

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

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UNITED STATES COAST GUARD

Complainant

vs.

**David Roy Shakespeare**

Respondent

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Docket Number 2016-0275  
Enforcement Activity No. 5723276

**DEFAULT ORDER**

**Issued: March 22, 2017**

**By Administrative Law Judge: Honorable Michael J. Devine**

**Appearances:**

**LT ISRAEL PARKER, SECTOR JACKSONVILLE**

**and**

**LINEKA QUIJANO, ESQ.**

**Suspension & Revocation National Center of Expertise**

**For the Coast Guard**

**DAVID ROY SHAKESPEARE, *Pro se***

**For the Respondent**

**TABLE OF CONTENTS**

**I. PROCEDURAL BACKGROUND PRIOR TO HEARING..... 3**

**II. HEARING PROCEEDINGS ON JANUARY 12, 2017 ..... 4**

**III. POST HEARING PROCEDURE AND MOTION FOR DEFAULT ORDER ..... 6**

**IV. DISCUSSION ..... 8**

**V. ORDER..... 9**

**VI. SANCTION ..... 9**

**Attachment A ..... 14**

## **I. PROCEDURAL BACKGROUND PRIOR TO HEARING**

The United States Coast Guard (USCG or Coast Guard) initiated this administrative action seeking suspension of the Merchant Mariner's Credential ("MMC") issued to David Roy Shakespeare (Respondent). On October 4, 2016, the undersigned judge conducted the first telephone scheduling conference in this matter with the parties. The Respondent was advised of the general procedural requirements of the regulations contained in 33 C.F.R. Part 20 and of the rights listed on the Complaint, including the exchange of information in discovery and the opportunity for Respondent to obtain *pro bono* counsel.<sup>1</sup> During the conference the parties agreed to complete discovery and exchange witness and exhibit lists, by November 25, 2016, to submit prehearing motions by December 8, 2016 and to a hearing date of January 12, 2017, in Jacksonville, Florida. Copies of the applicable Coast Guard regulations in 33 C.F.R. Part 20 and 46 C.F.R. Part 5 were provided to Respondent with the Scheduling Order issued on October 4, 2016. The Court issued an Order setting the location of the hearing at the United States Courthouse, 300 N. Hogan Street, 6A 6th Floor, Jacksonville, Florida 32202, on October 18, 2016.

Respondent did not submit any list of witness or exhibit lists or motions by the dates noted above. On or about December 16, 2016, a letter from Respondent was received at ALJ Baltimore. In the letter dated December 12, 2016, Respondent requested to continue the hearing for up to two months based on an unclear request for an unidentified witness who he contended was with him while he was ashore in Thailand in January of 2016. Respondent provided no information about the witnesses potential

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<sup>1</sup> The Order of September 21, 2016, scheduling the initial telephone conference had an attachment listing potential *pro bono* attorneys.

testimony and provided no other explanation. In order to consider Respondent's request and obtain the position of the Coast Guard, the ALJ issued an Order on December 16, 2016, to conduct a telephone conference on December 20, 2016, to address Respondent's request. Respondent failed to attend the telephone conference, as reflected in the Court's December 20, 2016 Order. In accordance with 33 C.F.R. § 20.501(f), Respondent's failure to attend the telephone conference waived any objections to matters addressed during the conference. The Coast Guard opposed Respondent's request for continuance because there was no identification of the alleged witness and no indication that any potential testimony would be relevant. The Coast Guard stated that it would not be opposed to Respondent seeking telephone testimony of the unidentified witness at the hearing. The Coast Guard also made an oral motion to hold Respondent in default for failure to attend the telephone conference. On December 20, 2016, the Court issued an Order denying Respondent's request for continuance and denying the Coast Guard's Oral Motion for Default Order.

