UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 53403
Issued to: Edward Lee BARNABY

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2433

Edward Lee BARNABY

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 3 February 1986, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, revoked Appellant's license upon finding proved the charges of "conviction of a narcotic drug law violation" and "misconduct." The first specification found proved alleges that, being the holder of the captioned document, on or about 22 December 1978, Appellant was convicted in the Circuit Court of Cook County, Illinois for possession of cannabis, a dangerous drug with intent to distribute a controlled dangerous substance, to wit: marijuana. The second specification found proved alleges that Appellant, while making application to the U.S. Coast Guard Regional Examination Center, Toledo, Ohio for renewal of his license, misrepresented the particulars of his prior record by failing to reveal a prior conviction for possession of cannabis.

The hearing was held at Chicago, Illinois, on 24 January 1986.

At the hearing Appellant was represented by professional counsel and answered "no contest" to the charge and specification

alleging the conviction. Appellant denied the allegations contained in the misconduct charge and specification.

The Investigating Officer introduced in evidence six exhibits.

In defense, Appellant introduce in evidence four exhibits, his own testimony, and the testimony of two additional witnesses.

After the hearing the Administrative Law Judge rendered a decision in which she concluded that both charges and specifications had been proved, and entered a written order revoking all licenses, documents and certificates issued to Appellant.

The complete Decision and Order was served on 12 February 1986. Appeal was timely filed on 10 March 1986 and perfected on 21 April 1986.

FINDINGS OF FACT

On or about 22 December 1978, Appellant was convicted, on his plea of guilty, in the Circuit Court of Cook County, Illinois, for the wrongful possession of cannabis on 28 September 1978. He was fined $25.00 and placed in probation for a period of one year. On the same date, three additional charges against Appellant were before the court: drunk driving, improper lane usage and speeding. Appellant was convicted of drunk driving and improper lane usage; the speeding charge was dismissed.

On 5 August 1985, Appellant submitted an application to the Coast Guard for renewal of his license. In response to a question on the application which asked if he had ever been convicted by any court of other than a minor traffic violation, Appellant did not indicate the 22 December 1978 conviction for possession of cannabis.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends:

1. The Administrative Law Judge's imposition of a revocation order, according to the requirement of 46 USC 7704, made 46 USC 7704 an ex post facto law and violated his constitutional rights.

2. He was not acting under the authority of his license at the time of the alleged misconduct.

3. Misconduct was not proven.

Appearance: Michael A. Snyder, Esq., Snyder and Gerard, 3712 Three First National Plaza, Chicago, Il 60602.

OPINION

I

Appellant first contends that his constitutional rights were violated by the application to him of 46 USC 7704, an ex post facto law. In support of this argument, Appellant points out that, at the time of his conviction in 1978, the predecessor to 46 USC 7704, 46 USC 239b, provided that "the Secretary *may*...take action to revoke [a] seaman's document ..." when the seaman has been convicted of a drug law violation, but that as codified in 1983, 46 USC 7704 provides for mandatory revocation after such a conviction.

Appellant argues that the provision of 46 USC 7704 have been unconstitutionally applied to him because revocation did not become mandatory until after his conviction. This argument is without merit. The "constitutional prohibition of ex post facto laws has always been limited to criminal law and has never applied to civil legislation or regulations. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)." 2 Davis, *Administrative Law Treatise 7.23* (1979). Further, an agency charged with the administration of an act of Congress "lacks the authority to pass upon the constitutionality of that act, even if it were so inclined. Thus the proper forum for such objection lies before a court of record and not an administrative proceeding. [Citations omitted.]" Appeal Decision 2202 (VIAL). See also Appeal Decisions 2203 (WEST) and 2135 (FOSSANI).

Evidence of the intent of Congress in enacting the above cited provision of 46 USC 7704, which was in effect at the time of the hearing in this case, is found in the Report of the House Committee on Merchant Marine and Fisheries which accompanies the bill, S.46:

> Section 7704 *requires* the Secretary to revoke the license, certificate, or document of any individual who has been convicted of a dangerous drug law within 10 years . . . . H.R. Rep. No. 338, 98th Cong., 1st Sess. 177 (1983).

See also Commandant v. Cain, NTSB Order EM-125 (1985). !Statute unequivocally requires revocation and does not contemplate discretionary exceptions.

It should also be noted that Appellant answered "no contest" to the charge that he had been convicted of a dangerous drug law violation. An answer of "admit" or "no contest" constitutes a waiver of all non-jurisdictional defects and defenses, and is sufficient to support a finding of proved. 46 CFR 5.527(c). *See* Appeal Decisions 2376 (FRANK) and 2362 (ARNOLD).

II

Appellant next contends that the proceeding lacked jurisdiction since he was not acting under the authority of his license at the time of the alleged misconduct. He argues that he had not yet received the license which he currently holds, license no. 53403, at the time he made application for it, so "in no sense can it be said that he committed an act of misconduct when acting under the authority of that license." Appellant's Brief at 10. This argument is specious.

At the time he made application for renewal Appellant held Coast Guard license No. 29520. His present license No. 53403 is the successor license. Applying for renewal, or upgrade of a license of document constitutes acting under the authority of that license or document. *See* 46 CFR 5.01-35 [current version at 46 CFR 5.57].

III

Finally, Appellant contends that misconduct was not proven because his failure to reveal the fact of his conviction at the time of his license renewal application was not wrongful. It is Appellant's contention that he did not know he had entered a plea of guilty to the criminal charge of possession of cannabis in Cook County, that he thought this charge had been "dropped," and that, at worst, he exercised poor judgment in not fully informing himself. He argues that poor judgment is not wrongful, citing *Recahny v. Roland*, 235 F Supp. 79 (S.D.N.Y. 1964). *Recahny*, however, is inapposite to the facts here. The issue in that case was whether Plaintiff's conduct - using a passkey to open a passenger's stateroom - was wrongful. The court distinguished between wrongful conduct and errors in judgment. Here, Appellant was not charged with not fully informing himself, but rather with misrepresentation. His answer on the application concerning his prior conviction for possession of cannabis was clearly false and in violation of pertinent statutes and regulations. *See* 46 USC 7503, 46 CFR 10.02-1. His conduct was wrongful and does not fall within the ambit of a mere error of judgment.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusion of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision of the Administrative Law Judge dated at St. Louis, Missouri, on 3 February 1986 is AFFIRMED.

P. A. Yost
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C. this *22nd* day of *September* 1986.

***** END OF DECISION NO. 2433 *****

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