



**In the Matter of:**

**MITCHEM TRANSPORTS, INC.,  
DAVID MITCHEM, and PEGGY  
MITCHEM, Individually and Jointly,**

**ARB CASE NO. 03-115**

**ALJ CASE NO. 02-SCA-16**

**RESPONDENTS.**

**DATE: June 30, 2004**

**A dispute regarding the payment of wages and  
fringe benefits to employees providing services  
under Respondents' contracts with the U.S. Postal  
Service and U.S. Veterans Administration.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For Respondents:***

**Hugh E. Hackney, Esq., Jeffrey D. Wilson, Esq., *Locke Liddell & Sapp LLP,*  
*Dallas, Texas***

***For Administrator, Wage and Hour Division:***

**Leif G. Jorgenson, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard  
M. Radzely, Esq., Solicitor, *U.S. Department of Labor, Washington, D.C.***

**DECISION AND ORDER OF REMAND**

This matter is before the Administrative Review Board (the Board) pursuant to the statutory authority of the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C.A. § 351-357 (West 1994). Our jurisdiction to hear and decide appellate matters under the Act is established by the regulations at 29 C.F.R. Parts 4 and 8 (2003) and Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Mitchem Transports, Inc., David Mitchem, and Peggy Mitchem (collectively Mitchem Transports or Respondents) filed a Petition for Review seeking reversal of a default judgment issued against them. The Administrator, Wage and Hour Division of the U.S. Department of Labor (Administrator), who was the prosecuting party below, opposes the Petition for Review. We hold that the Petition for Review warrants consideration by the Board and that the ALJ exceeded his discretion when he entered default judgment against Mitchem Transports. We therefore grant the Petition for Review and remand this matter for further action.

## BACKGROUND

The material facts in this matter consist of the procedural history surrounding the Administrator's request for, and the ALJ's entry of, the default judgment against Mitchem Transports. Throughout the proceeding before the ALJ, Mitchem Transports were represented only by Peggy Mitchem, appearing *pro se*. Default Judgment at 1.

Based on the results of an investigation conducted by the Wage and Hour Division, the Administrator issued a Complaint on August 27, 2002. That Complaint was filed with the Office of Administrative Law Judges (OALJ) on September 4, 2002. In the Complaint, the Administrator alleged that Mitchem Transports held three Federal service contracts which were subject to the SCA and that they "failed and refused" to pay the contracts' service employees the required prevailing hourly wages and fringe benefits. Complaint at 2, ¶ 4, ¶ 5, ¶ 6. *See* 41 U.S.C.A. § 351(a)(1), (a)(2); 29 C.F.R. § 4.6(b). Further, the Administrator contended that Mitchem Transports "failed to make available ... adequate and accurate records with respect to many of their service employees showing, among other things, their daily and weekly hours worked, as required by Section 4(g) of 29 C.F.R. Part 4." *Id.* at ¶ 10. The Administrator submitted that Mitchem Transports was liable for \$84,489.09 in back wages, and should be debarred from government contracting (pursuant to 41 U.S.C.A. § 354(a)), for these violations. *Id.* at 3-4, ¶ 10. On the last page of the Complaint, below the attorney's signature and above the certification of mailing, there was a single spaced "NOTICE TO RESPONDENT" which stated, "Pursuant to 29 CFR Section 6.16, *you are required to file* with the Office of Administrative Law Judges *a complete answer* to the above Complaint within thirty (30) days after service of this Complaint upon you.... *Failure to timely file an answer may result in a default judgment being filed against you.*" *Id.* at 4 (emphases added).

On September 11, 2002, the OALJ issued a Notice of Docketing. Regarding the requirements for an Answer, the Notice of Docketing stated that: "**29 C.F.R. §6.16 provides that the Respondent shall file an Answer with the Chief Administrative Law Judge within 30 days after service of the Complaint.**" Notice of Docketing at 1 (emphasis in original).

In a letter dated September 20, 2002, Peggy Mitchem responded to the Complaint.<sup>1</sup> However, on November 6, 2002, the OALJ issued an Order to Show Cause (OSC or Order), stating "Respondents have failed to file an Answer to the Complaint." The OSC directed Mitchem Transports to demonstrate within 30 days why a default judgment should not be entered against them. OSC at 1. The Order advised that "a default judgment will result in the assessment of back wages allegedly due, and in [Mitchem Transports'] being denied the award of any contract with the United States Government for a period of three (3) years from the publication date of the Comptroller General's debarment list containing [the Respondents'] names." *Id.*

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<sup>1</sup> See n.7, *infra*.

