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

UNITED STATES OF AMERI CA UNITED STATES COAST GUARD	:	DECISION OF THE
vs.	:	VICE COMMANDANT
	:	ON APPEAL
MERCHANT MARINER DOCUMENT	:	NO. 2647
Issued to: JOSEPH RICARDO BROWN	:	

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

By a Decision and Order (D&O) dated May 20, 2003, an Administrative Law Judge (ALJ) of the United States Coast Guard at New Orleans, Louisiana, revoked Joseph Ricardo Brown's (Respondent's) merchant mariner document upon finding proved a charge of *use of or addiction to the use of dangerous drugs*.

The specification found proved alleged that Respondent tested positive for marijuana metabolite as part of a random drug screening conducted on November 24, 2002.

PROCEDURAL HISTORY

The instant case is the result of a Default Order issued by the ALJ. Therefore, it will be helpful to discuss the procedural progression of the case. The case progressed as follows:

- **January 30, 2003—**the Coast Guard filed a Complaint against Respondent's merchant mariner document alleging, due to a positive test result, that Respondent had used or had been addicted to the use of dangerous drugs. [Complaint at 2]

- **February 3, 2003—**Complaint received at Respondent's address of record.
- **February 24, 2003**[1]—Respondent's Answer due.
- **March 31, 2003**—the Coast Guard files a Motion for Default Order. [D&O at 1; Motion for Default Order at 1-2].
- **April 23, 2003—**Respondent's counsel files a "Notice of Appearance" in the matter, via facsimile, with the ALJ Docketing Center. [Respondent's Notice of Appearance]
- **April 29, 2003**—Respondent's counsel files an "Amended Notice of Appearance", indicating the full style of her mailing address, via First Class Mail with the ALJ Docketing Center. [Respondent's Amended Notice of Appearance]
- **May 2, 2003**--"Amended Notice of Appearance" received by the ALJ Docketing Center [*See* ALJ Docketing Center Date received stamp on Amended Notice of Appearance]
- **May 20, 2003—** Default Order issued by ALJ. [D&O at 1-2]
- **June 18, 2003—**Respondent files a timely "Notice of Appeal", via facsimile, with the ALJ Docketing Center. [Respondent's Notice of Appeal and Cover Letter at 1]
- **July 19, 2003—**Respondent perfects his appeal by filing an appellate brief with the ALJ Docketing Center.

Accordingly, this appeal is properly before me.

APPEARANCE: Hayden and Milliken, P.A. (Patty Spivey, Esq.) for Respondent, 101 George King Boulevard, Suite 5, Cape Canaveral, Florida 32920.

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued merchant mariner document.

[1] Pursuant to 33 C.F.R. § 20.306(a)(1), the first day of the period—the date that Respondent received the complaint (in this case February 3, 2003)—is not counted in the computation of the 20-day period. Therefore, Respondent's Answer was required to be submitted on or before February 23, 2003. However, because the last day of the 20-day period fell on a Sunday, pursuant to 33 C.F.R. § 20.306(a)(2), the period was extended to the next business day, Monday, February 24, 2004, and his Answer was required to be submitted by that date.

On November 24, 2002, Respondent submitted to a random drug test. [Complaint at 2] Respondent provided a urine sample to Ms. Shelly A. Clark of Quality Drug Screen, 125 Sylvan St., La Porte, Texas. [Complaint at 2] In accordance with customary procedure, Respondent's urine specimen was provided a unique ID number and Respondent signed a Federal Drug Testing Custody and Control Form. [Complaint at 2] Respondent's urine specimen was tested at Greystone Health Sciences Corporation, which confirmed via Department of Transportation approved procedures, that the sample was positive for the presence of marijuana metabolite. [Complaint at 2]

BASES OF APPEAL

This appeal has been taken from the Default Order imposed by the ALJ finding proved the charge of *use of or addiction to the use of dangerous drugs* and revoking Respondent's merchant mariner document. In his Appellate Brief, Respondent raises the following issue:

