UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

MARTIN JAMES JOHNSON

Respondent

Docket Number CG S&R 07-0250
CG Activity No. 2868425

DEFAULT ORDER

Issued: JUNE 19, 2008

Issued by: BRUCE T. SMITH
Administrative Law Judge

Investigating Officer:

CWO Jim Fayard
Marine Safety Unit Morgan City

For Respondent:

Martin James Johnson, Pro se

I. PRELIMINARY STATEMENT

The United States Coast Guard ("Coast Guard" or "Agency") initiated this administrative action seeking revocation of the Merchant Mariner's Document issued to Respondent Martin James Johnson. This action was brought pursuant to the legal authority contained in 46 USC §7703 and was conducted in accordance with the procedural requirements of 5 USC §§551-559, 46 CFR Part 5, and 33 CFR Part 20. In its Amended Complaint, the Coast Guard charged Respondent Johnson with Misconduct, per 46 USC §7703 and 46 CFR §5.27, based on his alleged refusal to take a random drug test. The Amended Complaint is the document upon which the Coast Guard now bases its Motion for Default.

A recitation of the procedural history of this case is important toward a resolution of the Coast Guard's instant Motion.

On May 23, 2007, the Coast Guard issued the original Complaint, which charged Respondent Johnson with Use of or Addiction to the Use of Dangerous Drugs based on his refusal to take a random drug test. Respondent filed an Answer to the initial Complaint on July 5, 2007.

On October 3, 2007, the undersigned Administrative Law Judge ("ALJ") was assigned to this case.

On November 7, 2007, a pre-hearing conference convened with the parties in which Respondent appeared *pro se*. During the pre-hearing conference, the ALJ verified Respondent's contact information and advised Respondent of his right to seek and obtain counsel in this proceeding. Respondent was further advised that obtaining counsel was not a requirement and that he would be permitted to proceed *pro se* if he pleased. However, throughout the conference,

the ALJ called to Respondent's attention that serious consideration should be given to obtaining counsel in light of the magnitude and potential impact the proceeding's outcome could have on Respondent's life. Respondent acknowledged he understood the allegations against him, and the hearing was set for January 10, 2008.

On January 4, 2008, Respondent submitted a letter wherein he requested the hearing be continued until a later date. Respondent explained he initially believed these proceeding would merely involve an informal meeting, for which he would not need the services of an attorney. However, Respondent expressed a desire for additional time to obtain counsel and to prepare his defense. Respondent specifically indicated his preference to have *pro-bono* counsel represent him. The ALJ responded by placing Respondent in contact with attorneys and student interns at the Tulane University Legal Clinic. At that time, the undersigned also continued the hearing until January 18, 2008.

On January 16, 2008, the Coast Guard filed the Amended Complaint, which charged Respondent Johnson with Misconduct, per 46 USC §7703 and 46 CFR §5.27, based on his alleged refusal to take a random drug test. In particular, the Agency alleged that Respondent acted under the authority of his document by serving aboard the motor vessel MISS FLO. The Coast Guard further alleged that Respondent refused a random drug and alcohol test conducted by the Owner/Operator of the vessel.

On March 31, 2007, counsel for Respondent filed a Notice of Appearance. The Notice of Appearance indicated that Respondent would be represented by two attorneys and five student interns at the Tulane University Legal Clinic.

On April 4, 2008, Respondent, through counsel, filed an Answer to the Amended Complaint, in which he denied the factual allegations contained in the Amended Complaint.

Respondent's counsel then conducted pre-hearing discovery, participated in pre-hearing conferences, and conducted extensive pre-trial preparation.

Thereafter, Respondent's counsel asked for, and was granted, a continuance and the hearing date was re-set for April 23-24, 2008 in New Orleans, LA.

The hearing was scheduled to convene at 10:00 a.m. on April 23, 2008 in New Orleans, LA. On the morning of the hearing, Respondent's counsel were present and ready to proceed with their representation of Respondent in this matter. The Respondent, however, failed to appear. The ALJ delayed the start of the hearing by an additional thirty (30) minutes to allow Respondent's counsel the opportunity to locate their client. When the hearing convened on the record, the ALJ inquired as to Respondent's whereabouts. Respondent's counsel noted they managed to contact Respondent's wife who informed them that her husband had showered, dressed, and was prepared to leave for the hearing. No additional information was provided. Immediately thereafter, the ALJ issued an Order to Show Cause from the bench. In turn, Respondent was given twenty (20) days to provide good cause for his failure to appear. The ALJ further instructed Respondent's counsel that if good cause was not shown, the failure to appear would result in the entry of a default order against Respondent pursuant to 33 CFR §§20.310(a) and 20.705(b).