On or about November 19, 2002, Mitchem Transports filed a timely response to the Order.<sup>2</sup> The Administrator filed a Motion for Default Judgment (Default Motion) on March 24, 2003. As grounds for this request, the Administrator argued that “Peggy Mitchem’s response to the order to show cause ... is not an answer to the complaint because it fails to meet the requirements of an answer as stated in the Office of Administrative Law Judges [sic] Procedural Rule 29 C.F.R. 6.16(b).” Default Motion at 3.

The ALJ denied the Administrator’s request on April 8, 2003, stating “[b]ecause Respondent [sic] is unrepresented in this matter, I find it appropriate to DENY [the Administrator’s] Motion for a Default Judgment at this time.” Order Denying Default and Allowing Time to File Answer (Order Denying Default) at 2.<sup>3</sup> The ALJ granted Mitchem Transports 10 days from receipt of the April 8 Order Denying Default to file an answer. Peggy Mitchem responded to the Order Denying Default in a letter, date-stamped as being received by the ALJ’s office at 10:44 A.M. on April 24, 2003.<sup>4</sup> Five days later, on April 29, 2003, the ALJ entered his Order Granting Default Judgment (Default Judgment).

Subsequent to entry of the Default Judgment, Mitchem Transports retained counsel. On June 16, 2003, Mitchem Transports petitioned for review of the ALJ’s Default Judgment. The Board issued its Notice of Appeal and Order Establishing Briefing Schedule on July 9, 2003. Mitchem Transports then filed a statement in support of the petition; the Administrator filed a statement in response; and Mitchem Transports

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<sup>2</sup> In her brief to the Board, the Administrator’s appellate counsel states: “[Respondents] did not file anything in the allotted time in response to this Order to Show Cause.” Statement of the Administrator in Response to the Petition for Review (Adm. Stmt.) at 5. However, the Administrator’s trial counsel previously conceded that “Peggy Mitchem responded to the Order to Show Cause. On December 18, 2002, the OALJ faxed a copy of a letter received by the OALJ from Peggy Mitchem to [the Administrator’s] counsel.” Administrator’s March 24, 2003 Motion for Default Judgment at 2. The OALJ record contains the original undated fax transmittal cover sheet and a copy of Peggy Mitchem’s September 20, 2002 letter, which is date-stamped as being received by the OALJ at 10:51 A.M. on November 19, 2002, only 13 days after issuance of the OSC and well within the 30 days provided by that Order. Thus, the record evidences that a timely response to the Order was submitted.

<sup>3</sup> The Wage and Hour Division promulgated the SCA hearing procedure regulations found at 29 C.F.R. Part 6, Subpart B, including Section 6.16(b). *See* 49 Fed. Reg. 10627 (Mar. 21, 1984). General rules of practice for proceedings before the OALJ are set forth at 29 C.F.R. Part 18. *See* n.6, *infra*.

<sup>4</sup> The Mitchem letter carries a clearly erroneous typewritten date of April 8, 2002, rather than 2003. Default Judgment, Attachment B.

filed a reply to the Administrator's response.

## **JURISDICTION AND STANDARD OF REVIEW**

The Board has jurisdiction over this Petition for Review pursuant to 29 C.F.R. § 8.1(b) (2003). In rendering its decisions, "the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning such matters." 29 C.F.R. § 8.1(c).

The Board's review of an ALJ's decision under the SCA is an appellate proceeding. The Board modifies and sets aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. §§ 8.1(d), 8.9(b); *see Dantran, Inc. v. U.S. Dept. of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed *de novo*. *SuperVan, Inc., et al.*, ARB No. 00-008, ALJ No. 94-SCA-14 (ARB Sep. 30, 2002), slip op. at 3; *United Kleenist Organization Corp. and Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18 (ARB Jan. 25, 2002), slip op. at 5.

In SCA matters such as this where the Board is presented with a petition seeking review of an ALJ's entry of default judgment, Department of Labor regulations further circumscribe our jurisdiction:

*[U]nless the petition for review [cites] alleged procedural irregularities in the proceeding below and not the merits of a case, the Board shall not consider a petition for review filed by any party against whom default judgment has been entered pursuant to the provisions of [29 C.F.R. Part 6].*

29 C.F.R. § 8.1(d) (emphasis added). When the Board reviews default judgments, we consider whether the ALJ acted within his discretion. *SuperVan, Inc., et al.*, slip op at 3-4; *Tri-Way Security and Escort Service, Inc. et al.*, (Board of Service Contract Appeals (BSCA) No. 92-05, July 31, 1992), slip op. at 3-4.<sup>5</sup>

## **ISSUES PRESENTED BY THE PETITION FOR REVIEW**

1. Whether the Petition for Review cites "alleged procedural irregularities" within the meaning of 29 C.F.R. § 8.1(d) such that the Board may review the default judgment entered in this matter.
2. Whether the ALJ acted within his discretion in entering the Default

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<sup>5</sup> Prior to the establishment of this Board in 1996, the Board of Service Contract Appeals was responsible for issuing final agency decisions under the SCA. *See* 61 Fed. Reg. 19985 (May 3, 1996).