> *Respondent contends that the ALJ's Default Order should be set aside for the following reasons: 1) because the Coast Guard's "Motion for Default Order" referenced the Complaint by an incorrect date which created "confusion as to whether there is another complaint filed against respondent"; 2) because Respondent did not understand the nature of the administrative proceedings and "attempted to respond to the complaint but did not know how to"; and, 3) because of "misunderstanding[s] and miscommunication[s] on the part of his [Respondent's] attorney."*

OPINION

The key question presented is whether the record supports Respondent's contention that the ALJ's Default Order should be set aside. Pursuant to 33 C.F.R. § 20.310(a), "[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." As I noted above, the record shows that the Coast Guard filed a Complaint against Respondent's merchant mariner document on January 30, 2003. Pursuant to 33 C.F.R. § 20.308(a), Respondent was required to "file a written answer to the complaint 20 days or less after service of the complaint." The record shows that the Complaint was received at Respondent's address of record on February 3, 2003. Therefore, to comply with the requirements set forth at 33 C.F.R. § 20.308, Respondent was required to file a written answer to the complaint on or before February 24, 2003[2]. Respondent did not file an Answer to the Coast Guard's Complaint and, as a result, on March 31, 2003, the Coast Guard filed a Motion for Default Order. Pursuant to 33 C.F.R. § 20.310(b), Respondent was required to file a reply to the Coast Guard's Motion for Default Order "20 days or less after service of the motion." Respondent did not file a timely reply to the Coast Guard's "Motion for Default Order" and, as a result, on May 20, 2003, the ALJ issued the "Default Order" at issue in the instant proceeding. In his D&O, the ALJ stated as follows:

> After reviewing the Motion for a Default Order, the undersigned is satisfied that Respondent (1) has been properly served with the complaint; (2) has failed to file a timely answer within the twenty (20) day rule, or (3) has not requested an extension of time to file an answer. Therefore, it is determined that a default may be entered against the Respondent, JOSEPH RICARDO BROWN.

I have long stated that I will only overturn the decision of the ALJ if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2645 (MIRGEAUX), 2642 (RIZZO), 2641 (JONES), 2640 (PASSARO), 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA),

[2] *See supra* note 1.

2581 (DRIGGERS), and 2474 (CARMIENKE). After a thorough review of the record, I do not find that the ALJ was either arbitrary or capricious or that he abused his discretion in granting a Default Order in this case.

A.

Respondent first contends that the ALJ's Default Order should be set aside because it is based on a "defective motion for default." [Respondent's Appellate Brief at 2] To that end, Respondent contends that an error occurred in paragraph 2 of the Coast Guard's motion wherein it was alleged that the motion was based upon a Complaint filed on June 12, 2002, instead of the date of the relevant Complaint, January 30, 2003. [Respondent's Appellate Brief at 2] Respondent contends that because the Complaint at issue is based on a random drug test administered on November 24, 2002, Respondent was confused as to whether another Complaint had been filed against him. [Respondent's Appellate Brief at 2] After a thorough review of the record, I do not find Respondent's first argument to be persuasive.

Although Respondent contends that the "Motion for Default Order" incorrectly stated that it was based upon a Complaint filed on June 12, 2002, I see nothing in the record to support Respondent's assertion in this regard. Indeed, contrary to Respondent's assertion, paragraph 2 of the "Motion for Default Order" contained in the record states that it is based on a Complaint filed on January 30, 2003. [Motion For Default Order at 1] The validity of this Motion for Default Order is supported by the fact that a signed Certificate of Service is attached to it. [Motion for Default Order at 2] Perhaps more importantly, when the Motion for Default Order was served on Respondent, a copy of the Coast Guard's Complaint was attached to it as part of Exhibit 1. [*See* Motion for Default

Order] Respondent acknowledged this fact in his Appellate Brief when he stated as follows:

> [p]lease note the complaint attached to the motion [U.S. Coast Guard's Motion for Default Order-Exhibit (1)] alleges respondent took a randon [sic] drug test on November 24, 2002. Exhibit (1)'s complaint attached to the Motion for Default Order was signed on January 30, 2003.

