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

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| UNITED STATES OF AMERI CA<br>UNITED STATES COAST GUARD | : | DECISION OF THE |
| | : | VICE COMMANDANT |
| vs. | : | |
| | : | ON APPEAL |
| LICENSE NO. 909300 | : | NO. 2645 |
| Issued to: STEVE A. MIRGEAUX | : | |

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

By a Decision and Order (D&O) dated December 30, 2002, an Administrative Law Judge (ALJ) of the United States Coast Guard at Seattle, Washington, revoked Steven A. Mirgeaux's (Respondent's) above-captioned license upon finding proved a charge of use of a dangerous drug.

The specification found proved alleged that Respondent tested positive for amphetamine/methamphetamine as part of a random drug screening conducted on April 2, 2002.

## PROCEDURAL HISTORY

The Coast Guard filed its Complaint on June 12, 2002, alleging, by virtue of his positive test result, that Respondent had used or been addicted to the use of dangerous drugs. [D&O at 1] Respondent failed to reply to the Complaint within the thirty-day time period prescribed by Coast Guard regulation and, on July 17, 2002, the Coast Guard filed a Motion for Default Order with the ALJ. [D&O at 1; Motion for Default Order at 1] Respondent first acted on the Coast Guard's Complaint when he filed an undated

four-page hand-written document—received by the ALJ Docketing Center on August 2, 2002—that requested an extension of time within which to file his Answer and alleged, among other things, that the Coast Guard's Complaint had not been served at his correct address. [D&O at 1; Respondent's Request for Extension of Time at 1] Via an Order of Extension, dated August 5, 2002, the Chief ALJ granted Respondent's request for time extension, impliedly denying the Coast Guard's earlier Motion for Default Order, and required that Respondent file his Answer to the Coast Guard's Complaint on or before August 19, 2002. [Order of Extension] Respondent filed a timely Answer to the Coast Guard's Complaint and, at the same time, requested that a hearing be held in the matter. [D&O at 1; Respondent's "Response to Complaint" at 1] Thereafter, on August 23, 2002, the Chief ALJ assigned the matter to ALJ Edwin M. Bladen. [D&O at 1; Notice of Assignment] Via a Scheduling Order dated October 15, 2002, the ALJ scheduled the Hearing in the matter for December 18, 2002. [D&O at 2; Scheduling Order] On November 2, 2002, the ALJ issued an "Amended Scheduling Order", rescheduling the hearing for December 20, 2002. [D&O at 2; Amended Scheduling Order] Via a six-page hand-written letter, received by the ALJ on December 16, 2002, Respondent requested a postponement of the hearing due to the fact that his father was in the process of undergoing cancer treatment and because Respondent was having difficulty contacting two unnamed witnesses that he had hoped to call on his behalf at the hearing. [D&O at 2; Respondent's Request for Postponement of the Hearing at 1-4] Via a "Decision on Respondent's Motion to Continue Hearing" dated December 16, 2002, the ALJ denied Respondent's request for a postponement of the Hearing and directed Respondent to

appear at the previously scheduled hearing on December 20, 2002. [D&O at 2; Decision on Respondent's Motion to Continue Hearing at 1-4].

The hearing was held, as scheduled, on December 20, 2002, at Marine Safety Office, Paducah, Kentucky. Because Respondent failed to appear at the hearing, the Coast Guard Investigating Officer requested that the ALJ enter an order of default pursuant to 33 C.F.R. § 20.705 and 33 C.F.R. § 20.310. [D&O at 2] Pursuant to Coast Guard regulation, the ALJ determined that Respondent's failure to appear was "without good cause" and concluded that "[t]he default of Respondent constitutes an admission of all facts as alleged" in the Coast Guard's Complaint. [D&O at 2] As a result, the ALJ found Respondent to be a user of dangerous drugs and ordered the revocation of Respondent's license. [D&O at 3]

The ALJ's D&O was served on Respondent on December 30, 2002, and Respondent filed a timely Notice of Appeal, via Priority U.S. Mail on January 22, 2003. Coast Guard regulations require that an individual applying for an appeal submit both a notice of appeal and an appeal brief. 33 C.F.R. § 20.1001; 33 C.F.R. § 20.1003. Due to the extensive nature of Respondent's Notice of Appeal, I will treat it as both the required Notice of Appeal and Appeal Brief. Therefore, this appeal is properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard Investigating Officer was CWO J. M. Baier, stationed at Marine Safety Office Paducah, Kentucky.

