

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

UNITED STATES COAST GUARD
Complainant

vs.

DERRICK THOMAS FREMEN

Respondent

Docket Number 2019-0155
Enforcement Activity No. 5764684

ORDER OF DEFAULT

Background

On May 2, 2019, the Coast Guard filed a Complaint against Derrick Thomas Fremem (Respondent). Subsequently, the Coast Guard filed an Amended Complaint on January 28, 2020 and February 18, 2021. In the February 18, 2021 Amended Complaint, the Coast Guard alleges Respondent committed an act of misconduct and also is a security risk that poses a threat to the safety or security of a vessel or structure located within or adjacent to the marine environment. See 46 U.S.C. § 7703(1)(B), (5). On March 27, 2020, Holly Chetta (Respondent's Counsel) entered her notice of appearance. On the same day, Respondent filed an Answer denying the allegations in the January 28, 2020 Amended Complaint.¹ Respondent has not filed a formal answer to the February 18, 2021 Amended Complaint.

On March 31, 2020, the Office of the Chief Administrative Law Judge assigned this case to the undersigned Administrative Law Judge (ALJ). On May 14, 2020, the undersigned issued a Scheduling Order setting the case for hearing on August 26, 2020 and August 27, 2020 in New Orleans, LA. On July 28, 2020, the parties filed a Joint Motion for Pre-Hearing Conference

asking the undersigned to hold a pre-hearing conference to discuss the dangers posed by an in-person hearing due to the COVID-19 pandemic. On July 31, 2020, the undersigned issued an Order continuing the hearing due to the dangers posed by the COVID-19 pandemic.

On February 18, 2021, Respondent's Counsel tendered her statement of resignation based in part on the fact "[c]ommunication with this client has been practically impossible"² On March 3, 2021, the undersigned convened a prehearing conference where Respondent represented himself *pro se*. During the prehearing conference, both parties agreed to have all pleadings served on them electronically and to hold a Zoom hearing on April 20, 2021. Further, Respondent stated he has the technology available for a Zoom hearing. Thus, the undersigned scheduled the case for hearing and set deadlines for motions and discovery.³ Further, the undersigned instructed Respondent to regularly check his spam mail for pleadings filed in this case.

On March 17, 2021, the Coast Guard filed a Motion to Compel. The same day, Respondent filed a Request for an Extension of the Hearing Date.⁴ On March 19, 2021, the undersigned issued a Scheduling Order setting a pre-hearing teleconference for March 25, 2021, at 10:30 a.m. Central Time. The Scheduling Order was sent to Respondent's email address of [REDACTED]. The purpose of the pre-hearing conference was to discuss the Coast Guard's Motion to Compel, Respondent's Request for an Extension of the Hearing Date, and any other pertinent issues. On March 25, 2021, the Coast Guard's representatives were present and prepared to proceed with the pre-hearing conference. However, Respondent was not present.

² Respondent's Counsel made this statement in a February 18, 2021 email that had her resignation attached.

³ On March 4, 2021, the undersigned issued a Pre-Hearing Conference Memorandum and Order memorializing the pre-hearing conference, setting a hearing date, and establishing deadlines for discovery and motions.

⁴ On March 17, 2021, Respondent sent an email to the Coast Guard stating "I wish to request a 30 day continuance of the scheduled USCG hearing with the Administrative Law Judge." The email did not include an explanation of why an extension was necessary. The undersigned considered this email to be a Request for Extension of the Hearing Date.

On March 29, 2021, the undersigned issued an Order Denying Respondent's Request for An Extension of the Hearing Date. The same day, the undersigned issued an Order Granting the Coast Guard's Motion to Compel. The Order instructed Respondent to file a witness and exhibit list by April 5, 2021. To date, Respondent has not complied with this Order.⁵

On April 13, 2021, the undersigned convened a Zoom pre-hearing conference. The Coast Guard's representatives were present and prepared to proceed with the Zoom pre-hearing conference. However, Respondent did not appear. Previously, on March 4, 2021, the undersigned issued a Pre-Hearing Conference Scheduling Order setting the Zoom pre-hearing conference for April 13, 2021, at 10:00 a.m. Central Time. The Order included the Zoom link to join the conference and was sent electronically to Respondent's email address of [REDACTED]. The purpose of this pre-hearing conference was to familiarize all the parties with the Zoom hearing forum and discuss any pertinent issues in this case, including Respondent's continued failure to submit a witness and exhibit list.

On April 13, 2021, the undersigned issued an Order to Show Cause instructing Respondent to provide good cause for his failure to appear at the pre-hearing conferences on March 25, 2021 and April 13, 2021. The Order gave Respondent until May 13, 2021 to provide good cause. Additionally, the Order stated the Zoom hearing scheduled for April 20, 2021 is continued until further notice. The Order to Show Cause was sent to Respondent's email address of [REDACTED]. On April 14, 2021, Respondent responded by sending an email to the undersigned's staff stating he was not aware there were any pre-hearing conferences scheduled prior to the April 20, 2021 Zoom hearing. Respondent sent this email from his address, [REDACTED].

⁵ The undersigned notes Respondent sent an email to his staff on March 30, 2021 asking how to submit his evidence. On March 31, 2021, the undersigned's staff replied to the email and informed Respondent he could submit his evidence as email attachments. Additionally, on April 2, 2021, the Coast Guard sent Respondent an email stating they would accept paper copies of his evidence sent via regular mail.

