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 DOCUMENT	:	NO. 2656
Issued to: MICHAEL W. JORDAN	:	

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

By an "Order Granting Coast Guard's Motion for Default and Order of Revocation" (hereinafter "Default Order") dated March 2, 2004, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Seattle, Washington, revoked Michael W. Jordan's (hereinafter "Respondent") Merchant Mariner Document upon finding proved a charge of misconduct.

The specification found proved alleged that Respondent committed misconduct by refusing to take a pre-employment drug test properly requested by his employer.

PROCEDURAL HISTORY

On August 25, 2003, Coast Guard Marine Safety Office Houston-Galveston, Texas, filed a Complaint, alleging misconduct, against Respondent. The Complaint was properly served on Respondent on August 28, 2003. Although page three of the

Complaint expressly informed Respondent that he was required to file an Answer to the Complaint within 20 days of service, Respondent failed to do so within that period. As a result, on January 27, 2004, the Coast Guard filed a "Request for Certification of Non-Answer" (hereinafter "Request") with the ALJ Docketing Center. Although the Request acknowledged that the Respondent had contacted the Coast Guard at some time after the Complaint was served to deny the allegation, the Request clearly stated that, as of the filing date, Respondent had not filed an Answer to the Complaint. On the same date, the Coast Guard ALJ Docketing Center filed a "Certification of Answer." The "Certification of Answer" confirmed that Respondent had not filed an Answer to the Complaint as of January 27, 2004. Following receipt of the "Certification of Answer", on January 29, 2004, the Coast Guard filed a "Motion for Default Order," (hereinafter "Motion") pursuant to 33 C.F.R. § 20.310. The Coast Guard's Motion requested that the ALJ grant a Default Order in the case because Respondent was properly served with the Complaint and failed to act appropriately thereafter.

The Motion was served on the Respondent on February 4, 2004. Thereafter, on February 18, 2004, the Coast Guard filed a "Return of Service for Default Motion" with the ALJ Docketing Center, which showed that the Motion was properly served on Respondent. The case file shows that Respondent's only response to the Motion was to acknowledge receipt, via telephone call, with the Coast Guard Marine Safety Office responsible for initiating the case, and to state that he planned no further action or comment.

On March 2, 2004, the ALJ issued an Order that granted the Coast Guard's Motion. The Order was premised on the fact that Respondent filed neither an Answer to

the Coast Guard's Complaint, as is required by 33 C.F.R. § 20.308(a), nor a response to the Coast Guard's Motion, as is required by 33 C.F.R. § 20.310(b). Following receipt of the ALJ's Order, on March 31, 2004, the Respondent sent a letter to Marine Safety Office Houston-Galveston, Texas, which stated, among other things, that he wished to "appeal the revocation" of his Merchant Mariner Document. Because Respondent appears *pro se*, that letter, though failing to rise to the level of formality typically expected in these proceedings, has been treated as both the Notice of Appeal and Appeal Brief required by the procedural rules applicable to these proceedings. *See* 33 C.F.R. Part 20, Subpart J, Appeals Procedures.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard Investigating Officer was MSTCS John I. Brown, stationed at Coast Guard Marine Safety Office, Houston-Galveston, Texas.

FACTS

On May 6, 2003, Respondent's Merchant Mariner Document expired. [Respondent's Appellate Brief at 1] Respondent properly applied to renew his mariner document with the Coast Guard Regional Exam Center, thereafter, and the document was renewed and reissued to Respondent on August 13, 2003. [Respondent's Appellate Brief at 1] In the interim, on May 13, 2003, Respondent applied for a Tankerman position at Buffalo Marine. [Respondent's Appellate Brief at 1; Complaint at 2] As part of its customary application process, Buffalo Marine required Respondent to submit to a pre-employment drug test. [Complaint at 2; Respondent's Appellate Brief at 1] Respondent agreed to submit to the required pre-employment drug test. [Complaint at 2] Sometime