On April 29, 2008, counsel for Respondent filed a Notice to Withdraw Appearance. The Notice contemplated the withdrawal of the two supervisory attorneys and the five student interns at the Tulane Legal Clinic. No further explanation was provided. The undersigned granted counsel's Motion to Withdraw.

On May 20, 2008, Respondent filed a hand-written response to the Order to Show Cause, seven days past the submission deadline. In the response, Respondent stated he was unable to

attend the hearing due to sickness. More specifically, Respondent explained that he feared that a lump in his stomach may be cancerous; however, he alleged that was unable to seek medical attention due to his lack of health insurance. Respondent also claimed that he suffered additional stress and depression, occasioned by his mother's recent death to cancer. Respondent did not provide any medical documentation to substantiate either ailment.

After careful review of the record in its entirety and applicable law in this case, I find Respondent Johnson in default for failing to appear at the suspension and revocation hearing on April 23, 2008.

II. DISCUSSION

Pursuant to the applicable regulations, the ALJ may find a respondent in default upon failure to appear at a suspension and revocation hearing without good cause shown. See 33 CFR§§ 20.705(b) and 20.310(a).

When a mariner fails to appear at a hearing, the ALJ will issue an order to show cause asking why a respondent was not present. If the mariner fails to provide good cause within the time ordered, the ALJ may enter a default against the respondent. See 33 CFR §§ 20.705 and 20.310. In this case, the explanation provided by Respondent Johnson to justify his failure to appear at the hearing is unavailing.

In this case, it is clear from the record that Respondent Johnson was represented by counsel and that he, and they, were formally notified of the time and place of the April 23, 2008 hearing. In addition, the Amended Complaint served on January 16, 2007 advised Respondent of the allegations, the nature of the proceedings, and his rights as a person charged. The

Amended Complaint also contained the address and telephone number for the U.S. Coast Guard Marine Safety Office, Morgan City, LA. Similarly, the initial and Amended Complaints served on the Respondent contained contact information for the ALJ Docketing Center. Likewise, Respondent also possessed the name, address, and telephone number of the Administrative Law Judge.

Once Respondent was properly advised of his rights and served with the charge, it was his responsibility to appear at the hearing. See Appeal Decision 2564 (MANUEL); see also, Appeal Decision 2604 (BARTHOLOMEW). Failing that, it was his responsibility to advise the Judge in advance of his inability to appear. See (MANUEL); see also Appeal Decision 2484 (VETTER); Appeal Decision 2441 (HESTER). In this case, the record demonstrates that Respondent made no effort to either reschedule the hearing or notify his counsel, the Agency, or the ALJ he would be unable to attend the hearing. At no time during the long pendency of this matter did the Respondent ever inform the undersigned of ANY potential medical or psychological impairment which might interfere with his ability to defend himself in these proceedings.

Furthermore, Respondent's attempt to establish good cause was not only submitted late -- but the explanation provided within his letter is was contradicted by his wife's assertions to counsel on the day of the hearing. While Respondent now claims illness and emotional distress kept him from attending the hearing, his wife told counsel (and the court) that the Respondent was showered, dressed and ready to leave his house for the hearing. She made no reference to any medical or psychological condition experienced by Respondent. Moreover, Respondent failed to include a letter from a medical practitioner supporting his allegation of medical

disability. Without the support of an official medical explanation of Respondent's current heath condition, Respondent's excuse for failing to appear is unconvincing.

III. CONCLUSION

A review of the record in this case supports a finding that Respondent Johnson is in default for failing to appear at the suspension and revocation hearing on April 23, 2008. In turn, default by Respondent constitutes an admission of all facts alleged in the Agency's Complaint and a waiver of his right to a hearing on those facts. See 33 CFR§ 20.310(c). In the Amended Complaint, the Agency alleges Respondent was serving as Captain onboard the MISS FLO on January 21, 2007. On that day, the Owner/Operator of the MISS FLO conducted a random drug and alcohol test onboard the vessel but Respondent refused to participate. As such, Respondent actions constitute a refusal to test in Violation of Law or Regulation.

In this case, the U.S. Coast Guard has proposed that Respondent's Merchant Mariner's document be revoked. It is well within the power of the ALJ to order any of a variety of sanctions, including revocation. See 46 CFR §5.569; see also Appeal Decision 2569 (TAYLOR). The Table of Suggested Range of an Appropriate Order, codified in 46 CFR § 5.569(d), provides information and guidance to the ALJ and is intended to promote uniformity in orders rendered. The ALJ is not bound by the Table of an Appropriate Order but, rather, has wide discretion to formulate an appropriate order. See Appeal Decision 2578 (CALLAHAN); see also Appeal Decision 2475 (BOURDO); Appeal Decision 2569 (TAYLOR). While the Table serves as guidance, consideration of mitigation and aggravation factors may justify a lower or higher order than the range suggested in the appropriate order table. See 46 CFR § 5.569(d)

