

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

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD

v.

MERCHANT MARINER CREDENTIAL

Issued to: DERRICK THOMAS FREMEN

DECISION OF THE  
VICE COMMANDANT  
ON APPEAL  
NO. 2736

APPEARANCES

For the Government:  
Lineka Quijano, Esq.

For Respondent:  
Derrick Fremmen, *pro se*

Administrative Law Judge:  
Brian J. Curley

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5, and 33 CFR Part 20.

On May 5, 2021, an Administrative Law Judge (ALJ) of the United States Coast Guard issued an Order of Default (OD) for Respondent Derrick Thomas Fremmen's failure to attend pre-hearing conferences, finding proved the Coast Guard's Amended Complaint filed on February 18, 2021 (Amended Complaint) against the Merchant Mariner Credential of Respondent, and ordering the revocation of Respondent's credential.

The Coast Guard Amended Complaint charged Respondent with two counts:  
(1) misconduct by engaging in official matters regarding his Merchant Mariner Credential by

presenting false documentation to a Coast Guard official during an investigation; and (2) posing a security risk.

Respondent appeals.

### FACTS & PROCEDURAL HISTORY

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential (MMC) issued to him by the United States Coast Guard. [Amended Complaint at 3.] On February 19, 2019, Respondent took a required Pre-Employment drug screen. [*Id.*] On February 26, 2019, a Medical Review Officer (MRO) determined that Respondent failed a chemical test for dangerous drugs. [*Id.*] On June 12, 2019, Respondent was served with a complaint alleging use of, or addiction to dangerous drugs. [*Id.*] On July 1, 2019, Respondent provided a prescription for medication to a Coast Guard Sector New Orleans Investigating Officer. [*Id.*]

On January 28, 2020, the Coast Guard filed an Amended Complaint no longer alleging use of, or addiction to a dangerous drug, and instead alleging misconduct in that Respondent provided falsified evidence to the Coast Guard Investigating Officer and the MRO in the form of a prescription, which the Government alleged had altered dates. [Complaint dated January 28, 2020.]. On March 27, 2020, Respondent filed his Answer to the Amended Complaint, denying all jurisdictional allegations and denying all factual allegations. [OD at 1.] After various preliminary matters, on July 31, 2020, the ALJ issued an order continuing the hearing due to the dangers posed by the COVID-19 pandemic. [*Id.* at 2.]

On December 16, 2020, the Transportation Security Administration (TSA) determined that Respondent did not meet security threat assessment standards, posed an imminent security threat, and revoked Respondent's Transportation Worker Identification Credential (TWIC). [Amended Complaint at 3.] On February 18, 2021, the Government filed a second Amended Complaint once again alleging misconduct and also that the TSA had revoked Respondent's TWIC and that Respondent was a security risk. [OD at 1; Amended Complaint at 3.] On February 19, 2021, the ALJ issued a scheduling order for a prehearing conference to take place

on March 3, 2021. [Scheduling Order – Pre-hearing Conference dated February 19, 2021.]

On March 3, 2021, the ALJ convened a prehearing conference where Respondent appeared *pro se*. [OD at 2.] 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. [*Id.*] The following day, on March 4, 2021, the ALJ issued a Pre-hearing Conference Memorandum and Order, which required both parties to exchange discovery materials, evidence, and amended witness and exhibit lists no later than March 10, 2021. [Pre-hearing Conference Memorandum and Order.] Also on March 4, 2021, the ALJ issued a Scheduling Order for a Government Zoom Pre-hearing Conference on April 13, 2021 with a hyperlink to attend said meeting. [Scheduling Order – Government Zoom Pre-hearing Conference dated March 4, 2021.] This order was sent electronically to Respondent’s e-mail address. [OD at 2.]

On March 17, 2021, the Coast Guard filed a Motion to Compel Discovery requesting an order compelling Respondent to disclose any witnesses or evidence Respondent intended to offer at the April 20, 2021 hearing. [Coast Guard Motion to Compel Discovery.] Also on March 17, 2021, Respondent sent a Request for an Extension of the Hearing Date seeking a thirty-day continuance of the scheduled hearing. [E-mail from Respondent dated March 17, 2021.] On March 19, 2021, the ALJ issued a Scheduling Order setting a pre-hearing teleconference for March 25, 2021 to discuss Respondent’s Request for an Extension of the Hearing Date and other pertinent issues. [Scheduling Order – Pre-hearing Conference dated March 19, 2021; OD at 2.] The Scheduling Order was sent to Respondent’s e-mail address. [OD at 2.]

On March 25, 2021, the Coast Guard’s representatives were present for the pre-hearing conference, but Respondent was not present. [*Id.*] On March 29, 2021, the ALJ issued an Order Granting the Coast Guard’s Motion to Compel, which instructed Respondent to file a witness and exhibit list by April 5, 2021. [Order Granting the Coast Guard’s Motion to Compel.] On the same day, the ALJ issued an Order Denying Respondent’s Request for an Extension of the Hearing Date on the grounds that Respondent did not attend the March 25, 2021 pre-hearing conference at which his request would have been discussed and had not provided any justification for his request. [Order Denying Respondent’s Request for an Extension of the

Hearing Date.]

On April 13, 2021, the ALJ convened the Zoom pre-hearing conference that had been set on March 4, 2021. [OD at 3.] The Coast Guard's representatives were present, but Respondent was not present. [*Id.*] On April 13, 2021, the ALJ issued an Order to Show Cause instructing Respondent to provide good cause by May 13, 2021 for his failure to appear at the pre-hearing conferences on March 25, 2021 and April 13, 2021. [Order to Show Cause.] The order was sent to the Respondent's e-mail address. [OD at 3.] On April 14, 2021, Respondent replied by sending an e-mail to the ALJ's staff stating he was not aware there were any pre-hearing conferences scheduled prior to the April 20, 2021 Zoom hearing. [*Id.*] The e-mail address used by Respondent to send this reply was the same e-mail address to which the ALJ sent the March 4, 2021 Scheduling Order, the March 19, 2021 Scheduling Order, the March 29, 2021 Order Granting the Coast Guard's Motion to Compel, and the April 13, 2021 Order to Show Cause. [*Id.*]

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 the April 13, 2021 Zoom pre-hearing conference. [Motion for Default Order at 1.] The Motion for Default Order was sent to Respondent's e-mail address and via express courier service. [OD at 4.] Respondent did not file a response to the Motion for Default Order. [*Id.*]

On May 5, 2021, the ALJ granted the Motion for Default Order, finding that Respondent failed to demonstrate good cause for his failure to appear at the pre-hearing conferences. [OD at 5.] The ALJ further found the allegations set forth in the February 18, 2021 Amended Complaint proved. [*Id.* at 5-6.] The ALJ further ordered Respondent's MMC revoked and for Respondent to deliver his MMC and any other Coast Guard issued credentials, licenses, certificates, or documents to the Coast Guard. [*Id.* at 6.] Finally, the ALJ provided instructions on filing a motion to set aside a finding of default with the ALJ Docketing Center, complete with an address for mailing. [*Id.*]

Respondent timely appealed (“Letter of Appeal”).<sup>1</sup> Respondent was provided until October 7, 2021 to file an appellate brief but did not do so. Although Respondent did not file a separate document labeled as an appellate brief in this case, in view of the extensive nature of Respondent’s notice of appeal, it will be treated as both a notice of appeal and an appellate brief. The Coast Guard did not file a reply brief, and this appeal is properly before me.

### ISSUE ON APPEAL

Considering Respondent’s Notice of Appeal in light of the task on appeal set forth in 33 CFR § 20.1004(a) – “to determine whether the ALJ committed error in the proceedings” – the issue on appeal may best be characterized as:

*Whether the ALJ erred in issuing a default order.*

### OPINION

*Whether the ALJ erred in issuing a default order.*

When a default order is issued, the decision is reviewed for abuse of discretion, “keeping in mind the federal policy favoring trial over default judgment.” *Appeal Decision 2696 (CORSE)* at 5, 2011 WL 6960130 (quoting *Whelan v. Abell*, 48 F.3d 1247, 1258 (D.C. Cir. 1995)). The standard of review for abuse of discretion is highly deferential:

A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion . . . [A]buse of discretion occurs where a ruling is based on an error of law, or, where based on factual conclusions, is without evidentiary support.

*Id.* (quoting *Appeal Decision 2692 (CHRISTIAN)*, 2011 WL 1042740).

