

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

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Complainant

vs.

RONALD E. MCDONALD

Respondent.

Docket Number: CG S&R 03-0628
CG Case No. 1932204

Order Ruling on Motions and Dismissing Proceeding

Issued: October 6, 2004

Issued by: Jeffie J. Massey, Administrative Law Judge

BACKGROUND FACTS

On November 4, 2003, the Coast Guard initiated an administrative proceeding against Respondent's License Number 894673 by filing a Complaint alleging that Respondent tested positive for cocaine as a result of a pre-employment drug test administered on September 2, 2003. The Coast Guard requested in said Complaint that Respondent's license be revoked.

Respondent was served with a copy of the Complaint on November 7, 2003 (Exhibit IO-01). Although Respondent signed the Answer to the Complaint on November 19, 2003 (Exhibit IO-02), it was not received at the ALJ Docketing Center until July 27, 2004.

On August 4, 2004, the undersigned Administrative Law Judge was assigned to hear this case. On August 9, 2004, the undersigned issued a Scheduling Order, mailing a copy of same to Respondent at his address of record. Said hearing was scheduled for October 1, 2004 at 12:30 p.m.

On October 1, 2004, at the duly appointed time for the hearing, the Respondent failed to appear. On the record, the Coast Guard indicated that they had not heard from the Respondent, had sought an address update from the postal service, and had received a response from the postal service indicating that the Respondent had moved from his last known address and left no forwarding address (Exhibit IO-03).

Prior to the hearing (on September 13, 2004), the Coast Guard filed a Motion to Amend Complaint, seeking to modify the original Complaint by adding a second allegation. Specifically, the Coast Guard added a Misconduct allegation based on the submission of false statements to the Coast Guard on October 31, 1995 and August 12, 2000. The Amended Complaint also requested an order of revocation for Respondent's license. On the record, the Coast Guard submitted a written Motion for Default Order.

RULING ON MOTIONS

At the time and place appointed for the hearing in this proceeding, the undersigned went on the record to allow the Coast Guard to move for a default, if it wished to do so, and to rule on the pending Motion to Amend Complaint. The undersigned received and admitted into the record exhibits relevant to the Motion for Default. A "hearing" was not held, however, as no witnesses were sworn, no testimony

was taken, and the exhibits admitted into the record did not speak to the allegations plead as a basis for the relief requested by Coast Guard.

On the record, the undersigned ruled on the two pending motions presented by Coast Guard. First, with respect to the Motion to Amend Complaint, it was announced on the record that this Motion was Denied. The denial was necessitated by the following facts: First, the added charge of Misconduct is barred as a matter of law, by the provisions of 46 CFR §5.55(a)(3), which bars allegations of misconduct (not otherwise provided for in other regulations) within three years after the commission of the act or offense alleged. The nature of the allegations contained in the proposed misconduct allegation place it within this "other" category. Thus, as a matter of law, the misconduct allegation cannot be brought against the Respondent. Second, the wording of the first allegation omitted a fundamental element for a legally sufficient charge (did not allege that the offensive conduct occurred while the Respondent was acting under the authority of his license), so the Complaint was deficient as a matter of law. In fact, the original Complaint, filed on November 6, 2003, was similarly deficient.

Because the original Complaint was legally insufficient, the Motion for Default Order was denied. A Default Order cannot be based on a legally insufficient Complaint. Unlike the Misconduct allegation, however, the Coast Guard could, if properly plead, bring the first allegation in a new complaint, assuming they properly plead the allegation with all necessary elements.

DISMISSAL OF ORIGINAL COMPLAINT WITHOUT PREJUDICE

As noted above, the Coast Guard's wording of the allegation in the original Complaint was fatally deficient. Accordingly, the original Complaint is dismissed without prejudice to its re-filing.

ORDER

IT IS HEREBY ORDERED that Docket No. 03-0628 be DISMISSED without prejudice to the re-filing of the allegation concerning a positive pre-employment drug test on September 2, 2003.

In compliance with 33 CFR §20.902(a)(5), the undersigned hereby states that any interested person may petition the Commandant to set aside this decision.

Done and dated October 6, 2004
New Orleans, Louisiana


JEFFREY J. MASSEY
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD