

**UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD**

UNITED STATES COAST GUARD,

Complainant,

vs.

DAVID BERNIE DUNCAN

Respondent.

**Docket Number: 2023-0422
Enforcement Activity Number: 7826378**

DEFAULT ORDER

This matter comes before me on the United States Coast Guard’s (Coast Guard) Motion for Default Judgment (Motion), filed on January 10, 2024. As of the date of this order, David Bernie Duncan (Respondent) has not filed an answer to the Complaint or responded to the Motion. Upon review of the record and pertinent authority, the Coast Guard’s Motion is **GRANTED**.

I. BACKGROUND

The Coast Guard initiated this case as an expedited hearing (also referred to as “temporary suspension” proceedings) under 46 U.S.C. 7702(d) and 33 C.F.R. Part 20, Subpart L. The Coast Guard served Respondent with a complaint titled, “Complaint and Affidavit – Temporary Suspension” on November 21, 2023, and filed the Complaint on December 1, 2023, ten days after service.

I held a telephonic pre-hearing conference (PHC) on December 6, 2023, to address several procedural matters. During the conference, Respondent stated he was incarcerated at the

Monroe County Detention Center (Detention Center) but could receive correspondence at the Detention Center until his release. Furthermore, because he indicated he did not have a permanent address, Respondent agreed to accept service by e-mail upon his release. In my December 15, 2023 Order, I directed Respondent to “notify the Coast Guard and my chambers immediately upon his release from the Monroe County Detention Center, at which time, Respondent agrees to electronic service at the e-mail address on file for Respondent.” For reasons set forth in my December 15, 2023 Order, I discontinued the expedited proceedings, directed the parties to proceed under the standard hearing procedures set forth in 33 C.F.R. Part 20, and ordered Respondent to file an answer to the Complaint by January 5, 2024.

On January 10, 2024, the Coast Guard filed its Motion, indicating in the Certificate of Service it served the Motion on Respondent by e-mail. Having received no communication from Respondent since the December 6, 2023 PHC regarding his release from the Detention Center, I issued an Order on January 11, 2024, directing the Coast Guard to file proof of service of the Motion, showing either that it served Respondent at the Detention Center, or that the Coast Guard received notice of Respondent’s release from the Detention Center. On January 12, 2024, the Coast Guard filed an Amended Certificate of Service accompanied by supporting documentation showing Respondent was released from the Detention Center on December 18, 2023. As of the date of issuance of this Order, Respondent has not filed an answer to the Complaint or a response to the Motion.

II. DISCUSSION

In the Motion, the Coast Guard requests an order finding Respondent in default for his failure to answer the Complaint and requests I impose the sanction of revocation of his Merchant Mariner Credential (MMC or credential). I address the Coast Guard’s requests, below.

A. Default by Respondent for Failure to Answer the Complaint

An 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." 33 C.F.R. § 20.310(a). Default constitutes an admission of all facts alleged in a complaint and a waiver of the respondent's right to a hearing on those facts. 33 C.F.R. § 20.310(c); Appeal Decision 2700 (THOMAS), 2012 WL 3135355 at *3.

In this case, pursuant to my December 15, 2023 Order, Respondent was required to file an answer on or before January 5, 2024. Respondent failed to file an answer and has made no attempt to provide good cause for not doing so. Furthermore, on January 10, 2024, the Coast Guard properly served the Motion on Respondent by e-mail, the method he agreed to use upon his release from incarceration. To date, Respondent has failed to file a response. 33 C.F.R. § 20.310(b) (“[t]he respondent alleged to be in default shall file a reply to the motion 20 days or less after service of the motion.”). Accordingly, I find Respondent in default, and his failure to file an answer constitutes an admission of all jurisdictional and factual allegations in the Complaint and a waiver of the right to a hearing. 33 C.F.R. § 20.310(c).

B. Charges Alleged in the Complaint

Regarding the substance of the allegations in the Complaint, the Coast Guard charged Respondent with three violations: (1) conviction of an offense described in 49 U.S.C. § 30304(a)(3)(A), pursuant to 46 U.S.C. § 7703(3); (2) negligence while acting under the authority of his MMC, pursuant to 46 U.S.C. § 7703(1)(B); and (3) violation of law or regulation while acting under the authority of his MMC, pursuant to 46 U.S.C. § 7703(1)(A).