[Respondent's Appellate Brief at 2] Furthermore, the record shows that the relevant Complaint was served at Respondent's address on February 3, 2003, and that the date of service was expressly stated within the Coast Guard's motion. [*See* Coast Guard Motion for Default Order at 1; Motion for Default Order Exhibit 1] Therefore, based on the evidence contained in the record, I do not agree with Respondent's assertion that the Coast Guard's Motion for Default Order created confusion. The record shows that the motion correctly stated that it was based on a Complaint filed against Respondent's mariner credential on January 30, 2003, and the content of the motion, itself, as well as the supporting documents submitted with the motion, left no room for doubt as to the date of the relevant Complaint. Accordingly, I do not find Respondent's first assertion to be persuasive.

B.

Respondent's second argument, though not expressly stated that way, is one of due process. To that end, Respondent contends that the Default Order should be set aside for the following reasons: 1) because he "did not understand the nature of the administrative proceedings"; 2) because he received a copy of the Complaint "several months after it was mailed to his residence"; and, 3) because the "face of the January 30, 2003 complaint…as contained in the record, does not have instructions that a seaman is to answer the complaint in writing; how a seamen is to answer a complaint; or that an

extension can be requested". [Respondent's Appellate Brief at 3-4] After a careful review of the record, I do not find Respondent's second argument to be persuasive either.

I see no evidence in the record to indicate that the Complaint was improperly served on Respondent. First, the federal courts have noted that agencies are free to fashion their own rules of procedure, as long as those rules satisfy the fundamental requirements of fairness and notice. Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396 (10th Cir. 1988). 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.

Furthermore, it is well settled that the mails may be used to effectuate service of process if the notice reasonably conveys the required information and affords a reasonable time for response and appearance. *See, e.g.,* Mennonite Board of Missions v. Adams, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L. Ed. 2d 180 (1983). At the same time, the courts have stated that if an agency employs a procedure reasonably calculated to achieve notice, successful achievement is not necessary to satisfy due process requirements. Day v. J. Brendan Wynne, Inc., 702 F.2d 10, 11 (1st Cir. 1983); Stateside

Mach. Co. v. Alperin, 591 F.2d 234, 241 (3d Cir. 1973). Irrespective of Respondent's assertions to the contrary, the record shows that the procedures used by the Coast Guard in the instant case were reasonably calculated to achieve notice. While Respondent argues that he was unable to understand how to respond to the Coast Guard's Complaint and that the face of the Complaint did not state how to respond, I do not find that the record supports Respondent's assertion in this regard.

The record shows that the relevant Complaint is three pages in length and that the pages are numbered as follows: "Page 1 of 3"; "Page 2 of 3"; and, "Page 3 of 3". Page 1 sets forth the statutory and regulatory authority of the charge and the jurisdictional allegations; Page 2 sets forth the factual allegations, proposed order, and proposed hearing locations and dates; and, Page 3 sets forth both "Respondent's Instructions" and the Coast Guard's Certificate of Service. A review of the "Respondent's Instructions" portion of the Complaint reveals that those instructions informed Respondent, in bold face type that he "MUST RESPOND TO HIS COMPLAINT WITHIN 20 DAYS." In addition, the instructions portion of the Complaint set forth the procedural requirements applicable to Respondent's answer by stating:

> The rules for Answers are at 33 CFR 20.308 and read as follows:
>
> § 20.308 Answers.
> (a) The respondent shall file a written answer to the complaint 20 days or less after service of the complaint. The answer must conform to the requirements of this subpart for filing and service.
> (b) The person filing the answer shall, in the answer, either agree to the place of hearing proposed in the complaint or propose an alternative.
> (c) Each answer must state whether the respondent intends to contest any of the allegations set forth in the complaint. It must include any affirmative defenses that the respondent intends to assert at the hearing. The answer must admit or deny each numbered paragraph of the complaint. If it states that the respondent lacks sufficient knowledge or information to admit or deny a

particular paragraph, it denies the paragraph. If it does not specifically deny a particular numbered paragraph, it admits that paragraph.