immediately thereafter, Respondent was escorted by his potential employer to Concentra Medical Center in Houston, Texas, where he was to provide a urine sample for drug testing. [Complaint at 2] Respondent returned to Buffalo Marine and indicated that he had provided a urine sample for testing. [Complaint at 2] Upon concluding that Respondent properly submitted to pre-employment drug testing, Buffalo Marine hired Respondent for the Tankerman position on May 13, 2003. [Complaint at 2; Respondent's Appellate Brief at 1] On May 16, 2003, Concentra Medical Center informed Buffalo Marine that Respondent did not submit a urine sample for testing, as was initially believed. [Complaint at 2] As a result, Buffalo Marine terminated Respondent's employment on that date, after he had been employed by the Company for approximately three days. [Complaint at 2] After Respondent committed the alleged acts of misconduct, but before suspension and revocation action was initiated by the Coast Guard, Respondent's Merchant Mariner Document was renewed on August 13, 2003. [Respondent's Appellate Brief at 1] The revocation of Respondent's renewed Merchant Mariner Document is the subject of the instant proceeding. [D&O at 3]

BASIS 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 credential. As was stated above, Respondent's letter of appeal, received by the Coast Guard ALJ Docketing Center on April 29, 2004, has been treated as both his Notice of Appeal and his Appellate Brief for the purposes of these proceedings. After a thorough review of Respondent's Letter of Appeal, I have summarized his assignment of error as follows:

I. The ALJ lacked jurisdiction to revoke Respondent's merchant mariner credential in this case because, at the time that the alleged misconduct occurred, Respondent's merchant mariner credential was expired.

OPINION

Coast Guard regulations allow, as occurred in this case, an ALJ to issue a Default Order when a Respondent fails to either file an Answer in a case or to appear at a scheduled hearing or conference. *See* 33 C.F.R. § 20.310. The record shows that both the Complaint and the Coast Guard's Motion—which Respondent was procedurally required to Answer—were properly served on Respondent. Respondent failed, in all respects, to properly respond to those documents. In such circumstances, the Coast Guard's regulations require the ALJ, upon finding Respondent in default, to issue a decision against Respondent. 33 C.F.R. § 20.310(d). Although an ALJ may, "for good cause shown," set aside a Default Order, the record shows that Respondent never contested the validity of the ALJ's Default Order; instead, he elected to Appeal the ALJ's Default Order on jurisdictional grounds. Pursuant to 33 C.F.R. § 20.310(c), "[d]efault by respondent constitutes…an admission of all facts alleged in the complaint and a waiver of his or her right to a hearing on those facts."

Since Respondent does not deny proper service of the Complaint, the Coast Guard's Motion, or the ALJ's Default Order, and because Respondent does not contend—but for the jurisdictional consideration—that the ALJ erred in issuing a Default Order in the case, I do not find that the ALJ erred in finding the misconduct charge proved. Therefore, this decision will focus solely on Respondent's assertion that the Coast Guard lacked jurisdiction to initiate suspension and revocation action against his mariner credential because it was expired at the time the misconduct occurred.

Past Commandant Decisions on Appeal state that jurisdiction is critical to the validity of a proceeding and make clear that when jurisdiction, or proof thereof, is lacking, dismissal is required. *See e.g.*, Appeal Decisions 2104 (BENSON), 2094 (MILLER), 2090 (LONGINO), 2069 (STEELE), and 2025 (ARMSTRONG). Accordingly, if I find Respondent's assertion with respect to jurisdiction to be persuasive, irrespective of his admission of the charged offense, I must grant Respondent's appeal and dismiss the case.

46 U.S.C. § 7703 makes clear that to establish jurisdiction in a misconduct case, the misconduct must be proven to have occurred while the mariner was "acting under the authority" of his merchant mariner credential. A definition of the term "acting under the authority" is found at 46 C.F.R. § 5.57. The regulatory definition includes situations when the holding of a license or document is "[r]equired by an employer as a condition for employment."

The record shows that Respondent applied for a Tankerman position that required that he hold a Merchant Mariner Document with a "Tankerman PIC" Endorsement. [Complaint at 2] As a result of the Default Order, Respondent is deemed to have admitted all factual allegations alleged in the Complaint. Accordingly, there can be no question that Respondent was "acting under the authority" of his document when he failed to submit to a pre-employment drug test that was required as a condition of his employment.