## **II. HEARING PROCEEDINGS ON JANUARY 12, 2017**

At the beginning of the hearing on January 12, 2017, the Court fully advised Respondent of the procedures for the hearing and his rights during the proceedings. Pursuant to 46 C.F.R. § 5.521(a), at the commencement of the hearing, the judge required Respondent to produce and present his Coast Guard Merchant Mariner's Credentials (MMC) for verification by the Court. After explaining the administrative nature of the case, the Court permitted the Coast Guard to present its case. After the Coast Guard had presented three witnesses and nine exhibits in support of its case-in-chief, Respondent made a request to continue the hearing, asserting he did not realize the hearing would

“take this long.” Transcript (Tr.) page (p.) 106 at 10-20. Respondent also informed the Court he wanted to return to Melbourne, Florida on time for a “family thing at 1600” concerning his granddaughter. Id. The Court denied Respondent’s motion noting Respondent had been on notice of the hearing since its prehearing scheduling Order on October 4, 2016. Respondent had been provided with copies of the regulations, and Respondent had sufficient time to prepare for the hearing. The Coast Guard had prepared its witnesses and evidence to be presented on the scheduled hearing date and had already presented most of its evidence. Id. at p. 107. The Court denied Respondent’s request for a continuance. However, in order to expedite the hearing process, the Court advised Respondent it would allow the evidence to be presented as expeditiously as possible including minimizing any breaks or delays to allow Respondent’s hearing to be completed as soon as possible. Id. at p. 106. The Court then allowed the Coast Guard to continue its case.

After the parties finished their examination of the Coast Guard’s fifth witness, Robert Bennington, Respondent requested a bathroom break and the Court granted a ten-minute recess. Respondent failed to return to the hearing after the ten-minute recess and failed to respond to attempts to contact him. The Coast Guard had only one witness remaining and requested to present that evidence in absentia because Respondent had departed without notice or permission. Although it was not clear what the proper procedure should be for addressing the unauthorized departure of the Respondent, since the Coast Guard had already presented all but one witness the Court allowed the Coast Guard to present the evidence subject to further determination of procedural requirements after the hearing.

The Court then took a one hour recess for lunch to provide Respondent an additional opportunity to reappear or contact the Court or Coast Guard to provide an explanation for his absence. After the lunch recess, Respondent again failed to return or make any contact with Court personnel explaining his absence.

In response to Respondent's absence, the Coast Guard made an oral motion for a default order at the hearing. The Court deferred ruling on the Coast Guard's Motion at that time, but took it under advisement, noting Respondent should have an opportunity to show good cause why he absented himself. *Id.* at 165. After the Coast Guard presented a closing argument, the Court closed the hearing, again noting Respondent had not returned. Although, ordinary procedure provides for return of the mariner's credentials pending a final decision, the Court finds that the Coast Guard presented a *prima facie* case in support of the charged offenses and Respondent's service on a vessel would constitute a danger to safety at sea, therefore the Court directed the Coast Guard to retain custody of Respondent's MMC until a further determination was made. See 46 C.F.R. § 5.521(b).

### **III. POST HEARING PROCEDURE AND MOTION FOR DEFAULT ORDER**

At the time that Respondent departed the hearing without any explanation, the Coast Guard had presented five of its six witnesses and the majority of its exhibits. When Respondent's unexcused absence became apparent, the Coast Guard was prepared to complete the hearing by proceeding *in absentia*. Review of the law shows that the Coast Guard procedural regulations were changed in 1999 and the change eliminated the requirement for conducting hearings *in absentia*.<sup>2</sup> Although nothing in the regulations

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<sup>2</sup> Where a respondent failed to appear previous procedure provided for presentation of evidence in absentia. E.g. Appeal Decision 2422 (GIBBONS) (1986).

prohibit a proceeding in absentia, the regulations include a provision that addresses a failure to appear at a hearing. Respondent was present at the hearing on January 12, 2017, and knew he was required to return from the short recess to complete the hearing. His action in departing without any notice or permission of the Court is a failure to appear at the hearing.

Therefore, on January 17, 2017, the Court issued an Order pursuant to 33 C.F.R. § 20.705, directing Respondent to submit a response in writing showing good cause why he absented himself and failed to return to his Suspension and Revocation hearing on January 12, 2017. On February 15, 2017, the office of ALJ Baltimore received a letter from Respondent dated February 10, 2017<sup>3</sup> in response to the Court's Order.

Respondent's letter indicates that he considered the ten minute recess the Court granted for a bathroom break was barely sufficient for Respondent to use the bathroom; he then left the building during the recess to add money to his parking meter; and when at the parking meter decided to leave to go to Melbourne, Florida, to see his granddaughter and see her baptism.