On April 13, 2021, the Coast Guard filed a Motion for Default Order based on Respondent's failure to appear at the March 25, 2021 telephonic pre-hearing conference and April 13, 2021, Zoom pre-hearing conference. On April 13, 2021, the Coast Guard sent the Motion for Default to Respondent's email address, [REDACTED]. The Coast Guard also sent the Motion for Default to Respondent via express courier service. As of this date, Respondent has not filed a response to the Motion for Default Order.

Discussion

Pursuant to 33 C.F.R. § 20.310 and 33 C.F.R. § 20.705, an ALJ can find a respondent in default for failing to file an answer to a complaint or failing to appear at a pre-hearing conference. Title 33 C.F.R. § 20.310(a) states "[t]he ALJ may find a respondent in default upon failure to file a timely answer to the complaint or, after motion, upon failure to appear at a conference or hearing without good cause shown." Additionally, 33 C.F.R. § 20.705 states, in pertinent part, "[t]he ALJ may enter a default under § 20.310 against a respondent threatening to fail, or having failed, to appear at a hearing unless . . . 30 days or less after an order to show good cause, the respondent shows good cause for his or her failure to appear."

The burden is upon Respondent to establish good cause for his failure to appear. See 33 C.F.R. § 20.705. Good cause is not defined in the applicable regulations, but it is a flexible term, dependent upon the circumstances of an individual case, and lies directly within the sound discretion of the ALJ to determine. See, e.g., Appeal Decision 2700 THOMAS (2012); Appeal Decision 2696 CORSE (2011).

Respondent asserts the undersigned should not find him in default because he was not aware of the pre-hearing conferences scheduled for March 25, 2021 and April 13, 2021. The undersigned does not find this assertion persuasive. Scheduling Orders for both of these pre-hearing conferences were sent to Respondent's email address of [REDACTED].

█ he has used to file his own pleadings in this case. Given the fact these Orders were sent to Respondent's active email address, the undersigned does not find his assertion persuasive.

Thus, after careful consideration of the facts and circumstances of this case, the undersigned finds Respondent failed to demonstrate good cause for his failure to participate in the pre-hearing conferences scheduled for March 25, 2021 and April 13, 2021. The March 25, 2021 pre-hearing conference was scheduled as a normal part of these proceedings in response to the pleadings filed by the parties. However, Respondent did not participate. Further, despite Respondent's failure to appear, the undersigned held a subsequent pre-hearing conference on April 13, 2021 to discuss the issues in this case and familiarize the parties with the Zoom hearing forum. Nevertheless, Respondent continued his unwillingness to participate in this proceeding by again failing to attend. Respondent's failure to attend these pre-hearing conferences provides good cause for default. See 33 C.F.R. § 20.310(a); 33 C.F.R. § 20.705. Additionally, the undersigned notes Respondent has further demonstrated his unwillingness to participate in this proceeding by failing to provide a witness and exhibit list in direct violation of the undersigned's Order Granting Coast Guard's Motion to Compel. Accordingly, the undersigned finds Respondent in **DEFAULT** pursuant to 33 C.F.R. § 20.310(a) and 33 C.F.R. § 20.705.

Default constitutes an admission of all facts alleged in the February 18, 2021 Amended Complaint and a waiver of the right to a hearing. See 33 C.F.R. § 20.310(c); Appeal Decision 2682 (REEVES) (2008).⁶ Further, "[u]pon finding a respondent in default, the ALJ shall issue a decision against her or him." 33 C.F.R. § 20.310(c). Based on the facts alleged in the Amended Complaint, the undersigned finds the charge of misconduct and the charge of being a security risk that poses a threat to the safety or security of a vessel or structure located within or adjacent to the marine environment **PROVED**. See 46 U.S.C. § 7703(1)(B), (5). Additionally, the

undersigned finds the facts alleged in Amended Complaint, including all aggravating facts, sufficient to warrant the suggested sanction of a **REVOCATION**. See 46 C.F.R. § 5.569.

ORDER

WHEREFORE,

Upon consideration of the record, the undersigned finds Respondent in **DEFAULT**.

IT IS HEREBY ORDERED, in accordance with 33 C.F.R. § 20.310, the undersigned finds the allegations set forth in the February 18, 2021 Amended Complaint **PROVED**.

IT IS FURTHER ORDERED, all of Respondent's Coast Guard issued credentials, including his Merchant Mariner Credential, are **REVOKED**. Respondent shall immediately cease using all Coast Guard issued credentials.


IT IS FURTHER ORDERED, Respondent must immediately deliver by mail, courier service, or in person, his Merchant Mariner Credential and any other Coast Guard issued credentials, licenses, certificates, or documents to USCG Sector New Orleans, 200 Hendee Street, New Orleans, LA 70114-1402.

IT IS FURTHER ORDERED, pursuant to 33 C.F.R. § 20.310(e), for good cause shown, an ALJ may set aside a finding of default. A motion to set aside a finding of default may be filed with the ALJ Docketing Center in Baltimore. The motion may be sent to U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022.

PLEASE TAKE NOTICE that service of this Default Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001-20.1004.

⁶ The undersigned notes that on April 20, 2021 Respondent sent an email to the undersigned's staff stating that (despite the fact the zoom hearing was continued) he had been present and prepared to proceed via a zoom hearing

SO ORDERED.



Brian J. Curley
US Coast Guard
Administrative Law Judge

Date:

earlier that day.

ATTACHMENT A

33 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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.

33 C.F.R. § 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.