As discussed above, I consider all allegations in the Complaint to be admitted by Respondent. Regarding the charge of conviction of an offense described in 49 U.S.C. §

30304(a)(3)(A), Respondent was convicted by a Florida state court on December 14, 2022, of driving under the influence, pursuant to Fla. Stat. § 316.193(1) (2020). The Florida statute under which Respondent was convicted is an offense described by 49 U.S.C. § 30304(a)(3)(A). As Respondent held a credential and received the conviction within three years of the initiation of this case, I find the charge **PROVED**. The Coast Guard also alleged, in aggravation, that Respondent was subsequently convicted by a Florida state court on July 17, 2023, of driving on a suspended license in violation of Fla. Stat. § 322.34(2)(c) (2021), a third-degree felony offense. See 33 C.F.R. § 20.1315(a)(4).

Regarding the charge involving negligence, on November 9, 2023, Respondent had direction and control of the auxiliary sail vessel REEF ROAMER (ON 986487) in Florida Bay, when at approximately 1230 EST, he allided with a private dock and boat lift. The Complaint additionally established that Respondent, at the time of the allision, held and was acting under the authority of his credential by serving as the Master of the REEF ROAMER. Respondent's allision with a stationary object raises the presumption of negligence. See 46 C.F.R. § 5.29; Appeal Decision 2639 (HAUCK), 2003 WL 1891873, at *4, *9. Respondent has provided no information to rebut the presumption. Accordingly, I find the charge **PROVED**.

Finally, regarding the charge of violation of law or regulation, pursuant to 46 C.F.R. §176.100(b), "each vessel inspected and certificated under the provisions of this subchapter must, when any passengers are aboard during the tenure of the certificate, be in full compliance with the terms of the certificate." The REEF ROAMER's Certificate of Inspection (COI) required the master operating the vessel to hold an Auxiliary Sail endorsement. Although Respondent held a credential and operated the REEF ROAMER as the master on November 9, 2023, he did not hold an Auxiliary Sail endorsement on his credential at that time. Accordingly,

Respondent was not in compliance with the terms of the COI and violated 46 C.F.R.

§176.100(b). I find the charge **PROVED**.

C. Selection of Appropriate Sanction

In Coast Guard Suspension and Revocation (S&R) cases, the authority to impose a sanction lies exclusively with the Administrative Law Judge (ALJ). Appeal Decision 2730 (BLAKE), 2020 WL 4516474 at *6 (citing Appeal Decision 2680 (MCCARTHY), 2008 WL 5765849 at *1 (citing 46 C.F.R. § 5.569(a))); Appeal Decision 1998 (LEBOUEF), 1974 WL 174990 at *2 (aff'd, NTSB Order No. EM-205, 2008 WL 4898624). Other than for offenses which carry a mandatory penalty, the ALJ may impose an admonition, suspension with or without probation, or revocation. 46 C.F.R. § 5.567(a). Ultimately, the sanction will only be “modified on appeal if it is clearly excessive or an abuse of discretion.” Appeal Decision 2730 (BLAKE), *supra*.

As noted above, the Coast Guard proposes revocation as the appropriate order. I have considered the entire record, the factors set forth in 46 C.F.R. § 5.569(b), and the suggested range of appropriate orders in Table 5.569. See 46 C.F.R. § 5.569(d). I also find Respondent’s third-degree felony conviction for driving on a suspended license, which occurred after his conviction for driving under the influence, to be a matter in aggravation that raises significant safety concerns. 33 C.F.R. § 20.1315(a)(4). Together, Respondent’s actions call into question his suitability to be entrusted with the duties and responsibilities required of a credentialed mariner and his ability to conduct himself in a manner that promotes safety at sea. Thus, I find the facts and matter in aggravation alleged in the Complaint sufficient to warrant the sanction of **REVOCATION**.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, the Coast Guard's Motion for Default Judgment is **GRANTED**.

IT IS FURTHER ORDERED, in accordance with 33 C.F.R. § 20.310, I find the charges alleged in the Complaint **PROVED**.

IT IS FURTHER ORDERED, Respondent's MMC and all other Coast Guard-issued credentials are **REVOKED**.

IT IS FURTHER ORDERED, 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, with a copy sent to the Coast Guard Investigating Officer and Attorney of record. The motion may be sent to the U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21202-4022. See 33 C.F.R. § 20.310(e).

PLEASE TAKE NOTICE of the appeal rights set forth in 33 C.F.R. § 20.1001-20.1004 (**Attachment A**).

Done and dated February 2, 2024
Baltimore, Maryland



**HON. LINEKA N. QUIJANO
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD**

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.