On February 24, 2016, the Coast Guard filed its response in opposition to Respondent's letter. The Coast Guard argues Respondent did not show good cause for absenting himself from the hearing. Specifically the Coast Guard notes that Respondent acknowledged his wrongful departure by apologizing to the Court for "not seeking a

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<sup>3</sup> The letter did not include a Certificate of Service to indicate Respondent provided a copy to the USCG Investigating Officer, nor to the Hearing Docketing Clerk, as required by the regulations. Notwithstanding the procedural deficiencies in Respondent's filing, the Court incorporated the materials into the record by Order on February 16, 2017, and described the appropriate procedure which should be followed. Although not relevant to his unexcused departure, Respondent also attempted to explain why he was late arriving at the hearing by referencing the Complaint that contained a proposed location at the bankruptcy court. The Court's Order of October 18, 2016, served on Respondent provided notice to Respondent of the location of the hearing at the U.S. Courthouse on 300 N. Hogan Street, Jacksonville, Florida.

more respectable exit procedure.” The Coast Guard also argues Respondent failed to present a meritorious defense and was culpable in his departure.<sup>4</sup>

#### IV. DISCUSSION

Respondent’s hope that his attempt at an excuse would not be considered “lame” is unfounded. Even accepting his contentions as true, the alleged family event (baptism) in Melbourne, Florida is not an emergency. A failure to plan or seek some accommodation in advance of a scheduled hearing is simply inexcusable. Respondent agreed to the hearing date on October 4, 2016, and made no effort to seek a change based on his personal family event. He could have asked to begin the hearing earlier and could have sought permission instead of leaving with no explanation. A litigant that attempts to create a detriment to the opposing party or an error in the record is not entitled to seek relief based in his own unauthorized departure.<sup>5</sup> To this end, to require the Coast Guard to again present the last witness and proffer additional exhibits (either in person or by phone) would again burden the Coast Guard’s resources, attributed solely to Respondent’s intentional action to absent himself from the January 12, 2017, proceeding. Respondent was fully advised of the nature and requirements of the proceedings. Respondent has failed to demonstrate “good cause” for his failure to attend the remainder of the hearing. See Appeal Decision 2682 (Reeves) (2008).

Finally, the Court finds that the Coast Guard had already presented a prima facie case to prove the charged offenses. Respondent’s departure was an intentional act and

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<sup>4</sup> Appeal Decision 2696 (CORSE) (2011) (three factors applied on review in determining whether to set aside a default order issued by an ALJ). As detailed in Corse, a Respondent is not culpable if his action “was excusable conduct or some other compelling reason for relief.” See also U.S. v. Timbers Preserve, Routt County, Colo., 999 F.2d 452, 454 (10th Cir. 1993). A Respondent is considered culpable if he demonstrates a “reckless disregard” for the effect of his actions on the hearing process. Id.

<sup>5</sup> See State v. Rich, 3 A.3d 1210, 1214; (Md 2010). United States v. Hill, 552 F.3d 541, 545 (7th Cir. 2008) (the defendant should not be entitled to receive the benefit of a new trial for a procedural error that he helped to create)



presents an appropriate basis for waiver of further proceedings. His letter in response to the Order to show good cause fails to present any indication of what additional evidence he would have provided for a defense at the hearing. Respondent did not file a witness and exhibit list nor did Respondent offer any exhibits on cross examination of the Coast Guard's witnesses.<sup>6</sup>

Considering Respondent's letter of February 15, 2017, and applicable authority, I find Respondent has not shown good cause as to why he absented himself and failed to appear for further proceedings at the hearing on January 12, 2017, in Jacksonville, Florida. Accordingly, I find he is in **DEFAULT**.

A default constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing. See 33 C.F.R. §§ 20.310; 20.705.

**WHEREFORE,**

#### **V. ORDER**

Upon consideration of the record, I find Respondent is in **DEFAULT**. A default constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing (33 C.F.R. §§ 20.310 and 20.705). Accordingly, the three alleged violations of 46 C.F.R. § 5.27 (misconduct) are **PROVED**. I have carefully considered the Motion for Default, and I have reviewed the record as a whole and find the proposed sanction is appropriate under the provisions of 46 C.F.R. § 5.569.

#### **VI. SANCTION**

Prior to issuing this Order, I carefully reviewed the record and considered all of the evidence presented in this matter beginning with the Amended Complaint and

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<sup>6</sup> E.g. in Appeal Decision 2186 (ASCIONE) (1980) “[w]hen the Appellant voluntarily absented himself from the hearing, he waived his right to present any evidence in his own behalf.”

