

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

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
	:	
MERCHANT MARINER DOCUMENT	:	NO: 2677
	:	
	:	
	:	
	:	
	:	
	:	
<u>Issued to: CHARLES EUGENE WALKER</u>	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter “D&O”) dated January 30, 2007, the Chief Administrative Law Judge (hereinafter “CALJ”) of the United States Coast Guard granted the Coast Guard’s Motion for Default and ordered the suspension of the Merchant Mariner Document of Mr. Charles Eugene Walker (hereinafter “Respondent”) upon finding that Respondent failed to answer a Complaint properly filed by the Coast Guard.

PROCEDURAL HISTORY

On November 1, 2006, the United States Coast Guard (hereinafter “Coast Guard”) issued a Complaint against Respondent’s merchant mariner document alleging a single specification of *misconduct*. [Complaint at 1] Pursuant to 46 U.S.C. § 7704(1)(b), the Coast Guard sought the outright suspension of Respondent’s merchant mariner license for a period of 15 days, followed by a probationary suspension period. [*Id.* at 2] The Complaint and specification alleged that Respondent, while the *holder* of a merchant

mariner document, was directed by his employer to take a “Reasonable Suspicion DOT alcohol test in accordance with 46 CFR 16 [sic]” and that “Respondent’s test results were positive for alcohol, in violation of 46 CFR 16 [sic].” [Complaint at 2] Respondent failed to answer the Complaint. On December 13, 2006, the Coast Guard filed a Motion for Default Order which the CALJ granted on January 30, 2007. In granting the Default Order, the CALJ imposed the sanction of suspension and probation sought by the Coast Guard. [D&O at 3]

On February 28, 2007, Respondent, through counsel, filed a Notice of Appeal in the matter. After receiving two extensions of his filing deadline, Respondent timely submitted his appellate brief in the matter on May 17, 2007. The Coast Guard filed a Reply Brief on June 22, 2007. Therefore, this appeal is properly before me.

APPEARANCE: John P. Calmes, Jr., Attorney for Respondent, 2335 Government Street, Baton Rouge, Louisiana. The Coast Guard was represented by LCDR Melissa Harper and Petty Officer Jeremiah Huss, USCG, Sector New Orleans, Louisiana.

#### FACTS

Because this case evolved from the issuance of a Default Order, no factual information was developed in the record. As such, the only facts pertinent to this decision are those stated in the Coast Guard’s Complaint, which, pursuant to Coast Guard regulation, are considered admitted by Respondent at this time. *See* 33 C.F.R. § 20.310(c).

According to the Coast Guard’s Complaint, Kirby Corporation, Respondent’s employer, directed Respondent to take a “Reasonable Suspicion DOT alcohol test in

accordance with 46 CFR 16 [sic]” and “Respondent’s test results were positive for alcohol, in violation of 46 CFR 16 [sic].” [Complaint at 2]

### BASES OF APPEAL

This appeal has been taken from the order of the ALJ finding Respondent to be in default in a proceeding and ordering the suspension of Respondent’s Merchant Mariner Document. A thorough review of Respondent’s appellate filings reveals two issues:

- I. *Whether the record contains substantial evidence to support the ALJ’s conclusion that “substantial evidence was introduced to show that respondent was actually on call at the time he was ordered to report for service,” and*
- II. *Whether the record contains “substantial evidence to show the validity and reliability of the alleged breath alcohol test administered to Respondent.”*

### OPINION

#### I.

*The record does not contain substantial evidence to support the ALJ’s conclusion that “substantial evidence was introduced to show that respondent was actually on call at the time he was ordered to report for service.”*

Though perhaps not artfully stated, on review it is clear that in asserting that the CALJ erred in finding substantial evidence to support a conclusion that Respondent was “actually on call at the time he was ordered to report for service,” Respondent is raising the issue of jurisdiction. Past Commandant Decisions on Appeal state that jurisdiction is critical to the validity of a proceeding and make clear that when jurisdiction, or proof thereof, is lacking, dismissal is required. *See e.g., Appeal Decisions 2104 (BENSON), 2094 (MILLER), 2090 (LONGINO), 2069 (STEELE), and 2025 (ARMSTRONG).*

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), *see also* Appeal Decision 2656 (JORDAN) (stating that, irrespective of Respondent’s admission of charged offense, appeal must be granted where jurisdiction is not established). Therefore, if proof of jurisdiction is lacking in this case, Respondent’s appeal must be granted.

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.”

Because this case arises from a default action, the facts supporting the jurisdictional allegation—and found proved by the CALJ—are found solely within the confines of the Coast Guard’s Complaint. A review of the jurisdictional allegations contained within that Complaint shows that the Coast Guard simply alleged that Respondent was the holder of a merchant mariner credential at the time of the alcohol test. [Complaint at 1] Although the Coast Guard’s factual allegations do allege that Respondent’s employer instructed him to take the alcohol test at issue here, the Complaint is silent as to how—or even if—Respondent was “acting under the authority” of his credential when the test was requested. Lacking from both the Complaint and the record, itself, are any indications that Respondent’s merchant mariner credential was required either by law or regulation or as a condition of Respondent’s employment.

Therefore, because evidence that Respondent was “acting under the authority” of his credential at the time of the alleged misconduct is absent from the record, and because the factual allegations presented within the Coast Guard’s Complaint cannot be relied upon to form the basis of a charge against Respondent’s merchant mariner document, dismissal of the matter is mandated.

## II.

*The ALJ erred in finding that the record contained “substantial evidence to show the validity and reliability of the alleged breath alcohol test administered to Respondent.”*

Given my determination that the dismissal of this case is warranted due to the Coast Guard’s failure to establish jurisdiction, discussion of Respondent’s second base of appeal is unwarranted.

## CONCLUSION

The Coast Guard’s Complaint failed to properly include sufficient jurisdictional allegations to allow the CALJ to enter a Default Order against Respondent. As a consequence, the decision of the CALJ was clearly erroneous and not based on competent, substantial, reliable, or probative evidence.

## ORDER

The order of the CALJ, dated at Washington, DC, on January 30, 2007, is VACATED and the Complaint against Respondent is DISMISSED.

/S/

Signed at Washington, D.C. this 20th day of March, 2008.

Therefore, because evidence that Respondent was "acting under the authority" of his credential at the time of the alleged misconduct is absent from the record, and because the factual allegations presented within the Coast Guard's Complaint cannot be relied upon to form the basis of a charge against Respondent's merchant mariner document, dismissal of the matter is mandated.

## II.

*The ALJ erred in finding that the record contained "substantial evidence to show the validity and reliability of the alleged breath alcohol test administered to Respondent."*

Given my determination that the dismissal of this case is warranted due to the Coast Guard's failure to establish jurisdiction, discussion of Respondent's second base of appeal is unwarranted.

## CONCLUSION

The Coast Guard's Complaint failed to properly include sufficient jurisdictional allegations to allow the CALJ to enter a Default Order against Respondent. As a consequence, the decision of the CALJ was clearly erroneous and not based on competent, substantial, reliable, or probative evidence.

## ORDER

The order of the CALJ, dated at Washington, DC, on January 30, 2007, is VACATED and the Complaint against Respondent is DISMISSED.

  
V. S. CREA  
Vice Admiral, U.S. Coast Guard  
Acting Commandant

Signed at Washington, D.C. this 20<sup>th</sup> day of March, 2008.