Judgment against Mitchem Transports.

## DISCUSSION

### **1. The Board will review the Default Judgment because Mitchem Transports has alleged sufficient procedural irregularities in the administrative proceeding before the ALJ.**

Mitchem Transports raises several allegations of procedural irregularities below. Mitchem contends that the ALJ improperly ruled that its pleadings were not legally sufficient to constitute an answer within the meaning of the regulation at 29 C.F.R. § 6.16(b) (Mitchem Transports' Br. in Support of Pet. for Rev. at 5-8); did not liberally construe Mitchem's *pro se* pleadings (*Id.* at 8-10); ordered the sanction of default judgment when it was inappropriate to do so (*Id.* at 10-11); and erred in failing to find good cause for Mitchem's failure to comply with the ALJ's expectations regarding the requirements for a Section 6.16(b) Answer (*Id.* at 11-12).

In *SuperVan*, we considered the petitioner's allegations that the Department of Labor had repeatedly delayed the administrative hearing and that he had been denied due process. The Board found that "these allegations, though vague, sufficiently refer to alleged procedural irregularities to warrant consideration of the Petition. We therefore conclude that consideration of the Petition for Review is appropriate." *SuperVan*, slip op. at 4. To meet the threshold requirement for review of a default judgment under 29 C.F.R. § 8.1(d), a petitioner faces a relatively light burden. The petitioner may not rely on arguments concerning the merits of their defense to the Complaint, but must allege "procedural irregularities" in the proceedings before the ALJ. The Administrator concedes that, under the *SuperVan* standard, Mitchem Transports' "arguments appear to be sufficient for the purpose of citing 'procedural irregularities' on the part of the ALJ." Adm. Stmt. at 7. We agree.

Accordingly, we find that Mitchem Transports allege procedural irregularities sufficient to establish a basis for Board review of the ALJ's Default Judgment. We will therefore address the Petition for Review.

### **2. The ALJ exceeded the reasonable bounds of his discretion when he entered the Default Judgment against Mitchem Transports.**

The conduct of SCA administrative proceedings is governed, primarily,<sup>6</sup> by the

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<sup>6</sup> The rules of practice found at 29 C.F.R. Part 18 are generally applicable to all ALJ proceedings, although specific provisions must yield to rules of "special application," like the rules promulgated under the SCA that are codified at 29 C.F.R. Part 6. *See* 29 C.F.R. § 18.1(a). The ALJ in this matter based entry of default solely upon 29 C.F.R. § 6.16, and the

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regulations found at 29 C.F.R. Part 6, Subpart B. Pertinent to this dispute is the regulation governing answers to SCA complaints. 29 C.F.R. § 6.16(a) requires that an answer be filed within 30 days after service of the complaint. The remainder of Section 6.16 provides:

(b) *The answer shall (1) contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny each of the allegations of the complaint unless the respondent is without knowledge, in which case the answer shall so state; or (2) state that the respondent admits all of the allegations of the complaint. The answer may contain a waiver of hearing. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.*

(c) *Failure to file an answer shall constitute grounds for waiver of hearing and entry of a default judgment unless respondent shows good cause for such failure to file. In preparing the decision of default judgment the Administrative Law Judge shall adopt as findings of fact the material facts alleged in the complaint and shall order the appropriate relief and/or sanctions.*

29 C.F.R. § 6.16(b), (c) (emphases added).

The Administrator filed the Complaint in this matter on September 4, 2002 and the OALJ issued the Notice of Docketing on September 11, 2002. The record indicates that, in response to the Complaint, Peggy Mitchem filed a letter dated September 20, 2002, well within 30 days of service of the Complaint.<sup>7</sup> She also refiled a copy of that September 20, 2002 letter in response to the ALJ's Order to Show Cause.<sup>8</sup> Before the

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default judgment standards found at 29 C.F.R. § 18.6(d)(2)(v) are not at issue here.

<sup>7</sup> The record does not demonstrate that either the ALJ or counsel for the Administrator actually received a copy of Peggy Mitchem's September 20, 2002 letter within the 30-day period. However, the Administrator's appellate counsel concedes that this letter "was received and considered prior to entry of the default judgment." Adm. Stmt. at 4 n.2. Peggy Mitchem's response to the Order stated that she was sending another copy of a document previously submitted. In any event, the Default Judgment rested solely on Mitchem Transports' failure to file *proper* answers; the timeliness of Mitchem's initial response letter is not at issue.