33 CFR § 20.705 provides, “The 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.” 33 CFR § 20.310(a) provides, “The ALJ may find a respondent in default upon failure

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<sup>1</sup> Respondent’s Notice of Appeal was titled as “Letter of Appeal” dated June 2, 2021. The Letter of Appeal does not contain information tending to show good cause to set aside the finding of default.

FREMEN

NO.

to file a timely answer to the complaint or, after motion, upon failure to appear at a conference or hearing without good cause shown.” In this case, Respondent failed to appear at two pre-hearing conferences scheduled by the ALJ. In such circumstances, the question becomes whether the respondent “provided good cause for his failure to appear . . .” *Appeal Decision 2700 (THOMAS)* at 5, 2012 WL 3135355 at 3. Neither the regulations nor Coast Guard precedents provide guidance on what constitutes “good cause.” In such a circumstance, it is appropriate to seek guidance in the Federal Rules of Civil Procedure and case law interpreting them. 33 CFR § 20.103(c); *CORSE* at 6.

In the context of Federal Rule of Civil Procedure 55(c), which governs setting aside a default or default judgment for “good cause,” the federal courts have described good cause as “a mutable standard, varying from situation to situation. It is also a liberal one—but not so elastic as to be devoid of substance.” *Coon v. Grenier*, 867 F.2d 73, 76 (1st Cir.1989). The Federal courts recognize that “good cause” is not susceptible to a precise formula, but some general guidelines are commonly applied. *Id.* Courts have considered whether the default was culpable or willful, whether setting it aside would prejudice the adversary, and whether the defaulting party presents a meritorious defense. *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010); *Sun v. Bd. of Trs. of Univ. of Ill.*, 473 F.3d 799, 810 (7th Cir.2007); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 243 (2d Cir.1994). Courts have also considered whether the public interest was implicated, whether there was significant financial loss to the defaulting party, and whether the defaulting party acted promptly to correct the default. *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion Eyeglasses*, 88 F.3d 948, 951 (11th Cir. 1996) (citing *Dierschke v. O'Cheskey*, 975 F.2d 181, 184 (5th Cir.1992)).

In this case, the issue is not whether to set aside a default, but whether Respondent provided good cause for his failure to appear, so as to preclude the ALJ’s finding of default. Many of the factors to be considered when the issue is whether to set aside a default do not apply here. However, one factor that stands out as applicable, which courts have considered vital in determining good cause in the context of setting aside a default, is whether Respondent was culpable. *See Compania Interamericana*, 88 F.3d at 951-952; *Organizacion Miss America*

*Latina, Inc. v. Urquidi*, 712 Fed.Appx. 945, 947 (11th Cir. 2017). “A defendant’s conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer.” *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987). To be deemed culpable for the default, a party must engage in conduct that is “taken willfully or in bad faith.” *Gross v. Stereo Component Sys., Inc.*, 700 F.2d 120, 123-24 (3d Cir. 1983).

“Most failures to follow court orders are not ‘willful’ in the sense of flaunting an intentional disrespect for the judicial process. However, when a litigant has been given ample opportunity to comply with court orders but fails to effect any compliance, the result may be deemed willful.” *Compania Interamericana*, 88 F.3d at 952. Furthermore, courts have found a party’s action justifies default judgment if the party has failed to participate in normal pretrial procedures or has not responded to a complaint or hearings. *See, e.g., Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996) (“ . . . total failure to participate in the litigation after their counsel withdrew . . . included complete failure to respond to the magistrate judge’s discovery order and other orders, failure to comply with pretrial requirements, and failure to attend the final pretrial/settlement conference; these actions are certainly grounds for default judgment”); *Serv. Emps. Int’l Union Loc. 32BJ, Dist. 36 v. ShamrockClean, Inc.*, 325 F. Supp. 3d 631, 637 (E.D. Pa. 2018) (“ . . . Defendant’s failure to respond to the complaint and failure to attend the hearing were both ‘willful,’ in the sense that Defendant accepted service of the complaint and the order setting the hearing and therefore was aware of the complaint and the hearing.”).

As noted above, Respondent and the Coast Guard both agreed to have all pleadings served on them electronically.<sup>2</sup> The record shows that the Court properly served electronically, to Respondent’s e-mail address, the scheduling orders for the March 25, 2021 and April 13, 2021 pre-hearing conferences. Furthermore, the record shows that the Respondent did not attend the March 25, 2021 and April 13, 2021 pre-hearing conferences.

