U N I T E D S T A T E S O F A M E R I C A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA U. S. COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
LICENSE NO. 793349	:	
DOCUMENT NO. [redacted]	:	NO. 2629
Issued to Hank J. Rapoza	:	

This appeal is taken in accordance with 46 USC 7704, 46 CFR 5.701, and 33 CFR Part 20.

By a Decision and Order (D&O) dated December 14, 2000, an Administrative Law Judge (ALJ) of the United States Coast Guard at Seattle, Washington, revoked Respondent's above-captioned license and document, upon finding the charge of *conviction for a dangerous drug law violation* proved. The supporting specification that was found proved alleges the Respondent "[w]as convicted of violating a dangerous drug law of the State of Washington for the wrongful possession of cocaine on or about April 27, 2000."

A hearing was held on December 14, 2000, in Seattle, Washington. Respondent appeared with counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer (IO) introduced two witnesses and eight exhibits. Respondent introduced five exhibits. Respondent's Exhibits 3 and 4 were duplicative of IO Exhibits 5 and 6. IO Exhibits 3, 4 and 8 were excluded from evidence as irrelevant. The charge was found proved, and Respondent's license and document were revoked.

The ALJ's D&O was served on Respondent's counsel via fax transmission on January 8, 2001. Respondent's counsel filed a timely notice of appeal on January 9, 2001, and an appellate brief on March 5, 2001. This appeal is properly before me.

APPEARANCES: Thomas F. Paul, Attorney at Law, LeGros, Buchanan & Paul, 701 Fifth Avenue, Seattle, Washington 98104-7051, for Respondent. The Investigating Officer (IO) was Lieutenant Heidi L. Rumazza, U.S. Coast Guard.

FACTS

At all relevant times, Respondent was the holder of the above captioned license and document. His license authorized him to serve as "Master of steam or motor vessels of any gross tons upon inland waters and the sheltered waters of British Columbia as defined in the Treaty between the United States and Canada signed on August 11, 1934; Radar Observer (unlimited) Radar expires on January 18, 2002; also, First Class Pilot on vessels of any gross tons upon Washington main ship channels between Point Defiance and Reef Point; all Puget Sound and San Juan Islands (including Spiden Channel) ferry routes; all interconnecting ferry routes between Point Defiance and Reef Point." His document is issued for "Able seaman – unlimited; wiper; steward's department (FH)." (IO Exhibits 1 and 2.). By his formal answer submitted on October 2, 2000, Respondent admitted to Coast Guard jurisdiction in this matter.

On April 27, 2000, the Seattle, Washington, police arrested Respondent in his home for possession of cocaine. (IO Exhibit 7). Respondent requested, and the Superior Court for King County, Washington agreed, to place Respondent in the Superior Court's Drug Court Program. Respondent entered into an Agreement of Participation with the King County Prosecutor and

entered the program on July 17, 2000, whereupon the Superior Court entered an Order of Participation. (IO Exhibit 6).

Under the terms of the agreement, Respondent did not enter a plea of any kind, nor was there a determination of guilt made by the court. Respondent waived his rights to a jury trial, to call witnesses, and to cross-examine the state's witnesses. Respondent also agreed not to contest the legality of the search of his home and stipulated to the positive results of the field test showing that the substance found in his home was cocaine. Respondent was admitted to the program, which required him to undergo treatment for drug use. Respondent paid a $100 fee and was placed under supervision, which included periodic random urinalysis testing. (IO Exhibit 5.)

The Superior Court's Drug Court Program is designed to allow a defendant to avoid prosecution and conviction, provided he or she complies with the conditions of the program. [Tr. at 71]. Respondent apparently was complying with the program at the time of hearing because no final order, judgment, decree of guilt or dismissal had been granted in the State case at the time of the hearing. *See* Respondents Brief Supporting Appeal of Judge Bladen's Decision dated December 14, 2000, Pages 2-3.