Even though I find sufficient evidence in the record to support a conclusion that Respondent "acted under the authority" of his document when he failed to submit to a requested drug testing, the facts of this case require that I delve deeper into the issue. In

this case, Respondent committed misconduct while his document was expired. As a result, I must now determine the jurisdictional implications of "acting under the authority" of an expired credential.

On this issue, the Coast Guard's regulations are silent. As a result, I will look to prior Commandant Decisions for guidance. I do so because, pursuant to 46 C.F.R. § 5.65, "[t]he decisions of the Commandant in cases of appeal...are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges."

A review of prior Commandant Decisions on Appeal shows that although no case directly addressed the jurisdictional issue presented here, at least two cases affirmed ALJ decisions where jurisdiction was established when a mariner was "acting under the authority" of an expired credential. *See* Appeal Decisions 2475 (BOURDO) (Commandant affirmed ALJ decision to suspend a mariner's (renewed) license for acts of misconduct that occurred while the license was expired) and 1381 (CLINTON) (Commandant affirmed ALJ decision to revoke a mariner's document for actions that occurred after the mariner's license was expired). Of the two decisions, *Bourdo* is of paramount importance here because it is based on factual allegations very similar to those developed in Respondent's case. Bourdo was charged with misconduct for wrongfully serving as the operator of a small passenger vessel while his license—a license required by regulation for such operation—was expired. Although Respondent's license was expired when the misconduct occurred, just as in Respondent's case, that license was renewed thereafter, but before suspension and revocation action was initiated. In the *Bourdo* case, the issue of jurisdiction was not expressly raised on appeal—the

assignments of error focused on alleged inconsistencies in the ALJ's written order and the severity of the sanction. Nonetheless, in affirming the ALJ's decision on other grounds, the Commandant upheld the ALJ's determination that the mariner acted under the authority of an expired credential and that suspension or revocation of the mariner's subsequently issued credential was an appropriate sanction for such action.

Accordingly, I find sufficient precedent to support a conclusion that a mariner may commit misconduct while acting under the authority of an expired mariner credential and that it is appropriate to suspend or revoke a subsequently issued credential when the alleged misconduct is proved. Because the record shows that the ALJ did not err in finding that Respondent acted under the authority of his mariner document when he failed to submit to the drug test requested by Buffalo Marine and because past Commandant Decisions show that a mariner may act under the authority of an expired mariner credential, I do not find Respondent's assignment of error to be persuasive.

Even though prior Commandant Decisions support the notion that a mariner may be found to have acted under the authority of an expired mariner credential, it is worth noting that public policy considerations support this result, as well. The purpose of suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701. This Congressionally mandated purpose would be wholly thwarted if the Coast Guard was barred from initiating suspension and revocation action against mariners who committed improper, illegal, or forbidden acts while awaiting renewal of their Coast Guard issued mariner credentials. In some ways, a mariner that commits misconduct while knowingly acting under the authority of an expired mariner credential has committed a more grievous action than a mariner who commits misconduct while acting

under the authority of a current mariner credential. This is because the mariner who is acting under the authority of the expired credential falsely presents himself as having essential qualifications and certifications.

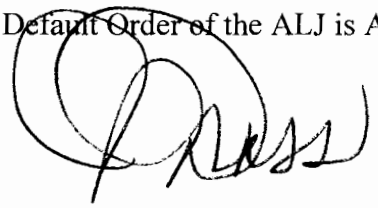
In this case, Respondent committed an act of misconduct while his Merchant Mariner Document was expired. Although Respondent applied for renewal of his Merchant Mariner Document before the misconduct occurred, he now seeks what amounts to a "free pass" for the misconduct—not because he denies committing the misconduct, but rather because his Merchant Mariner Document had not yet been renewed at the time that the misconduct occurred. The result that Respondent seeks is contrary to the public policy considerations discussed above.

CONCLUSION

The actions of the ALJ had a legally sufficient basis and his decision was not arbitrary, capricious, or clearly erroneous. Competent, reliable, probative, and substantial evidence existed to support the findings and Default Order of the ALJ. Therefore, Respondent's basis of appeal is without merit.

ORDER

The Default Order of the ALJ is AFFIRMED.



Signed at Washington, D.C., this 26 day of January 2006.