FACTS

At all times relevant herein, Respondent held the above-captioned license.

Respondent is licensed as an Operator of Uninspected Towing Vessels upon the Inland Waters of the United States excepting Waters Subject to the International

Regulations for Preventing Collisions at Sea, 1972; and as a Radar Observer-Rivers. [D&O at 2; I.O. Exhibit 1].

While serving under the authority of his license, and while under the employ of Missouri Barge Lines, on April 2, 2002, Respondent was selected for random drug testing in accordance with the requirements set forth at 46 C.F.R. § 16.230. [D&O at 2-3] As a result of his selection for random testing, Respondent provided a urine sample to Ms. Sheila Edmonds of Roche Bio Medical. [D&O at 2-3; I.O. Exhibit 3] As part of her normal routine, during the specimen collection, Ms. Edmonds asked Respondent to submit his urine and fill out the Drug Testing Custody and Control Form (DTCCF) which acknowledged that he had given the specimen, that the specimen was sealed in tamper proof bottles, and that the information provided on the form was true and accurate. [D&O at 2] Respondent's urine sample was tested at Laboratory Corporation of America, which confirmed via Gas Chromatography and Mass Spectrometry (GC/MS) that the sample was positive for the presence of amphetamine/methamphetamine. [D&O at 2; I.O. Exhibit 3] A Medical Review Officer, confirmed the positive test results. [D&O at 2; I.O. Exhibit 4]

## BASES OF APPEAL

This appeal has been taken from the Order imposed by the ALJ finding proved the charge of *use of or addiction to the use of dangerous drugs* and revoking Respondent's merchant mariner license. As I indicated above, Respondent's Notice of Appeal contains sufficient argument to allow me to treat the Notice as his Appeal Brief. Therefore, I have summarized the substance of Respondent's Notice of Appeal/Appeal Brief and have divided his assignments of error into two arguments:

*I. Respondent alleges that the ALJ's decision is "full of errors and omissions" and that the decision "subtly accused [him] of lying". To support his assertion, in this regard, Respondent contends that all correspondence in the instant proceeding was sent to an incorrect address, provided to the Coast Guard by Respondent's employer.*

*II. Respondent contends that the ALJ erred by refusing to grant his request for a postponement.*

OPINION

I.

*Respondent alleges that the ALJ's decision is "full of errors and omissions" and that the decision "subtly accused [him] of lying". To support his assertion, in this regard, Respondent contends that all correspondence in the instant proceeding was sent to an incorrect address, provided to the Coast Guard by Respondent's employer.*

Respondent's first assertion, though not expressly stated as such, seems to be that his due process rights have been violated throughout the instant proceedings because the Coast Guard did not correspond with him at the correct address. After a thorough review of the record, I find Respondent's argument to be without merit.

I have held that Respondent has a duty to provide the Coast Guard with his proper address. Appeal Decision 1399 (NOVAK). At the same time, it is well settled that where service of process is technically incorrect, but the Respondent receives actual notice in time to preserve his rights, there is no need for a dismissal. Berhalter v. Irmish, 75 F.R.D. 539 (W.D.N.Y. 1972); *Cf.* Howse v. Zimmer, 109 F.R.D. (D. Mass. 1986); In re Vincze, 230 F.3d 297 (7th Cir. 2000) (holding that service is valid even if mailed to an incorrect address as long as the address was the last listed by debtor on documents filed with the court.); Baker v. Latham Sparrowbush Assocs., 72 F.3d 246 (2d Cir. 19995) (holding that although pleadings were sent to an incorrect address, Corporation could not claim service was constitutionally defective where Corporation's president had received

