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

UNITED STATES COAST GUARD
Complainant

vs.

RAYMOND DEAN SIMONES

Respondent

Docket Number 2010-0188
Enforcement Activity No. 3716469

DEFAULT ORDER
Issued: July 08, 2010

By Administrative Law Judge:
Honorable George J. Jordan

Appearances:

LTJG Peter J. Raneri
Sector Portland
For the Coast Guard

RAYMOND DEAN SIMONES, Pro se
For the Respondent

DEFAULT ORDER
AND REASONS GRANTING THE AGENCY'S MOTION FOR DEFAULT

This administrative proceeding concerns the suspension or revocation of the merchant mariner's credential issued to Raymond Simones (Respondent) pursuant to 46 U.S.C. §§ 7701 et seq. and United States Coast Guard (Coast Guard) regulations found at 46 C.F.R. Part 5. This proceeding is conducted under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and the Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard found at 33 C.F.R. Part 20. The Coast Guard initiated this proceeding by filing a Complaint seeking to suspend Respondent's Coast Guard issued Credentials for Respondent's alleged refusal to submit to a chemical test ordered by his employer while acting under the authority of his credential. The Coast Guard alleges this refusal constitutes Misconduct. This matter comes before me for review and approval of the Coast Guard's Motion for Default under 33 CFR § 20.310. [Docket 2010-0188, Docket Item 05]

I. PROCEDURAL HISTORY

1. The Coast Guard initiated an administrative proceeding seeking Revocation of Respondent's Merchant Mariner Document (MMD) by filing a Complaint on April 26, 2010. [Docket Item 01]
2. The Complaint alleged Misconduct and stated as its jurisdictional basis that Respondent is the holder of an MMD and that Respondent acted under the authority of that MMD on February 19, 2010 by serving as a Crew Member aboard the vessel POLAR RANGER, as required by an employer and as a condition of employment.

3. The Complaint included the following factual allegations:

> 1. On February 19th 2010 Respondent was employed by Dunlap Towing Company and was to serve in the capacity of crewmember aboard the towing vessel POLAR RANGER.
>
> 2. Prior to getting underway on February 19th 2010, Respondent was directed to submit to a random urinalysis as directed by his marine employer. After notification of random urinalysis requirement, respondent gathered belongings and departed sight [sic] without submitting to random urinalysis.
>
> 3. Coast Guard alleges that Respondent committed an act of misconduct by refusing to submit to random drug test as directed by his marine employer.

4. On April 30, 2010, the Coast Guard filed a return of service form indicating that Respondent was served with a copy of the Complaint by Certified Mail, Return Receipt on April 30, 2010. [Docket Item 04]
5. The Coast Guard ALJ Docketing Center had not received an answer from Respondent as of June 1, 2010.
6. The Coast Guard filed its Motion for Default with the Coast Guard ALJ Docketing Center on June 1, 2010 [Docket Item 05]
7. On June 9, 2010, the Coast Guard filed a Return of Service form indicating that the Motion for Default was received on June 4, 2010. Someone other than Respondent signed the Return of Service form. [Docket Item 07]
8. The Coast Guard ALJ Docketing Center received no further filings, and on June 29, 2010, this matter was assigned to me for review and disposition. [Docket Item 08]

II. STANDARD OF REVIEW

Because Respondent failed to respond to both the Complaint and the Motion for Default, the threshold question is whether a default has occurred. This process involves reviewing the

record to determine whether: (1) there is been proper service of the Complaint; (2) the period for filing an Answer has expired; and (3) there has been proper service of the Motion for Default.

If a default has occurred, that is not the end of the inquiry. If there was a default, then the judge's role shifts to a review of the pleadings to determine whether: (1) the Coast Guard has jurisdiction in this matter; (2) the Complaint is legally sufficient; and (3) the proposed sanction of revocation is consistent with Coast Guard regulation and policy.

There was no hearing in this matter. Because this case arises from a default action, the facts supporting the jurisdictional and factual allegations are found solely within the confines of the Complaint and the record. The review is therefore limited to the Docket Record. See Appeal Decision 2677 (WALKER) (2008).

III. ANALYSIS

A. Default

The record reveals that the Coast Guard has filed sufficient evidence that the Complaint was properly served on Respondent at Respondent's last known address on April 26, 2010. Under 33 C.F.R. § 20.306, Respondent had until May 24, 2010 to file an Answer to the Complaint. No such Answer was received.

On June 1, 2010, the Coast Guard filed a Motion for Default. The record shows the Motion for Default was delivered on June 4, 2010. Further, the person who signed for the motion was not Respondent. Under 33 C.F.R. § 20.310(b), Respondent had until June 28, 2010 to file a reply to the Motion. No response has been received.