BASES OF APPEAL

Respondent asserts the following bases of appeal from the decision of the ALJ:

I. The ALJ erroneously found that the State of Washington convicted Respondent of violating a dangerous drug law of the State of Washington, when Washington law clearly shows, and the parties stipulated, that the State of Washington does not consider Captain Rapoza to have been convicted of such a violation;

II. The ALJ and the Coast Guard misapplied 33 CFR 20.1307(d) by revoking Respondent's license, because Respondent did not participate in a "scheme of a state for the expungement of convictions"; and,

III. The ALJ misapplied Coast Guard case law precedent by declining to review Washington law to determine whether Captain Rapoza was participating in a scheme for the "expungement" of a conviction.

OPINION

I.

I will address Respondent's first and part of his third bases of appeal by saying that a reading of the transcript shows that the ALJ did not ignore Washington State law when making his decision. In fact, the transcript contains prolonged passages of lucid and thoughtful discussions between Respondent's counsel, the ALJ, and the IO about Washington State law. *See* [Tr. at 55-57, 71-73]. The transcript shows the ALJ found that Respondent was not convicted of a dangerous drug law under the laws of the State of Washington. [Tr. at 56]. Additionally, addressing the second bases of appeal, the ALJ and the IO both agreed with Respondent's counsel that the Superior Court's Drug Court Program is not a scheme of a state for the expungement of convictions. In the words of the ALJ, " . . .he [Respondent] is not participating I think we can all agree not an expungement of conviction scheme. Would you agree with that Lieutenant?" [Tr. at 61]. To which the IO replied, "Your Honor, I would agree to it not being an expungement scheme…" [Tr. at 61].

II.

Respondent raises the key issue of expungement of convictions in this appeal in his bases of appeals two and three. Respondent focuses on the language of 33 CFR 20.1307(d) which states in applicable part:

> If the respondent participates in the scheme of a State for the expungement of convictions, **and** if he or she pleads guilty, or no contest **or**, by order to the trial court has to attend classes, contribute time or money, receive treatment, submit to any manner of probation or supervision, or forego appeal of the finding of the trial court, the Coast Guard regards him or her, for purposes of 46 U.S.C. 7703 or 7704, as having received a conviction. (emphasis added).

Respondent argues that in order for him to have been "convicted" in accordance with the regulations cited above, he must have:

1) Participated in a scheme of a state for the expungement of a conviction, **and**

2) Entered a plea of guilty, *nolo contendere* to a dangerous drug law, and/or

3) Received an order from a court to attend drug awareness classes or drug treatment.

Respondent further argues that, through the conjunctive "**and"** highlighted in the quotation above, the regulation establishes a two or three-pronged test, the first prong of which is that Respondent must have been participating in a scheme of a state for the expungement of a conviction. *See* Respondents Brief Supporting Appeal of Judge Bladen's Decision dated December 14, 2000, Page 8. Respondent argues that his interpretation is a simple matter of statutory construction based on the plain language of the regulation and that it is unnecessary to go beyond that plain language. Finally, Respondent cites the holdings in Appeal Decisions 2355 (RHULE), 2611 (CIBULKA), and 2435 (BABER), for the proposition that the ALJ is bound to examine only Washington State law to determine whether Respondent had been convicted of a dangerous drug law.

The ALJ, however, found that the regulation was not plain on its face and looked to the regulatory history of 33 CFR 20.1307(d) to determine the drafters' intent when the regulation was written in 1999. The ALJ found that the drafters in 1999 intended the regulation to be consistent with 46 CFR Part 10. The drafters, in response to a comment that 33 CFR Part 20 define the word "conviction," stated that "we believe that 33 CFR 20.1307 establishes a definition of the term 'conviction' that both is adequate and consistent with the definition in 46 CFR 10.103." *See* 64 Fed.Reg. at page 28060 (May 24, 1999).