actual notice of the commencement of the lawsuit in ample time to appear and protect Corporation's interests). Whether the Coast Guard corresponded with Respondent at his proper address (the record shows that the Coast Guard sent all documentation to Respondent's brother's address, Respondent's address of record with his employer, Missouri Barge Lines), or not, I see no evidence to indicate that Respondent was not afforded every opportunity to preserve his rights in the instant proceedings. The record shows that Respondent received notice of the Complaint and that the ALJ accommodated him by granting an extension after he alleged that the Coast Guard had sent the Complaint to the wrong address. In addition, the record shows that although the Amended Scheduling Order was allegedly posted to the incorrect address, Respondent admits that he received the Order on the day that it was served, December 6, 2002. [Respondent's Motion to Adjourn at 1] Based upon this information, and the fact that the Hearing Officer allowed the case to remain open after Respondent failed to meet his initial filing deadlines, I see no evidence in the record to indicate that Respondent's rights have, in any way, been violated by the instant proceedings and I find Respondent's first argument to be without merit.

II.

*Respondent contends that the ALJ erred by refusing to grant his request for a postponement.*

In effect, Respondent next contends that the ALJ abused his discretion by refusing to grant his request for an adjournment. Although Respondent does not submit any additional evidence to support his assertion on appeal, Respondent seems to contend that the evidence that he presented to the ALJ, including his arguments that his father was in the process of undergoing cancer treatment and needed Respondent's assistance in

reaching the treatment center and the fact that he was unable to contact two unnamed witnesses that would support his defense at the hearing, provided sufficient cause for the ALJ to postpone the Hearing. After a thorough review of the record, I find Respondent's argument, in this regard, to be without merit.

I have long stated that I will only overturn the decision of the ALJ if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2640 (PASSARO), 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). After a review of the evidence that Respondent submitted to support his request for postponement of the hearing and in light of the fact that the scheduling of hearings in Suspension and Revocation proceedings is solely within the discretion of the ALJ, for the reasons discussed below, I do not find that the ALJ erred in denying Respondent's request for a postponement of the hearing. *See* 33 C.F.R. § 20.704.

The record shows that the ALJ fully considered the arguments that Respondent raised to support his request for a postponement/adjournment in denying Respondent's request. With respect to Respondent's assertion that he was the only person who could take his father to his cancer treatments, the ALJ noted that "[i]n most communities there are various volunteer and charitable services available to assist persons such as Respondent's father to be transported to and from radiation therapy" and added that "Respondent has not informed this Judge whether any such service or organization exists or not in the father's geographic area and whether any such alternative transportation is available." [Decision on Respondent's Motion to Continue Hearing at 2] With respect to

Respondent's contention that he could not contact two witnesses necessary to support his defense, the ALJ noted that "Respondent informs me he really has no concrete information on the location or identity of either of these two witnesses" and, based upon that fact, that Respondent's "claim that these witnesses will support his defense theory are speculative." Based upon his assessment of the evidence that Respondent submitted in support of postponement, the ALJ stated as follows:

> I am therefore not persuaded that sufficient and sound reason has been presented which militates in favor of adjournment. I am especially reluctant to adjourn this hearing in light of the clear evidence of the lack of prompt and responsible communication and cooperation emanating from Respondent. On two occasions now the deadline has arrived to face a required answer or appearance in this matter [and now] does Respondent come forth at the very last minute pleading a need for more time.

[Decision on Respondent's Motion to Continue Hearing at 3]

Therefore, the record clearly shows that the ALJ considered the evidence that Respondent submitted in denying Respondent's request for a postponement of the hearing. Respondent has not submitted any evidence to support a conclusion that the ALJ was either arbitrary or capricious or that he abused his discretion in failing to grant Respondent's request for a postponement. Therefore, I find Respondent's second argument to be without merit.

## CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ and the hearing was conducted in accordance with applicable law. Therefore, I find Respondent's bases of appeal to be without merit.

ORDER

The order of the ALJ, dated at Seattle, Washington on December 30, 2002, is AFFIRMED.

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

Signed at Washington, D.C. this 5th day of April, 2004.