The Table of an Appropriate Order recommends an order of 12 to 24 months suspension for refusal to take a chemical drug test**.** Here, the Coast Guard seeks revocation -- but guidance

from a superior appellate body, the NTSB, in *Coast Guard v. Moore, NTSB Order No. EM-201 (2005*) reveals that revocation is not automatic. There, in an action brought against a mariner for misconduct (refusal to submit to a drug test), the NTSB disapproved of a license revocation order because the Coast Guard neither proved, nor did the ALJ find, specific factors in aggravation sufficient to depart from the guidance provided in 46 CFR Table 5.569. The NTSB clearly explained that the guidance contained in the Table is "for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered." While it is true that 46 CFR 5.569(d) ALSO says: "This table should not affect the fair and impartial adjudication of each case on its individual facts and merits." Therefore, it is not for the undersigned to speculate what those individual aggravating facts and merits are relative to ***this*** Respondent, absent some proof.

In determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: any remedial actions undertaken by the respondent; respondent's prior records; and evidence of mitigation or aggravation. See 46 CFR 5.569(b)(1)-(3).

Here, I am aware of no remedial actions undertaken by the Respondent nor has any evidence been offered regarding Respondent's prior records.

Here, however, I specifically find Respondent's mendacity is a factor in aggravation. I specifically find that his lack of candor in his attempt to justify his absence from the hearing reflects an absence of the trustworthiness so essential to the safe operation of marine vessels, where lives and property are so frequently at risk. I further note that the Respondent abandoned his *pro bono* legal counsel on the day of the hearing, despite their extensive and professional

efforts on his behalf. This abandonment further reflects a lack of trustworthiness in the maritime environment.

Thus, in light the totality of the circumstances surrounding this case: i.e., Respondent's failure to submit to testing, his failure to appear at the hearing and his apparent dishonesty in explaining that absence, outright revocation is deemed appropriate.

The purpose of the mandated drug-testing regulations is to minimize use of intoxicants by merchant mariners and to promote a drug free and safe work environment. See 46 CFR §16.101(a); see also Appeal Decision 2578 (CALLAHAN). This goal would be severely undermined if merchant mariners could refuse a chemical test and face a lesser sanction than if they tested positive for a controlled substance. See (CALLAHAN); see also Appeal Decision 2624 (DOWNS). Consequently, revocation is the appropriate remedy to ensure maritime safety, to guarantee the effectiveness of the drug-testing program, and to prevent potential abuse by Respondent in the future. See (CALLAHAN); see also (DOWNS).

However, pursuant to the applicable regulations governing suspension and revocation proceedings, the ALJ may set aside a finding of default if good cause can be shown. See 33 CFR § 20.310(e). As such, the undersigned ALJ would entertain a motion to set aside this Default Order upon a showing by a competent medial practitioner that Respondent was unable to attend the hearing on April 23, 2008 due to objectively verifiable medical reasons.

WHEREFORE,

IV. ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's Document issued to Respondent Martin J. Johnson is hereby **REVOKED**. Respondent is ordered to immediately surrender his Merchant Mariner's Document to the Investigating Officer at U.S. Coast Guard Marine Safety Office Morgan City, Louisiana.

IT IS HEREBY FURTHER ORDERED that the service of this Decision of the Respondent will serve notice to the Respondent of his right to appeal, the procedure for which is set forth in 33 CFR §§20.1001-20.1003. (Attachment A).

Dated this 19th day of June, 2008, at
New Orleans, LA

HON. BRUCE T. SMITH
Administrative Law Judge
United States Coast Guard

ATTACHMENT A

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS

CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

SUBPART J - APPEALS

33 CFR § 20.1001 General.

(a) Any party may appeal the ALJ' s decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
(b) No party may appeal except on the following issues:
    (1) Whether each finding of fact is supported by substantial evidence.
    (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
    (3) Whether the ALJ abused his or her discretion.
    (4) The ALJ's denial of a motion for disqualification.
(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
(d) The appeal must follow the procedural requirements of this subpart.

33 CFR § 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.
(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then,--
    (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
    (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR Sec. 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
    (1) The appellate brief must set forth the appellant's specific objections to the

decision or ruling. The brief must set forth, in detail, the—

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless--

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Facsimile:

Commander,
USCG MSU Morgan City
Attention: CWO Jim Fayard, IO
800 David Drive, Room 232
Morgan City, LA 70380
(Fax #) 985-380-5379

Andrea Wilkes, Esquire
Tulane Law Clinic
6329 Freret Street, Suite 130
New Orleans, LA 70118
(Fax #) 504-862-8753
(Courtesy Copy)

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Federal Express:

Martin James Johnson
[REDACTED]

Done and dated this ___ of June, 2008 at
Baltimore, Maryland

Lauren Meus
Paralegal Specialist