Answer and note that the proposed sanction of revocation would potentially exceed the suggested range of sanctions contained in Table 5.569 of 46 C.F.R. § 5.569. Respondent was charged with (1) a violation of misconduct for refusing a reasonable cause chemical test in violation of 33 C.F.R. § 95.035 and being intoxicated in violation of 33 C.F.R. § 95.045 (2) a violation of misconduct for refusing a reasonable cause drug test pursuant to 46 C.F.R. § Part 16; and (3) a violation of misconduct for possession of marijuana, a dangerous drug.

The charged violation of misconduct for refusing a drug test indicates a range of sanctions from 12 to 24 months outright suspension. The same would apply for the refusal to complete a chemical test for alcohol. Any use or possession of dangerous drugs may result in revocation. 46 C.F.R. §5.59. Here, the possession of a dangerous drug aboard a vessel may also be considered a serious issue in regard to safety at sea. 46 C.F.R. § 5.5.

In this case, Respondent refused to provide a specimen in connection with reasonable cause drug and alcohol tests. The default also deems Respondent admitted to the possession of a dangerous drug (marijuana).

There was no evidence of Respondent having any previous violations or incidents. This was considered in Respondent's favor and served as mitigating evidence. On the other hand, the refusal to provide specimens in connection with a reasonable cause drug test undermines the purpose of a drug tests and undercuts safety at sea. As such, this was regarded as a significant aggravating factor in determining Respondent's sanction of revocation. See e.g., Appeal Decision 2624 (DOWNS) (2001) (affirming ALJ's Order

revoking MMC based on a misconduct charge for refusal to provide urine specimen in response to a reasonable cause drug test).

The Table of Average Orders is only intended to provide information and guidance, and the Administrative Law Judge is not bound by the range of appropriate orders in 46 C.F.R. § 5.569(d). Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988). Evidence of mitigating or aggravating circumstances may justify departing from the suggested range. 46 C.F.R. § 5.569(d).

The Coast Guard recommended a sanction of revocation arguing that the refusal to test is an aggravating factor and the combination of violations including intoxication aboard the vessel and possession of a dangerous drug aboard a vessel should be met with the most severe penalty allowed.

Respondent's prior record with no history of prior offenses or incidents is not sufficient to overcome the aggravating concerns of having a mariner under the influence of dangerous drugs while acting under the authority of his credentials on a vessel. Applicable authority indicates that evidence in aggravation should be presented to support going beyond the suggested range of sanctions in the table. Commandant v. Moore, NTSB Order No. EM-201 (2005).

After considering all of the evidence in the record including the fact that a mariner refused to provide a specimen for a reasonable cause drug test, and is deemed to have admitted possession of marijuana is sufficient to support revocation. A refusal to test interferes with the drug testing process creates a risk of an impaired mariner continuing to serve in a safety sensitive position. The drug-testing regulations are designed to minimize use of intoxicants by merchant mariners and to promote a drug free and safe

work environment. This goal would be undermined if merchant mariners could refuse to participate in a chemical test and receive a lesser sanction than if they tested positive for a controlled substance and I would order revocation on that basis alone in this case.

Appeal Decision 2624 (Downs) (2001); Appeal Decision 2578 (Callahan) (1996); and Appeal Decision 2625 (Robertson) (2002). The purpose of the regulations for suspension and revocation proceedings is remedial and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 C.F.R. § 5.5. Based on the evidence of record as a whole, I find that the Coast Guard has provided sufficient evidence of aggravating factors to support exceeding the suggested range contained in the table even if the charge of possession of marijuana was not deemed admitted. Therefore, I find that revocation is the appropriate sanction in this case.

**IT IS FURTHER ORDERED**, your Mariner's Credentials MMC 000190204, are hereby **REVOKED**. Respondent produced his MMC to the Court, but absented himself from the hearing without good cause. If Respondent knowingly continues to use his Merchant Mariner credentials, he may be subject to further action including criminal prosecution.

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

**PLEASE TAKE NOTICE**, service of this Default Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 - 20.1004. (Attachment A). **A copy of the transcript of the hearing in this matter may be provided upon request of a party.**

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**Michael J. Devine**  
**U.S. Coast Guard**  
**Administrative Law Judge**

Date: March 22, 2017