The Complaint and Motion were properly served on Respondent. The Commandant has considered service in default cases several times. In Appeal Decision 2647 (Brown) (2004), the Commandant stated:

> A review of the applicable procedural rules shows that personal service is not required in Coast Guard Suspension and Revocation proceedings. 33 C.F.R. § 20.304 establishes the service requirements applicable to the instant case. Pursuant to 33 C.F.R. Table 20.304(D), a Complaint may be served by either Certified mail with return receipt requested, express courier service that has a receipt capability, or by personal delivery. In addition, 33 C.F.R. Table 20.304(F) states that a Complaint must be sent to "[t]he last known address of the residence…of the person to be served." Since the record shows that the Complaint was properly mailed to Respondent's address of record (by both Certified mail and express courier) and that the complaint was received at that address, service was completed in accordance with Coast Guard regulation.

Under 33 C.F.R. § 20.304(g)(3)(i), service was complete when the document was delivered to Respondent's address and signed for by a person of suitable age and discretion. Here, the Certified Mail Receipt, Return Receipt postcard and the Coast Guard's Certificate of Service establish that the service copy of the Motion for Default was properly addressed, mailed, forwarded and delivered. Thus, receipt by Respondent can be presumed.

Accordingly, Respondent has not timely responded to the Complaint as required by 33 C.F.R. § 20.308(a) or to the Motion for Default as required by 33 C.F.R. § 20.310(b). Therefore the Respondent is found to be in default. Default by respondent constitutes, for purposes of this action, "an admission of all facts alleged in the complaint and a waiver of …his right to a hearing on those facts. 33 C.F.R. § 20.310(c)

B. Jurisdiction

Although this case arises from a default action within which all alleged facts are considered admitted, the burden of establishing jurisdiction nonetheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2677 (WALKER) (2008); see also Appeal Decision 2656 (JORDAN) (2006).

Respondent is charged with Misconduct in this proceeding. The Commandant in Walker stated that:

> 46 U.S.C. § 7703 makes clear that to establish jurisdiction in a misconduct case, the action of misconduct alleged 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. 46 C.F.R. § 5.57(a) states, in relevant part, that a person employed in the service of a vessel is "acting under the authority" of a merchant mariner credential when the holding of the credential is either "[r]equired by law or regulation" or "[r]equired by an employer as a condition for employment."

As in Walker, this case arises from a default action, and the facts supporting the jurisdictional allegation are found solely within the confines of the Coast Guard's Complaint. The Complaint alleged that Respondent acted under the authority of his MMD "on February 19, 2010 by serving as Crew Member aboard the vessel POLAR RANGER as required by an employer as a condition of employment [.]"

The specificity of this allegation distinguishes this case from Walker, in which it was only alleged that Respondent was a "holder" of a credential and was "silent as to how—or even if—Respondent was 'acting under the authority' of his credential when the test was requested." Here, there is an adquate allegation, now deemed admitted, that supports jurisdiction. Accordingly, the record supports jurisdiction, and I so find jurisdiction established.

C. Legal sufficiency of the Complaint

The Complaint alleges that "[p]rior to getting underway on February 19, 2010, Respondent was directed to submit to a random urinalysis as directed by his marine employer. After notification of random urinalysis requirement, respondent gathered belongings and departed sight without submitting to random urinalysis."

Refusal to Submit to Federal Random Drug Test

The Transportation Workplace Chemical Testing rules for maritime workers are the Coast Guard's responsibility and are found in 46 C.F.R. Part 16. Coast Guard rules describe the federally mandated chemical tests for drugs. Included in those tests are the requirements for Random Drug Testing at 46 C.F.R. § 16.230. Part 40 of Title 49, Code of Federal Regulations, contains the Department of Transportation's Procedures for Transportation Workplace Drug and

Alcohol Testing Programs. Section 49 CFR 40.191 is entitled: "What is a refusal to take a DOT drug test, and what are the consequences?" and it describes the various ways an employee can refuse to take a drug test. 46 CFR 40.191(a) includes "[a]s an employee, you have refused to take a drug test if you: (1) Fail to appear for any test … within a reasonable time, as determined by the employer …after being directed to do so by the employer. … [or] (2) Fail to remain at the testing site until the testing process is complete. " Accordingly, the allegations as deemed admitted by Respondent's default that he was directed to submit to a test but instead gathered his belongings and left, are clearly sufficient to support the Misconduct charge in this Complaint.