<sup>8</sup> The ALJ specifically notes that "Peggy Mitchem filed a response to the complaint. .... A copy of Peggy Mitchem's response [dated April 8, 2002 (sic)] is attached [to the

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ALJ, the Administrator did not argue that Mitchem Transports failed to file an answer to the Complaint. Rather, the Administrator contended that Mitchem Transports “failed to file a *proper answer* to the complaint in that [Mitchem Transports] never admitted, explained, or denied the complaint allegations ....” Default Judgment at 1 (emphasis added). The ALJ agreed with the Administrator’s position and found “that [Mitchem Transports] failed to provide proper answers[,] providing instead obscure, random, and at times incomprehensible [sic] statements.” *Id.* at 1-2. Based on the finding that Mitchem Transports did not provide “proper answers” to the Complaint, the ALJ “adopt[ed] as findings of fact the material allegations of the complaint,” found Mitchem Transports liable for \$84,489.09 in SCA back wages, and ordered Respondents’ debarment from contracting with the Federal government for three years.

Mitchem Transports argues that the ALJ improperly entered default judgment under 29 C.F.R. § 6.16(c) because the plain language of that regulation authorizes entry of default judgment only in the event that a respondent completely fails to file any response. The ALJ, as noted, deemed Mitchem Transports’ response insufficient to constitute an Answer to the Complaint and entered default judgment under, in part, the provisions of 29 C.F.R. § 6.16(c). We agree with Mitchem Transports that the regulation applies where a respondent fails to file an Answer. However, because we determine that Petitioner’s responses did address the allegations in the complaint, and therefore constituted an adequate Answer, we need not go so far as to consider whether *any* document, no matter how deficient, constitutes an Answer under 29 C.F.R. § 6.16(c).

It is well established that the pleadings of a *pro se* party are to be liberally construed. *Haynes v. Kerner*, 404 U.S. 519, 520 (1972); *Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001), slip op. at 3.<sup>9</sup> The Administrator’s complaint charged that Mitchem Transports failed to pay proper SCA hourly wages and fringe benefits under certain contracts. Further, the Complaint alleged that Mitchem Transports failed to maintain and make available payroll records for work performed under the contracts. After our review of Mitchem Transports’ responses, we conclude that, given a liberal construction, those responses constituted general denials of the charges that Respondents failed to pay the proper wages and fringe benefits, and admissions that Mitchem Transports held contracts with the Veterans Administration and Post Office. Therefore, the responses did constitute an Answer to the Complaint.

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Default Judgment] as Attachment B. Attached as Peggy Mitchem’s initial response [dated September 20, 2002] to the complaint is Attachment C.” Default Judgment at 1.

<sup>9</sup> While an ALJ is under the obligation to construe a *pro se* party’s pleadings liberally, he is not, however, required to develop arguments on behalf of the complainant. *See Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28 (ARB Feb. 28, 2003), slip op. at 3 n.1, 9-11 (ALJ’s obligation to assist *pro se* complainant did not obviate requirement for the ALJ to remain impartial).

In sum, under its plain terms, Section 6.16(c) applies when no Answer is filed in response to an SCA Complaint. Mitchem Transports did file an Answer – in the form of two letters -- which, when liberally construed, provides sufficient specificity to constitute a denial that the charged violations occurred. Section 6.16(c) does not provide authority for waiver of hearing and entry of a default judgment, where, as here, an Answer to the Complaint was filed. Therefore, we hold that the ALJ exceeded the discretion conferred under 29 C.F.R. § 6.16(c) and that he erred in entering default judgment under that regulatory provision.

We observe further that there may be good cause for any failures or deficiencies with respect to the response that was filed. Counsel for Mitchem Transports cites numerous personal circumstances as factors constituting good cause for perceived deficiencies in the Answer. Without entering into specifics, those factors include marital separation and serious health issues.

Finally, we note that Petitioners raise a subject matter jurisdiction challenge before the Board with respect to the Veterans Administration contracts that are involved in this matter. However, we decline to address that jurisdictional question at this time because the record is not sufficiently developed to allow the Board to render an opinion. In the interest of judicial efficiency, that issue is best determined on remand before the ALJ.

#### **CONCLUSION AND ORDER OF REMAND**

For the foregoing reasons, we **GRANT** the Petition for Review and **REVERSE** the ALJ's Order Granting Default Judgment. We hereby **REMAND** this matter to the ALJ for further action consistent with this Decision and Order of Remand.

**SO ORDERED.**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**