The record also shows that a Motion for Default Order, outlining these facts, was

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<sup>2</sup> In fact, the ALJ cautioned Respondent to examine his spam folders in the event any pleadings or filings would be mistakenly forwarded there.

delivered to the Respondent's residence and signed for by the Respondent via express-courier service in accordance with 33 CFR § 20.304(d). Following service of the Motion for Default Order on April 13, 2021, the Respondent had twenty days to file a reply. 33 CFR § 20.310(b). Hence, the Respondent had until May 3, 2021 to file a reply to the Coast Guard's Motion for Default Order, but the record shows no reply was ever filed. Respondent's only explanation for failing to attend the pre-hearing conferences, both now on appeal and while the matter was pending before the ALJ, was that he had never received notice of the pre-hearing conferences at the heart of the Motion for Default Order.

However, the record shows Respondent had attended the pre-hearing conference set forth in the February 19, 2021 scheduling order and responded to the ALJ's April 13, 2021 Order to Show Cause, both of which were sent to the same e-mail address as the scheduling orders for the March 25, 2021 and April 13, 2021 pre-hearing conferences. He did not and does not explain why he should be believed when he says he did not receive the two scheduling orders. Finally, Respondent failed to respond to the Coast Guard's Motion for Default Order, which was sent directly to his domicile and the record shows a signature was obtained for the Motion's receipt. Nor does he offer an explanation for that failure. Given Respondent's multiple failures to comply with the ALJ's scheduling orders, to respond to the second Amended Complaint, and to even respond to the Motion for Default, after they were all properly served on him, Respondent's actions must be deemed willful and therefore culpable; they certainly justify the Order of Default.

Respondent has not sought to have the default set aside. To do so, he would have needed to raise a meritorious defense. *CORSE* at 7 (citing, *inter alia*, *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984) ("The threshold issue in opening a default judgment is whether a meritorious defense has been asserted.") and *Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) ("Generally a default should be set aside where the moving party acts with reasonable promptness and alleges a meritorious defense.")). "A meritorious defense [need not], beyond a doubt, succeed in defeating a default judgment, but [it should] at least raise[ ] a serious question regarding the propriety of a default judgment and [be] supported by a developed legal and factual basis." *Jones v. Phipps*, 39 F.3d



158, 165 (7th Cir.1994).

Respondent's letter of appeal contains a hint of a defense, but without any support by a developed legal and factual basis. Respondent stood accused of misconduct for "provid[ing] falsified evidence in the form of a prescription for medication with altered dates" to a Coast Guard Investigating Officer after he had apparently failed a pre-employment drug test. Respondent was also facing a separate charge as a security risk. To date, Respondent has not asserted any defense other than a general denial, nor any Answer at all to the security risk charge. Respondent has also not provided any witness and exhibit list, as he was ordered to do on two separate occasions, to support a defense to either of these charges.

As a *pro se* party, Respondent should be given wide latitude and reasonable allowances. *Appeal Decision 2697 (GREEN)* at 5, 2011 WL 6960131 at \*1. However, a party's *pro se* status does not excuse compliance with a court's orders. *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir.1991); *Jones*, 39 F.3d at 163; *see also Anderson v. Home Insurance Co.*, 724 F.2d 82, 84 (8th Cir.1983) (upholding district court's grant of default judgment against *pro se* defendant for failure to respond to a discovery order).

After a thorough review of the record and the submissions by Respondent, I find no error in the ALJ's conclusion to grant the default order.<sup>3</sup> Respondent's failure to respond to the Motion for Default Order and attend the pre-hearing conferences constitutes culpable conduct. The ALJ properly determined that Respondent had not demonstrated good cause for failing to attend the pre-hearing conferences.

### CONCLUSION

The ALJ's decision to issue an Order of Default was not an abuse of discretion. The order imposed by the ALJ, revoking Respondent's Merchant Mariner Credential, was not excessive. There is no reason to disturb the ALJ's Order.

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<sup>3</sup> The ALJ cited both 33 CFR § 20.310(a) and 33 CFR § 20.705 as authority for the Order of Default. 33 CFR § 20.310(a) clearly provides a basis for the Order. I need not decide whether 33 CFR § 20.705 applies to this case.

FREMEN

NO.

**ORDER**

The ALJ's Order dated May 5, 2021 is AFFIRMED.

 , Atm, VSCG

Signed at Washington, D.C., this 22 day of November, 2021.