The ALJ found that "conviction" under 46 CFR 10.103 included cases of deferred adjudication and that the drafters intended for this definition to be used in reference to 33 CFR Part 20.

"Conviction" as defined at 46 CFR 10.103 provides in pertinent part:

> If an applicant pleads guilty or no contest, is granted deferred adjudication, **or** is required by the court to attend classes, make contributions of time and money, receive treatment, submit to any manner of probation or supervision, or forego appeal of a trial courts conviction, then the applicant will be considered to have received a conviction. (emphasis added)

The ALJ's analysis led him to the conclusion that the word "**or**" in 33 CFR 20.1307(d) is used in the same way the word "**or**" is used in 46 CFR 10.103, as a disjunctive to highlight two or more alternatives. *See* [Tr. at 76]. The ALJ then examined the Washington State drug diversion program. As noted previously, as part of the Superior Court's Drug Court Program, Respondent entered a program where he underwent treatment for drug use, paid a fee, and was placed on supervision including periodic urinalysis testing. In addition, the state court entered an order, directing Respondent to participate in the program. The ALJ determined the components of the program described above met the definition of "conviction" as it is used in

33 CFR 20.1307(d).

The ALJ also analyzed Appeal Decisions 2355 (RHULE), 2611(CIBULKA) and 2435 (BABER). The ALJ determined that all three cases involved pleas of *nolo contendere* unlike the case at hand, which does not involve a plea at all. The ALJ found those cases require only that the ALJ to refer to state law to interpret meaning of a plea of *nolo contendere* or no contest in the state in which the plea is made. [Tr. at 74]. I concur with the ALJ. The holdings in the above cited cases do not bind the hands of the ALJ. At most they stand for the proposition that the ALJ may analyze state law to determine whether a plea of *nolo contendere* or no contest in a state court constitutes a conviction either under state law or for purposes of federal regulations. Those cases in no way suggest the ALJ is prohibited from examining federal regulations and regulatory history for the same purpose. The hearing transcript demonstrates that the ALJ wisely examined all resources at his disposal to make the most informed decision possible.

The ALJ is vested with broad discretion to resolve inconsistencies in evidence. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2614 (WALLENSTEIN). Findings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2506 (SYVERSTEIN), 2424 (CAVANAUGH), 2282 LITTLEFIELD), and 2614 (WALLENSTEIN).

Nonetheless, I will reverse the decision of the ALJ if the findings are arbitrary, capricious, unsupported by law, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363

(MANN), 2344 (KOHANDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). The actions of the ALJ in reviewing 33 CFR 20.1307(d) in the context of and consistent with 46 CFR 10.101 were within his proper discretion in light of the regulatory history illuminating the drafter's intent. Within this framework, the facts surrounding the Respondent's participation in the Drug Court program met the criteria of 46 CFR 10.101 for purposes of "conviction." In addition, the ALJ's reliance on federal law rather than state law was similarly within his proper discretion.

Suspension and revocation proceedings are intended to promote safety of life and property at sea. 46 USC 7701. Congress has determined as a matter of public policy that involvement with illegal drugs is inconsistent with employment in the merchant marine and has required revocation of a holder's license, certificate of registry, or merchant mariners document when the mariner has been convicted within the past ten years of a dangerous federal or state drug law. 46 USC 7704. The actions of the ALJ had a legally sufficient bases; the ALJ's decision was not arbitrary or capricious and was not clearly erroneous. Competent, substantial, reliable, and probative evidence existed as to Respondent's arrest for cocaine possession and entry into the drug court program and this evidence was presented by the Coast Guard as exhibits and properly admitted by the ALJ.

CONCLUSION

I find that Respondent's bases of appeal are without merit. Therefore, the finding of *proved* as it relates to the charge and specification is AFFIRMED.

ORDER

The Decision and Order of the Administrative Law Judge dated December 14, 2000, is AFFIRMED.

T. J. BARRETT
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 31st day of July, 2002.