However, I note that this allegation states "After notification of random urinalysis requirement, Respondent gathered belongings and departed *sight* without submitting to random urinalysis." emphasis added. I assume that the word "sight" was intended to be "site." In any event, these allegations are adequate in spite of this simple misspelling. Minor defects in a complaint's specification do not necessarily demand dismissal of an action. See Appeal Decision 2545 (JARDIN) (1992). See also Appeal Decision 2585 (COULON) (1997) ("The purpose of pleadings is to provide notice and not to make a ritualistic recitation of the details.") Based on the default, the allegation that Respondent refused to submit to a random drug test is deemed admitted and the charge of Misconduct is **PROVED**.

IV. DISCUSSION CONCERING APPROPRIATE ORDER.

Having found Respondent in default, the regulations require that I "issue a decision against" Respondent. 33 C.F.R. § 20.310(d). In issuing a decision, the ALJ must include the disposition of the case including any appropriate order. 33 C.F.R. § 20.902(b) Here, the Coast Guard has proposed an order of twenty-four (24) months outright suspension. Respondent failed to respond to the Complaint so the underlying facts are proven and there is no evidence of any

remedial actions or mitigation by Respondent in the record. The recommended order is consistent with the range of orders suggested in the Table entitled "Suggested Range of an Appropriate Order" in 46 C.F.R. § 5.569. This Table of Appropriate Orders has been considered to be guidance for the ALJ and has been virtually unchanged since 1985. However, the main changes to the Table in 1989 and 2001 both deal with the refusal to take chemical tests.[1]

Longstanding Coast Guard law on the area of appropriate orders states that the order is in the discretion of the ALJ and the ALJ is not bound by the table. Other factors may be considered in fashioning an appropriate order.[2] However, in Coast Guard v. Moore, NTSB Order No. EM-201 (2005), the NTSB disapproved a license revocation order in a refusal to test case because the Coast Guard neither proved, nor did the ALJ find, specific factors in aggravation sufficient to depart from the guidance provided in 46 C.F.R. Table 5.569.

Because this is a default case, the record is limited to the pleadings and there has been no testimony or documentary evidence in aggravation entered into the record that would trigger a greater result than suggested in the Table. Any evidence in aggravation must be found in the facts deemed admitted in the pleadings. Several Appeal Decisions have held that revocation may be considered an appropriate sanction in refusal to test cases. See Appeal Decisions 2578 (CALLAHAN) (1996) and 2624 (DOWNS) (2001). However, both of those cases predate the NTSB decision in Moore. Subsequently, the Commandant has reiterated the Callahan and Downs rationale in Appeal Decision 2666 (SPENCE) (2007) finding revocation appropriate for refusal to submit to a chemical test without any reference to Moore.

However, the NTSB has stated that the Coast Guard's position concerning revocation in refusal cases as set forth in Callahan and Downs is "in conflict with the Coast Guard's

[1] 53 FR 47079, Nov. 21, 1989; and 66 FR 42967, Aug. 16, 2001

[2] An Administrative Law Judge has wide discretion to formulate an order adequate to deter the Appellant's repetition of the violations he was found to have committed. Appeal Decision (2475) (BOURDO)

articulation of a 12-24 month suspension as the "appropriate" sanction, absent mitigating or aggravating factors." The Board stated that "unless and until the Coast Guard changes its regulation, [the Board] will not uphold an upward departure from the policy currently embodied in the Coast Guard's regulation without a clearly articulated explanation of aggravating factors." Moore at 16. Given this record, I cannot provide such an explanation of aggravating factors. The Coast Guard's recommended sanction is consistent with the Moore decision. Accordingly, I find that an outright suspension of twenty-four (24) months is an appropriate sanction adequate to deter the Respondent's repetition of this violation and to deter other mariners from refusing to submit to random drug tests.

ORDER

WHEREFORE:

1. **IT IS HEREBY ORDERED** that the Coast Guard's Motion for a Default Order is **GRANTED**; and
2. **IT IS HEREBY FURTHER ORDERED** that Respondent's Mariner's credential is **SUSPENDED** for **TWENTY-FOUR (24) MONTHS** from the date the credential is surrendered to the Coast Guard; and

The Respondent must immediately surrender his credential to the Coast Guard. If you knowingly continue to use your document after this time, you may be subject to criminal prosecution.

An Administrative Law Judge may set aside this finding of Default under the provisions of 33 C.F.R. § 20.310(e) for good cause shown. You may file a motion to set aside the findings with the ALJ Docketing Center, Baltimore.

Service of this Order upon the parties will serve as notice to the parties of the triggering of their appeal rights as set forth in 33 CFR Subpart J, Section 20.1001. (Attachment A)

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George J. Jordan
US Coast Guard Administrative Law Judge

Date: July 08, 2010