(d) A respondent's failure without good cause to file an answer admits each allegation made in the complaint.

Furthermore, the instructions informed Respondent that if he denied any of the allegations "an ALJ will schedule a hearing on the matter", that Respondent could "request an extension of time to file…[his]…answer within 20 days", and that if the ALJ finds Respondent in default "a decision could be issued against…[him]…without any hearing." The instructions also informed Respondent of his rights by specifically stating that he had the right to: 1) "representation by counsel at the hearing"; 2) "have witnesses, records or other evidence subpoened"; 3) "examine witnesses"; 4) "cross-examine witnesses"; 5) "introduce relevant evidence into the record"; and, 6) "testify to facts or relevant information" on his behalf. Finally, the instructions portion of the Complaint expressly informed Respondent, in bold face type, that he should file his answer at the ALJ Docketing Center and clearly set out the Docketing Center's address, telephone and facsimile contact information. Therefore, since the record shows that the information contained within the Coast Guard's Complaint afforded Respondent a reasonable time for response and appearance and appropriately informed Respondent of the applicable procedural rules, I do not find Respondent's second argument to be persuasive.

C.

Respondent's final assertion is that the Default Order should be set aside "due to any mis-communication or misunderstanding on the part of his attorney." [Appellate Brief at 5] To that end, Respondent contends that his counsel was unaware that a hearing had not been scheduled in the case and was "not aware that a written answer had not been filed and that a written answer needed to be filed." [Appellate Brief at 4-5] As a result,

Respondent contends that the Default Order should be set aside because the complainant would not be "prejudiced as a hearing has not been held." [Appellate Brief at 5]

The Default Order at issue in the instant proceeding resulted from the fact that Respondent failed to file an Answer to the Coast Guard's Complaint within the twenty-day time-period prescribed by Coast Guard regulation. *See* 33 C.F.R. § 20.308. Although Respondent does not deny that he failed to properly answer the Coast Guard's Complaint, he attempts to use the alleged "misunderstandings" of his counsel to show good cause to set aside the ALJ's Default Order. After a thorough review of the record with Respondent's third argument in mind, I do not find that the ALJ erred in granting a Default Order in this case.

The record shows that Respondent's attorney did not officially enter the matter until April 23, 2003, when she filed her Notice of Appearance with the ALJ Docketing Center. [Respondent's Notice of Appearance] The record shows that, at that time, the deadline for filing Respondent's Answer—February 24, 2003—had passed by nearly two months and that twenty-four days had passed since the Coast Guard filed its Motion for Default Order. In the past, I have stated that the failure of a Respondent to take advantage of the right to obtain counsel places upon his shoulders the responsibility for whatever may follow at the trial. *See* Appeal Decision 2624 (DOWNS). Although the instant case did not progress to a hearing, I feel that a similar rationale should be applied here.

Based upon the evidence contained in the record—specifically the evidence showing that Respondent's counsel did not appear in the case until April 23, 2003—I find that the responsibility for answering the Complaint fell on Respondent's shoulders.

Since, as I noted in paragraph B above, the record shows that Respondent was properly informed of the procedural rules applicable to the instant proceedings, I do not find that his failure to properly represent himself should be excused by the subsequent actions of his attorney. Therefore, I do not find Respondent's final argument to be persuasive.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision to issue a Default Order was not arbitrary, capricious, or clearly erroneous. Because competent, substantial, reliable, and probative evidence existed to support the ALJ's decision to grant a Default Order, I find Respondent's basis of appeal to be without merit.

ORDER

The order of the ALJ, dated at New Orleans, Louisiana, on May 20, 2003, is AFFIRMED.

//S//
T. J. Barrett
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 18th day of May, 2004.