with the plain language of the statute, its origin, and purpose. So long as the regulation bears a fair relationship to the language of the statute, reflects the views of those who sought its enactment, and matches the purpose they articulated, it will merit deference.' " Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103, 110 (3rd Cir. 1996) (quoting Sekula v. FDIC, 39 F.3d 448, 452 (3rd Cir. 1994))."

The Congressional record is thin as to the full meaning behind why 46 U.S.C. § 7704(b) was amended in 2004, and although there is some indication that one of the purposes was to provide ALJ's flexibility in approving Settlement Agreements, the plain meaning of the amended statute is unambiguous. *See* H.R. Conference Report 108-617, § 402. Congress has not dictated a desired or preferred sanction for conviction of a dangerous drug law; rather Congress has merely authorized either sanction. 46 U.S.C.

§ 7704(b).

Under the current Coast Guard regulation, there is no circumstance in which an ALJ could suspend a merchant mariner credential for conviction of a dangerous drug law even though such a sanction is authorized by statute. 46 C.F.R. § 5.59. In order for this regulation to be in "harmony" with the authorizing statute and "[bear] a fair relationship to the language of the statute," it must provide some circumstance in which an ALJ could order the suspension of a merchant mariner credential, even if rare. Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103, 110 (3rd Cir. 1996) (quoting Sekula v. FDIC, 39 F.3d 448, 452 (3rd Cir. 1994)); Manhattan General E. Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936) (citing Lynch v. Tilden Produce Co., 265 U.S. 315, 320-322 (1924); Miller v. United States, 294 U.S. 435, 439, 440 (1935)).

Congress has authorized suspension as an alternative to revocation of a merchant mariner's credential when there is a conviction for possession of a dangerous drug. The ALJ therefore, was correct when she stated that "the undersigned is statutorily authorized to consider suspension (in lieu of revocation) as an appropriate sanction in this proceeding." (D&O Footnote 3 at 5).

It has long been held that the ALJ's decision may only be reversed if his or her findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). In this case, the ALJ correctly found by a preponderance of the evidence that Respondent was convicted of a

dangerous drug law. [D&O at 6-7] Therefore, in accordance with the applicable statutory authority, the ALJ was authorized to consider a sanction less than revocation, and having considered several factors, she subsequently issued an order of suspension. 46 U.S.C. § 7704(b); [D&O at 7-9] Although Coast Guard regulations preclude such an order, the statute in this case is controlling. *See e.g.*, Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129 (1936); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) and Dixon v. U.S., 381 U.S. 68 (1965). Accordingly, the Coast Guard's appeal is denied.

CONCLUSION

The actions of the ALJ had a legally sufficient basis and, for the reasons stated above, I find that the ALJ's decision was not arbitrary, capricious or clearly erroneous. Furthermore, the record shows that competent, substantial, reliable and probative evidence existed to support the findings and order of the ALJ.

ORDER

The Decision and Order of the Administrative Law Judge, dated at New Orleans, Louisiana, on June 10, 2005, is AFFIRMED**.**

/S/

Signed at Washington, D.C. this 20th of March, 2008.

statutory authority, the ALJ was authorized to consider a sanction less than revocation, and having considered several factors, she subsequently issued an order of suspension. 46 U.S.C. § 7704(b); [D&O at 7-9] Although Coast Guard regulations preclude such an order, the statute in this case is controlling. *See e.g.,* Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129 (1936); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) and Dixon v. U.S., 381 U.S. 68 (1965). Accordingly, the Coast Guard's appeal is denied.

CONCLUSION

The actions of the ALJ had a legally sufficient basis and, for the reasons stated above, I find that the ALJ's decision was not arbitrary, capricious or clearly erroneous. Furthermore, the record shows that competent, substantial, reliable and probative evidence existed to support the findings and order of the ALJ.

ORDER

The Decision and Order of the Administrative Law Judge, dated at New Orleans, Louisiana, on June 10, 2005, is AFFIRMED.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C. this 20th of March, 2008.